

BIENNIAL REPORT
of the
ATTORNEY GENERAL
STATE OF FLORIDA

From January 1, 1955, to December 31, 1956

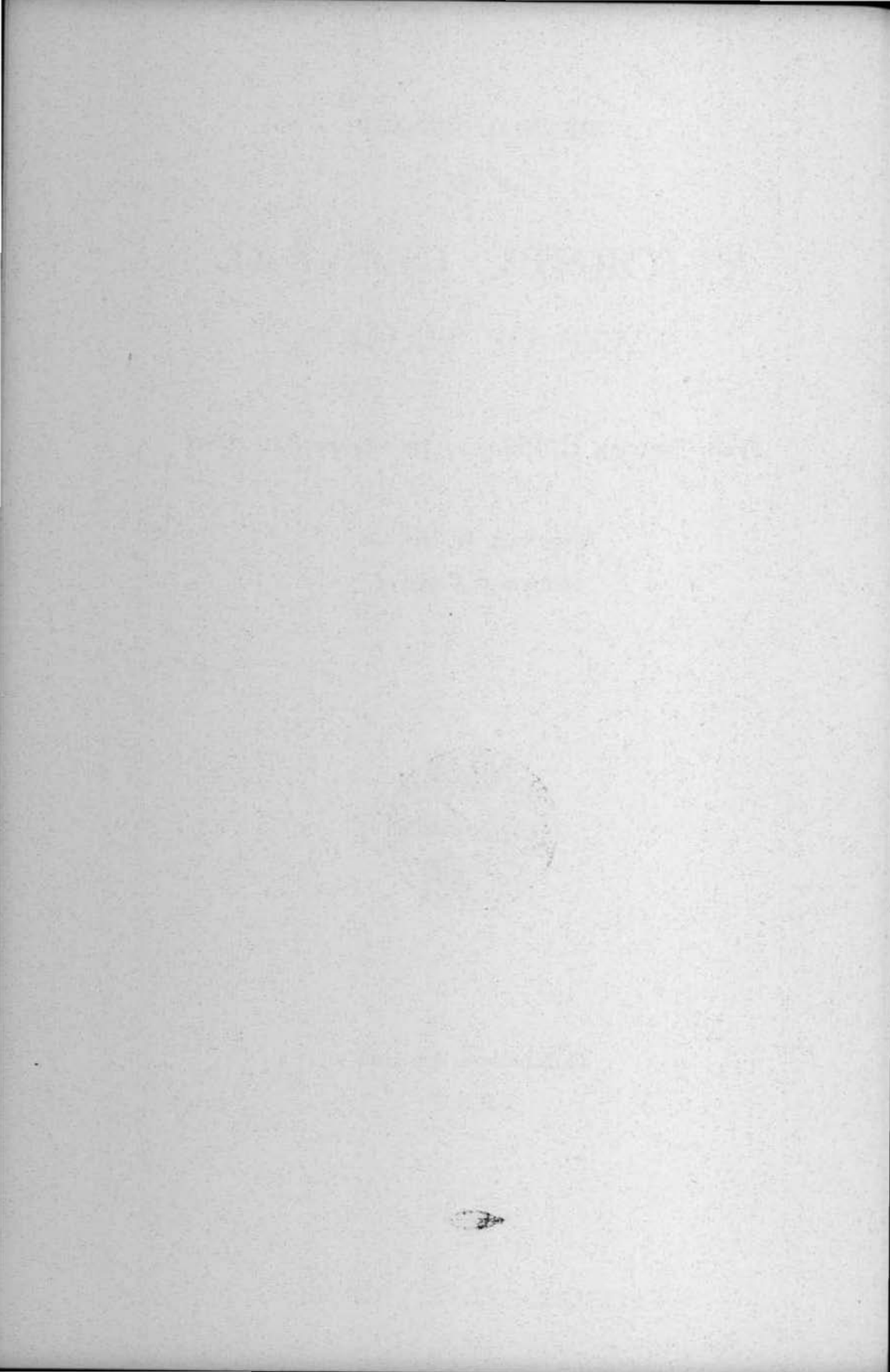
RICHARD W. ERVIN
Attorney General



Tallahassee, Florida
1957



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STATE OF FLORIDA
OFFICE OF THE
ATTORNEY GENERAL
TALLAHASSEE

RICHARD W. ERVIN
ATTORNEY GENERAL

January 8, 1957

LETTER OF TRANSMITTAL

TO HIS EXCELLENCY
HONORABLE LEROY COLLINS
GOVERNOR OF FLORIDA

SIR:

I have the honor of submitting to you my Biennial Report of the two preceding years from January 1, 1955 through December 31, 1956. This report is submitted as required by the constitutional mandate directing each officer of the Executive Department to make a full report of the official acts, of the receipts and expenditures of his office, and of the requirements of same, to the Governor at the beginning of each regular session of the legislature or whenever the Governor shall require a report.

In keeping with the long established custom, this report, with a brief of all opinions of general interest rendered during two calendar years, includes a listing of former Attorneys General, the personnel of my office during the past two years, the membership of the Florida Supreme Court, Circuit Judges, Judges of the Courts of Record, the Courts of Crime, the Criminal Courts of Record, the Civil Courts of Record, Juvenile Courts and the County Judges. Listed also are the State Attorneys, the Assistant State Attorneys and County Solicitors.

Pertinent information, reports and statistics connected with the activities of my office and opinions rendered during the last biennium as printed herein will be found listed in the Table of Contents.

Respectfully submitted,
RICHARD W. ERVIN
ATTORNEY GENERAL

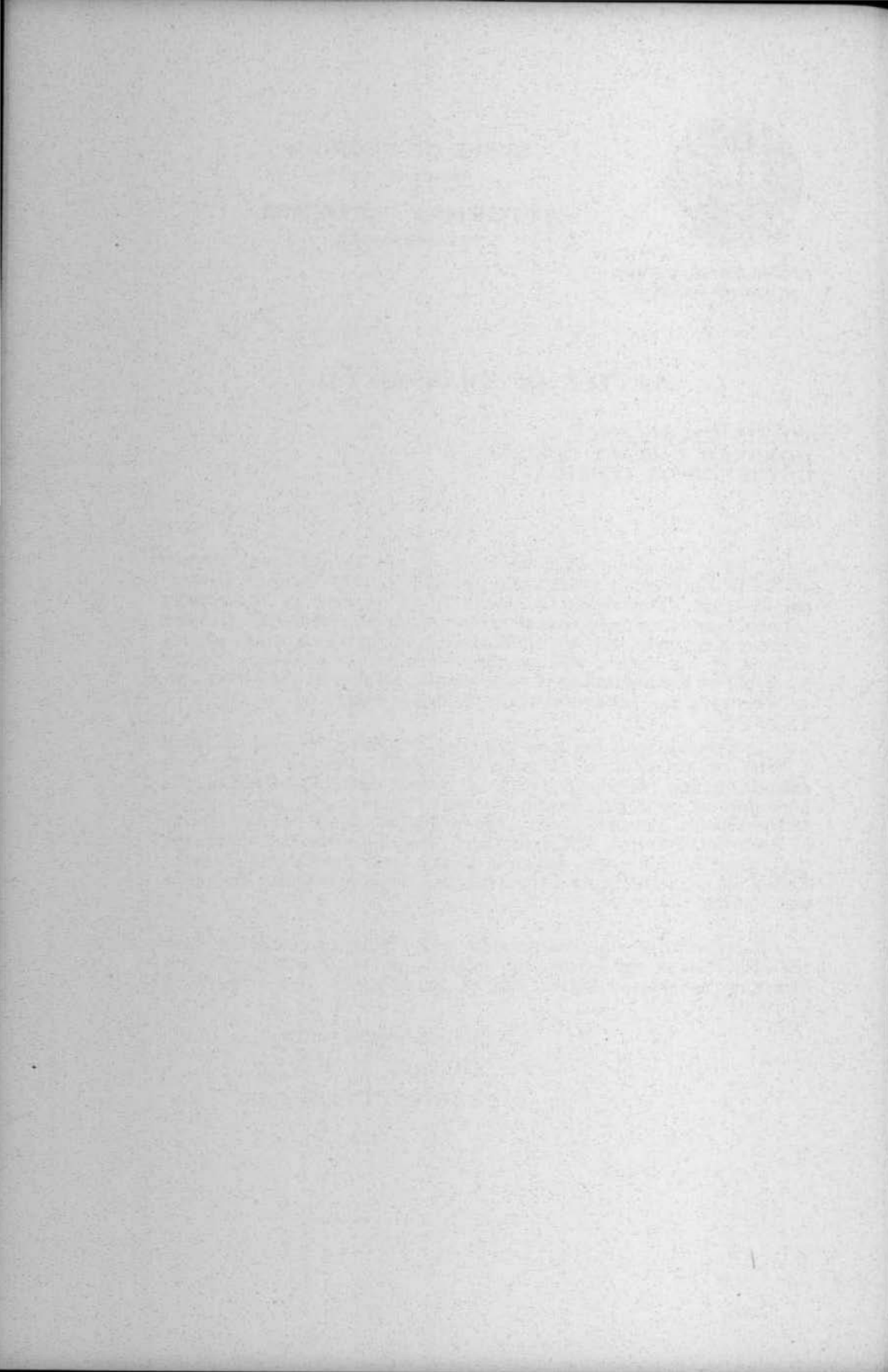


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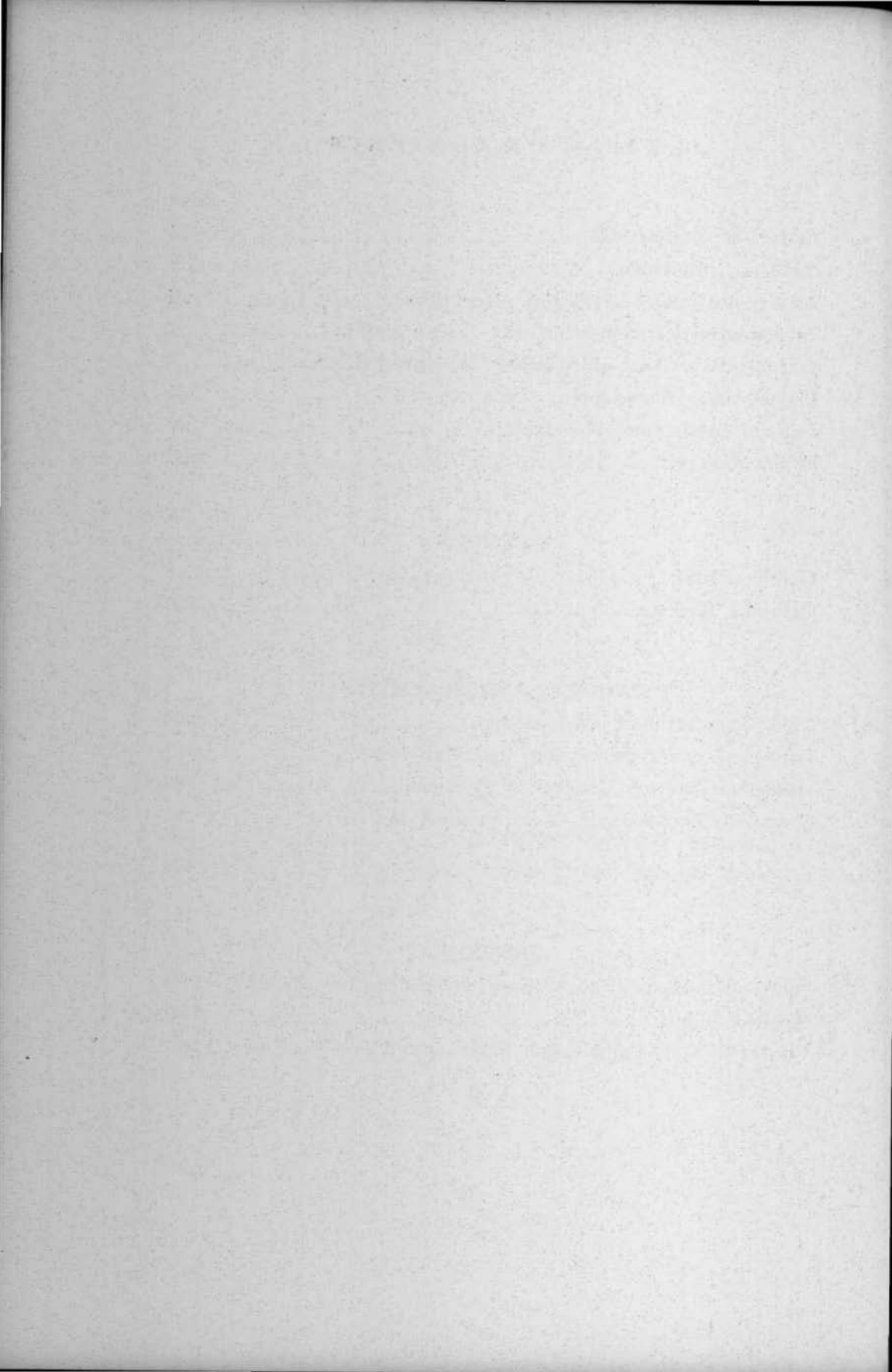
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ATTORNEYS GENERAL OF FLORIDA

SINCE 1845

JOSEPH BRANCH	1845-1846
AUGUSTUS E. MAXWELL	1846-1848
JAMES T. ARCHER	1848-1848
DAVID P. HOGUE	1848-1853
MARIANO D. PAPY	1853-1860
JOHN B. GALBRAITH	1860-1868
JAMES D. WESCOTT, JR.	1868-1868
A. R. MEEK	1868-1870
SHERMAN CONANT	1870-1870
J. P. C. DREW	1870-1872
H. BISBEE, JR.	1872-1872
J. P. C. EMMONS	1872-1873
WILLIAM A. COCKE	1873-1877
GEORGE P. RANEY	1877-1885
C. M. COOPER	1885-1889
WILLIAM B. LAMAR	1889-1903
JAMES B. WHITFIELD	1903-1904
W. H. ELLIS	1904-1909
PARK TRAMMELL	1909-1913
THOMAS F. WEST	1913-1917
VAN C. SWEARINGEN	1917-1921
RIVERS BUFORD	1921-1925
J. B. JOHNSON	1925-1927
FRED H. DAVIS	1927-1931
CARY D. LANDIS	1931-1938
GEORGE COUPER GIBBS	1938-1941
J. TOM WATSON	1941-1949
RICHARD W. ERVIN	1949-



In Memoriam
FRANK JOSEPH HEINTZ

FRANK JOSEPH HEINTZ

Frank Joseph Heintz was born in Medora, Illinois, October 12, 1886, son of Mr. and Mrs. Victor Heintz, and passed away at Tallahassee Memorial Hospital, Tallahassee, Florida, on December 12, 1955, a few hours after he was stricken at his desk in the office of the Attorney General. Immediate survivors are his widow, the former Alva Tupper of Jacksonville, Florida, a son, Frank J. Heintz, of Cleveland, Ohio, a daughter, Mrs. John P. Stone, of Jacksonville, Florida, and five grandchildren.

Mr. Heintz attended Quincy College, Quincy, Illinois, receiving from that institution his B.A. degree in 1906 and his M.A. degree in 1907. He obtained his legal education at the University of Mississippi, and upon graduation from that institution was admitted to practice law in that state in 1911. He moved to Jacksonville, Florida, in 1914, where he was admitted to the bar of Florida in that year. From that time until his removal to Tallahassee, Florida, in 1944, he practiced law in Jacksonville, at one time as a member of the firm of Haley and Heintz.

Mr. Heintz entered the army in World War I and received officer's training at Fort Sill. At various other times during the period of his military experience he was stationed at Camp Beauregard, in Louisiana, and Camp Jackson, in South Carolina. He was discharged subsequent to the Armistice in 1918 as a Captain of Artillery.

In May, 1939, Mr. Heintz was appointed Referee in Bankruptcy by the late Judge Louie W. Strum. In the early part of 1944, he terminated the practice of law in Jacksonville and a period of his life characterized by his demonstrated ability as a lawyer and the personal affection of many people whose lives he touched. During that period he was a charter member of Timuquana Country Club, a member of the Seminole Club, Friars, and Florida Yacht Club.

Mr. Heintz served as an Assistant Attorney General of Florida from April, 1944, to December 12, 1955. He handled numerous important assignments, but perhaps he will be best remembered for his long service as legal representative, under the Attorney General, of the Board of Control. During that period he dealt with many problems and programs relating to higher education in a changing and expanding Florida; and he disposed of each task which confronted him, complex or otherwise, with understanding of subject matter and skill as a lawyer.

Mr. Heintz was of the Roman Catholic faith. He was a lawyer's lawyer. Yet such was his studious and kindly disposition, his comprehension of traditions and contemporary legal, social and economic problems, that he dealt with issues with warmth and human understanding in the wholesome light of dictated Christian principles.



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FRANK JOSEPH HEINTZ

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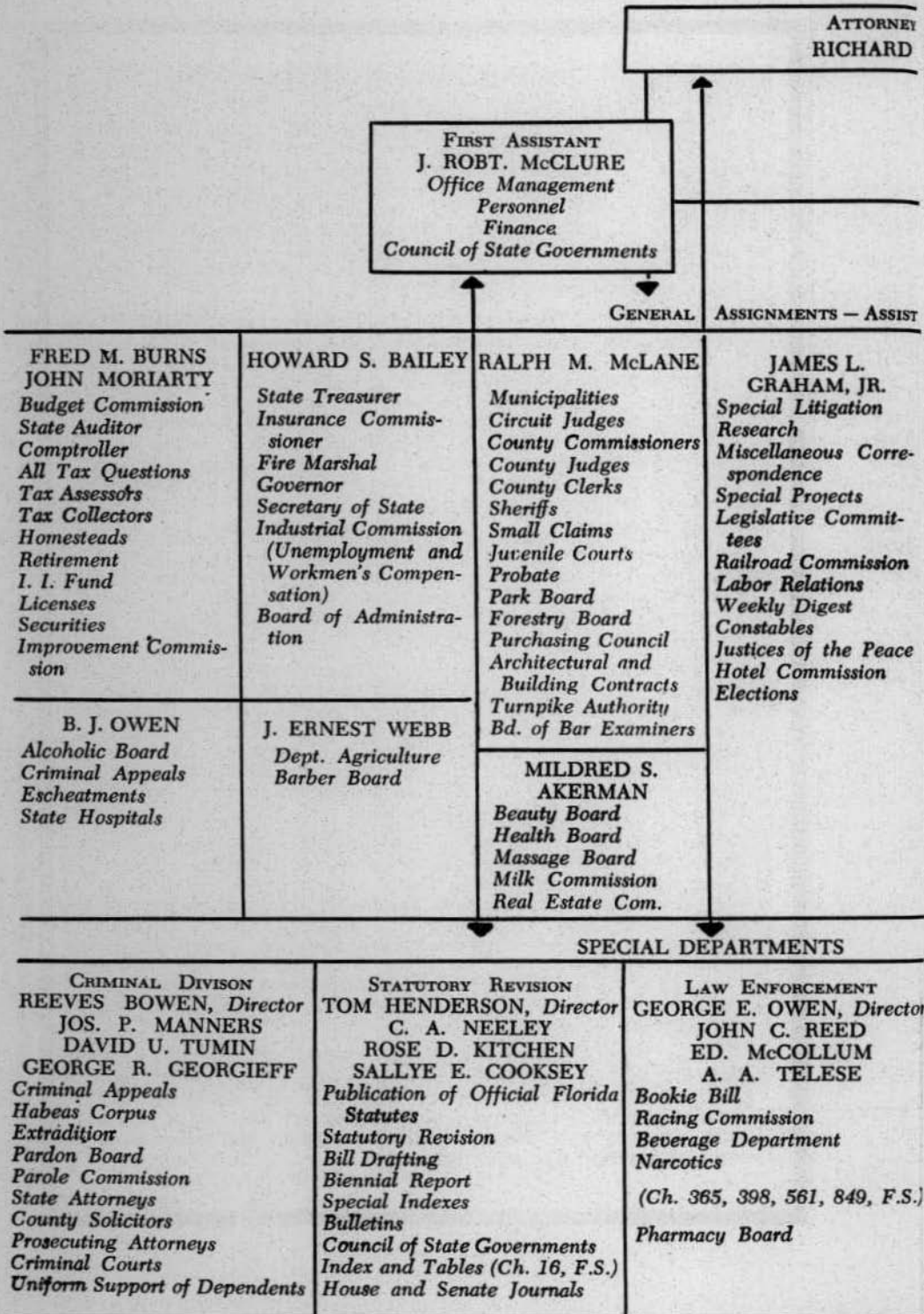
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Mr. Heintz was of the Roman Catholic faith. He was a lawyer's lawyer. Yet such was his studious and kindly disposition, his comprehension of traditions and contemporary legal, social and economic problems, that he dealt with issues with warmth and human understanding in the wholesome light of dictated Christian principles.

ORGANIZATION OF ATTO



RNEY GENERAL'S OFFICE

GENERAL
W. ERVIN

SECRETARIES

ANT ATTORNEYS

JOHN J. BLAIR

Civil Defense
Military Affairs
Veterans Affairs
Merit System
Aviation
Advertising Commission
Welfare Board
Citrus Commission
Dental Board
Library Board
Public Safety
Motor Vehicle Commission

RALPH E. ODUM

Board of Control
Board of Education
Dept. of Education
Public Institutions
Council School Boards
Teacher's Retirement
Council of Blind
Bd. of Com. of St. Institutions

PHILLIP GOLDMAN

JOHN C. REED

CHARLES L.

VOCELLE

EDWARD J.

NELSON

Miami Area Litigation

MARY SCHULMAN

Boards of
Accountancy
Anatomical
Architects
Chiropody
Chiropractic
Engineers
Funeral Directors
Naturopaths
Optometrists
Osteopaths
Physical Therapist
Veterinary
Atlantic States Marine Fisheries Compact
Tuberculosis Board
Children's Commission, Crippled Children's Commission
Conservation Salt Water Fish
Flood Control, Drainage and Irrigation
Game and Fresh Water Fish Commission
Gulf and Caribbean Fisheries Compact
Gulf States Marine Fisheries Compact
Medical, Basic Science, Nurses
Nursing Homes
Oil Compact Commission
Structural Pest, Mosquito Control
Water Research and Survey

T. PAINE KELLY

State Road Department
Abstracts and Titles
Condemnation
Bond Validation
Drainage Districts
Land Foreclosure
Agriculture
Livestock Board
Market Board

OPINIONS SCREENING COMMITTEE

Assistant Attorney General FRED M. BURNS

Assistant Attorney General RALPH E. ODUM

Assistant Attorney General RALPH M. McLANE

ATTORNEY GENERAL'S OFFICE

LEGAL DEPARTMENT

RICHARD W. ERVIN	Attorney General
J. ROBERT McCLURE	First Assistant
HOWARD S. BAILEY	Assistant
REEVES BOWEN	Assistant
FRED M. BURNS	Assistant
*BART L. COHEN	Assistant
PHILLIP GOLDMAN	Assistant
JAMES L. GRAHAM, JR.	Assistant
**FRANK J. HEINTZ	Assistant
T. PAINE KELLY	Assistant
JOSEPH P. MANNERS	Assistant
RALPH M. McLANE	Assistant
JOHN D. MORIARITY	Assistant
*W. C. MORRIS	Assistant
RALPH E. ODUM	Assistant
B. JAY OWEN	Assistant
GEORGE E. OWEN	Assistant
JOHN C. REED	Assistant
MARY SCHULMAN	Assistant
J. ERNEST WEBB	Assistant
MILDRED S. AKERMAN	Special Assistant
JOHN J. BLAIR	Special Assistant
*W. R. CULBREATH	Special Assistant
GEORGE R. GEORGIEFF	Special Assistant
*JOHN S. LLOYD	Special Assistant
EDWARD J. NELSON	Special Assistant
*JACK A. SUDDUTH	Special Assistant
*MOIE J. L. TENDRICH	Special Assistant
DAVID U. TUMIN	Special Assistant
CHARLES L. VOCELLE	Special Assistant
JESSE F. WARREN	Special Assistant

*Resigned

**Deceased

LILLIAN S. RYDER	Secretary to Attorney General
BETTY F. EPPES	Secretary to First Assistant
BETTYRE POWELL	Secretary
BESSIE MARY ALLEN	Secretary
CARRIE LOU CHAMBLISS	Secretary
LEILA K. COFIELD	Secretary
MARIANNE C. CUNNINGHAM	Secretary
CAROLINE L. DEDGE	Secretary
PAULINE H. EVANS	Secretary
NINA LEE KINSEY	Secretary
BETTY B. KIRBY	Secretary
WINIFRED KITCHING	Secretary
JUANITA S. PATTON	Secretary
ANNIE MARY PERKINS	Secretary
MINNIE D. PHILLIPS	Secretary
MAE ELLEN ROOT	Secretary
PEGGY SUE RUSS	Secretary
NELLIE JO VON FUNK	Secretary
LILLIAN H. WALKER	Secretary
*VIRGINIA C. WILEY	Secretary
BETTY HALL YON	Secretary
MARGUERITE E. KEEGAN	File Clerk
AUGUSTA D. TURNLEY	Assistant File Clerk
*GEORGIA K. BARBER	Opinion Editor
*J. ELDRIDGE BEACH	Investigator
*WILLIAM H. GASQUE	Investigator
ED McCOLLUM	Investigator
A. A. TELESE	Investigator
LIDIE E. MOSS	Receptionist
HORTENSE K. WELLS	Librarian
ROBERT LANDERS	Janitor-Machine Operator
HATTIE HOLLINGSWORTH	Maid
RUTH N. LANDERS	Maid

*Resigned

ATTORNEY GENERAL'S OFFICE

STATUTORY REVISION DEPARTMENT

CHARLES TOM HENDERSON..... Director of Statutory
Revision and Bill
Drafting, Assistant
Attorney General

SALLYE E. COOKSEY..... Editor, Assistant

ROSE D. KITCHEN..... Indexer, Editor, Assistant

C. A. NEELEY..... Editor, Assistant

JEWELL R. ROEMER..... Secretary to Director

HILDA F. LIPSEY..... Secretary

MARY O'Q. POMEROY..... Secretary

SHIRLEY SWAIN HUGGINS..... Secretary

HILDRED Y. CASEY..... Part-time Typist

MILDRED L. MADDOX..... Typist

DOROTHY M. STARK..... Proofreader

MAMIE M. HARRELL..... Proofreader

*EDITH GRADY COOMBS..... Proofreader

CAROLYN M. ERVIN..... Clerk

DORA BELLE BROOKS..... Clerk

CATHERINE COMISKEY..... Clerk

DONALD HARTSFIELD..... Machine Operator

***HAROLD STEWART..... Machine Operator

*Resigned

***Military Service

JUDICIAL DEPARTMENT OF FLORIDA

SUPREME COURT JUSTICES

TALLAHASSEE, FLORIDA

<i>Chief Justice</i>		<i>Term Expires</i>
GLENN TERRELL.....	Tallahassee.....	January, 1961

Justices

E. HARRIS DREW.....	Tallahassee.....	January, 1959
T. FRANK HOBSON.....	Tallahassee.....	January, 1963
STEPHEN C. O'CONNELL.....	Tallahassee.....	January, 1961
B. K. ROBERTS.....	Tallahassee.....	January, 1959
ELWYN THOMAS.....	Tallahassee.....	January, 1963
CAMPBELL THORNAL.....	Tallahassee.....	January, 1961

GUYTE P. McCORD, Clerk Supreme Court.

RICHARD W. ERVIN, Attorney General, Reporter to Supreme Court.

DEMPSEY B. MAYO, Marshal.

CARSON F. SINCLAIR, Librarian.

CIRCUIT JUDGES

FIRST Judicial Circuit — Escambia, Okaloosa, Santa Rosa and Walton Counties.

Harold Crosby.....	Pensacola, Florida
D. Stuart Gillis.....	DeFuniak Springs, Florida
Woodrow M. Melvin.....	Milton, Florida

SECOND Judicial Circuit — Franklin, Gadsden, Jefferson, Leon, Liberty and Wakulla Counties.

W. May Walker.....	Tallahassee, Florida
Hugh M. Taylor.....	Quincy, Florida

THIRD Judicial Circuit — Columbia, Dixie, Hamilton, Lafayette, Madison, Suwannee and Taylor Counties.

Hal W. Adams.....	Mayo, Florida
R. H. Rowe.....	Madison, Florida

FOURTH Judicial Circuit — Duval, Clay and Nassau Counties.

Charles A. Luckie.....	Jacksonville, Florida
Bayard B. Shields.....	Jacksonville, Florida
A. D. McNeill.....	Jacksonville, Florida
Claude Ogilvie.....	Jacksonville, Florida
W. A. Stanly.....	Jacksonville, Florida

DUVAL COUNTY CIRCUIT — Duval County.

Edwin L. Jones.....	Jacksonville, Florida
---------------------	-----------------------

FIFTH Judicial Circuit — Citrus, Hernando, Lake, Marion and Sumter Counties.

Wallace E. Sturgis.....	Ocala, Florida
T. G. Futch.....	Leesburg, Florida

SIXTH Judicial Circuit — Pasco and Pinellas Counties.

John U. Bird.....	Clearwater, Florida
John Dickinson.....	St. Petersburg, Florida
C. Richard Leavengood.....	St. Petersburg, Florida
Orvil L. Dayton, Jr.....	Dade City, Florida

SEVENTH Judicial Circuit — Flagler, Putnam, St. Johns and Volusia Counties.

George William Jackson	St. Augustine, Florida
Robert H. Wingfield	DeLand, Florida
P. B. Revels	Palatka, Florida

EIGHTH Judicial Circuit — Alachua, Baker, Bradford, Gilchrist, Levy and Union Counties.

George L. Patten	Starke, Florida
John A. H. Murphree	Gainesville, Florida

NINTH Judicial Circuit — Brevard, Indian River, Martin, Okeechobee, Orange, Osceola, St. Lucie and Seminole Counties.

Frank A. Smith	Orlando, Florida
Vassar B. Carlton	Titusville, Florida
A. O. Kanner	Stuart, Florida
Terry B. Patterson	Winter Park, Florida

TENTH Judicial Circuit — Hardee, Highlands and Polk Counties.

D. O. Rogers	Bartow, Florida
Don Register	Winter Haven, Florida
William P. Allen	Sebring, Florida

ELEVENTH Judicial Circuit — Dade County.

George E. Holt	Miami, Florida
Marshall C. Wiseheart	Miami, Florida
Stanley Milledge	Miami, Florida
Charles A. Carroll	Miami, Florida
J. Fritz Gordon	Miami, Florida
William A. Herin	Miami, Florida
Grady L. Crawford	Miami, Florida
Vincent C. Giblin	Miami, Florida
Pat Cannon	Miami, Florida
Robert L. Floyd	Miami, Florida
Robert H. Anderson	Miami, Florida
Harold R. Vann	Coral Gables, Florida
Ray Pearson	Miami, Florida
John W. Prunty	Miami, Florida

TWELFTH Judicial Circuit — DeSoto, Charlotte, Collier, Glades, Hendry, Lee, Manatee and Sarasota Counties.

Lynn Gerald	Ft. Myers, Florida
W. T. Harrison	Palmetto, Florida

THIRTEENTH Judicial Circuit — Hillsborough County.

L. L. Parks	Tampa, Florida
Harry N. Sandler	Tampa, Florida
Henry C. Tillman	Tampa, Florida
I. C. Spoto	Tampa, Florida

FOURTEENTH Judicial Circuit — Bay, Calhoun, Gulf, Holmes, Jackson and Washington Counties.

E. C. Welch	Marianna, Florida
E. Clay Lewis, Jr.	Panama City, Florida

FIFTEENTH Judicial Circuit — Broward and Palm Beach Counties.

R. O. Morrow	Lake Worth, Florida
James R. Knott	West Palm Beach, Florida
Lamar G. Warren	Ft. Lauderdale, Florida
Joseph S. White	West Palm Beach, Florida
Otis L. Farrington	Ft. Lauderdale, Florida
James H. Walden	Dania, Florida

SIXTEENTH Judicial Circuit — Monroe County.

Aquilino Lopez, Jr. _____ Key West, Florida

JUDGES AND SOLICITORS

BROWARD COUNTY CRIMINAL COURT OF RECORD

Louis Weissing, Ft. Lauderdale _____ Judge
Emerson Allsworth, Ft. Lauderdale _____ Solicitor

DADE COUNTY CRIMINAL COURT OF RECORD

Ben C. Willard, Miami _____ Judge

DUVAL COUNTY CRIMINAL COURT OF RECORD

William T. Harvey, Jacksonville _____ Judge
A. Lloyd Layton, Jacksonville _____ Judge
Lacy Mahon, Jr., Jacksonville _____ Solicitor

HILLSBOROUGH COUNTY CRIMINAL COURT OF RECORD

L. A. Grayson, Tampa _____ Judge
Paul B. Johnson, Tampa _____ Solicitor

MONROE COUNTY CRIMINAL COURT OF RECORD

Thos. S. Caro, Key West _____ Judge
Allan B. Cleare, Jr. _____ Solicitor

ORANGE COUNTY CRIMINAL COURT OF RECORD

W. M. Murphy, Orlando _____ Judge
Richard Cooper _____ Solicitor

PALM BEACH COUNTY CRIMINAL COURT OF RECORD

Edward G. Newell, West Palm Beach _____ Judge
Hugh MacMillan, West Palm Beach _____ Judge
Charles A. Nugent, Jr. _____ Solicitor

POLK COUNTY CRIMINAL COURT OF RECORD

Roy H. Amidon, Lakeland _____ Judge
Clifton M. Kelly, Lakeland _____ Solicitor

PINELLAS COUNTY CIVIL & CRIMINAL COURT OF RECORD

Joseph P. McNulty, St. Petersburg _____ Judge

BROWARD COUNTY COURT OF CRIMES

Thomas F. Tompkins, Jr., Ft. Lauderdale _____ Judge

DADE COUNTY COURT OF CRIMES

Gene Williams, Miami _____ Judge
George E. Schulz, Miami _____ Judge

DADE COUNTY CIVIL COURT OF RECORD

David J. Heffernan, Miami _____ Judge
Norman Hendry, Miami _____ Judge
J. Tillman Pearson, Miami _____ Judge
John R. Blanton, Miami _____ Judge

DUVAL COUNTY CIVIL COURT OF RECORD

Burton Barrs, Jacksonville _____ Judge

ESCAMBIA COUNTY COURT OF RECORD

Ernest E. Mason, Pensacola _____ Judge
Kirke M. Beall, Pensacola _____ Judge
John L. Reece, Pensacola _____ Solicitor

JUDGES OF JUVENILE COURTS

Broward	Dorr S. Davis, Fort Lauderdale
Dade	Walter H. Beckham, Miami
Dade	W. R. Culbreath, Miami
Duval	Marion W. Gooding, Jacksonville
Hillsborough	O. D. Howell, Jr., Tampa
Monroe	Mrs. Eva Warner Gibson, Key West
Orange	Mrs. Mattie H. Farmer, Ocoee
Pinellas	Charles O. Parks, Jr., St. Petersburg
Polk	G. Bowdon Hunt, Bartow

JUDGE OF THE JUVENILE DIVISION OF THE COURT OF RECORD

Escambia	Theodore F. Bruno, Pensacola
----------	------------------------------

STATE ATTORNEYS

FIRST Judicial Circuit	Ed. Wicke, Pensacola Escambia, Okaloosa, Santa Rosa and Walton Counties.
SECOND Judicial Circuit	William D. Hopkins, Tallahassee Franklin, Gadsden, Jefferson, Leon, Liberty and Wakulla Counties.
THIRD Judicial Circuit	Wm. Randall Slaughter, Live Oak Columbia, Dixie, Hamilton, Lafayette, Madison, Suwannee and Taylor Counties.
FOURTH Judicial Circuit	William A. Hallows, III, Jacksonville Clay, Duval and Nassau Counties.
FIFTH Judicial Circuit	G. G. Oldham, Jr., Leesburg Citrus, Hernando, Lake, Marion and Sumter Counties.
SIXTH Judicial Circuit	Clair A. Davis, St. Petersburg Pasco and Pinellas Counties.
SEVENTH Judicial Circuit	William W. Judge, Daytona Beach Flagler, Putnam, St. Johns and Volusia Counties.
EIGHTH Judicial Circuit	T. E. Duncan, Gainesville Alachua, Baker, Bradford, Gilchrist, Levy and Union Counties.
NINTH Judicial Circuit	Murray W. Overstreet, Kissimmee Brevard, Indian River, Martin, Okeechobee, Orange, Osceola, St. Lucie and Seminole Counties.
TENTH Judicial Circuit	Gunter Stephenson, Winter Haven Hardee, Highlands and Polk Counties.
ELEVENTH Judicial Circuit	Richard E. Gerstein, Miami Dade County.
TWELFTH Judicial Circuit	Wm. M. (Mack) Smiley, Sarasota Charlotte, Collier, DeSoto, Glades, Hendry, Lee, Manatee and Sarasota Counties.
THIRTEENTH Judicial Circuit	James M. (Red) McEwen, Tampa Hillsborough County.
FOURTEENTH Judicial Circuit	J. Frank Adams, Blountstown Bay, Calhoun, Gulf, Holmes, Jackson, Washington Counties.
FIFTEENTH Judicial Circuit	Phil O'Connell, West Palm Beach Broward and Palm Beach Counties.

SIXTEENTH Judicial Circuit..... J. Lancelot Lester, Key West
Monroe County.

ASSISTANT STATE ATTORNEYS

FIRST Judicial Circuit..... Erwin Fleet, Fort Walton
Escambia, Okaloosa, Santa Rosa and Walton Counties.

SECOND Judicial Circuit..... Harry Morrison, Crawfordville
Franklin, Gadsden, Jefferson, Leon, Liberty and Wakulla
Counties.

THIRD Judicial Circuit..... O. O. Edwards, Cross City
Columbia, Dixie, Hamilton, Lafayette, Madison, Suwannee and
Taylor Counties.

FOURTH Judicial Circuit..... Nathan Schevitz, Jacksonville
Richard C. Gordie, Green Cove Springs
Thomas J. Shave, Fernandina
Clay, Duval and Nassau Counties.

FIFTH Judicial Circuit..... John W. McCormick, Mount Dora
Citrus, Hernando, Lake, Marion and Sumter Counties.

SIXTH Judicial Circuit..... Sam Y. Allgood, Jr., New Port Richey
Robert R. Tench, Clearwater
Pasco and Pinellas Counties.

SEVENTH Judicial Circuit..... Frank G. Howatt, St. Augustine
Flagler, Putnam, St. Johns and Volusia Counties.

EIGHTH Judicial Circuit..... Joe Hill Williams, P. O. Box 158,
Lake Butler.
Alachua, Baker, Bradford, Gilchrist, Levy and Union Counties.

NINTH Judicial Circuit..... Charles R. P. Brown, Ft. Pierce
Volie A. Williams, Jr., Sanford
Brevard, Indian River, Martin, Okeechobee, Orange, Osceola,
St. Lucie, Seminole Counties.

TENTH Judicial Circuit..... Joseph O. Macbeth, Sebring
Hardee, Highlands and Polk Counties.

ELEVENTH Judicial Circuit..... John W. Achor, Miami
Adele Segall Faske, Miami
William Meadows, Jr., Miami
Paul A. Louis, Miami
Edward P. Swan, Miami
Thomas N. Balikes, Miami
Max B. Kogen, Miami
Anthony J. Hosemann, Jr., Miami
Dade County.

TWELFTH Judicial Circuit..... Frank B. Watson, Jr., Fort Myers
William H. Stockham, Sarasota
Charlotte, Collier, DeSoto, Glades, Hendry, Lee, Manatee and
Sarasota Counties.

THIRTEENTH Judicial District..... Ralph L. Rousseau, Jr., Tampa
Hillsborough County.

FOURTEENTH Judicial Circuit..... Larry G. Smith, Panama City
Bay, Calhoun, Gulf, Holmes, Jackson and Washington Counties.

FIFTEENTH Judicial Circuit..... Quentin V. Long, Hallandale
Broward and Palm Beach Counties.

SIXTEENTH Judicial Circuit..... None
Monroe County.

COUNTY JUDGES, 1957—1961

<i>County</i>	<i>Name</i>	<i>County Seat</i>
Alachua.....	H. H. McDonald.....	Gainesville
Baker.....	B. R. Burnsed.....	Maccleenny
Bay.....	Joseph W. Bailey.....	Panama City
Bradford.....	Theron A. Yawn, Jr.....	Starke
Brevard.....	Virgil B. Conkling.....	Titusville
Broward.....	Boyd H. Anderson.....	Ft. Lauderdale
Calhoun.....	Sidney Parrish.....	Blountstown
Charlotte.....	John T. Rose, Jr.....	Punta Gorda
Citrus.....	O. Frank Scofield.....	Inverness
Clay.....	Thomas J. Rivers.....	Green Cove Springs
Collier.....	S. S. Jolley.....	Everglades
Columbia.....	G. A. Buie, Jr.....	Lake City
Dade.....	W. F. Blanton.....	Miami
Dade.....	Frank B. Dowling.....	Miami
DeSoto.....	Gordon Hays.....	Arcadia
Dixie.....	Ike C. Harmon.....	Cross City
Duval.....	McKenney J. Davis.....	Jacksonville
Escambia.....	Harvey E. Page.....	Pensacola
Flagler.....	Duane A. Deen.....	Bunnell
Franklin.....	Raymond M. Witherspoon.....	Apalachicola
Gadsden.....	H. Y. Reynolds.....	Quincy
Gilchrist.....	E. M. Akins.....	Trenton
Glades.....	J. M. Couse.....	Moore Haven
Gulf.....	Sam P. Husband.....	Wewahitchka
Hamilton.....	Ernest Rutledge.....	Jasper
Hardee.....	Clyde Maddox.....	Wauchula
Hendry.....	R. M. Harris.....	LaBelle
Hernando.....	Monroe W. Treiman.....	Brooksville
Highlands.....	Mervin Rehrer.....	Sebring
Hillsborough.....	William C. Brooker.....	Tampa
Holmes.....	Comer White.....	Bonifay
Indian River.....	Otis M. Cobb.....	Vero Beach
Jackson.....	Robert L. McCrary, Jr.....	Marianna
Jefferson.....	Kenneth E. Cooksey.....	Monticello

Lafayette	Guy M. McClain	Mayo
Lake	W. Troy Hall, Jr.	Tavares
Lee	Archie M. Odom	Fort Myers
Leon	James C. Gwynn	Tallahassee
Levy	W. F. Anderson	Bronson
Liberty	R. H. Deason	Bristol
Madison	Curtis D. Earp	Madison
Manatee	Robert E. Hensley	Bradenton
Marion	D. R. Smith	Ocala
Martin	Harris Lowery, Jr.	Stuart
Monroe	Raymond R. Lord	Key West
Nassau	J. E. Weatherford	Fernandina Beach
Okaloosa	Wilbur F. Osborn	Crestview
Okeechobee	G. E. Bryant, Jr.	Okeechobee
Orange	Roger A. Barker	Orlando
Osceola	O. P. Johnson	Kissimmee
Palm Beach	Richard P. Robbins	West Palm Beach
Pasco	A. J. Hayward, Jr.	Dade City
Pinellas	Jack F. White	Clearwater
Pinellas	Richard A. Miller	Clearwater
Polk	Chester M. Wiggins	Bartow
Putnam	Wm. E. Warren	Palatka
St. Johns	Chas. C. Mathis, Jr.	St. Augustine
St. Lucie	Flem C. Dame	Ft. Pierce
Santa Rosa	Mahlon C. McCall	Milton
Sarasota	John D. Justice	Sarasota
Seminole	Ernest Housholder	Sanford
Sumter	P. B. Howell	Bushnell
Suwannee	John Melvin Hearn	Live Oak
Taylor	Byron Butler	Perry
Union	S. B. Brooks	Lake Butler
Volusia	Thomas N. Tappy	DeLand
Wakulla	George L. Harper	Crawfordville
Walton	Joe Dan Trotman	DeFuniak Springs
Washington	Fred T. Bennett	Chipley

EXPLANATION

This report contains copies of a majority of the opinions rendered by this office during the past two years. The opinions that are omitted are of a purely local nature or application. It has been necessary to eliminate some material in the interest of economy since the number of opinions issued has increased beyond all expectations. A copy of any opinion omitted from this report is on file in this office. For omitted opinions by number and subject matter, see index and table of Omitted Opinions listed immediately preceding the Alphabetical Index.

BIENNIAL REPORT

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BIENNIAL REPORT
of the
ATTORNEY GENERAL

State of Florida

January 1, 1955, to December 31, 1956

055-2—January 6, 1955

CRIMES

**CRUELTY TO CHILDREN AND ANIMALS—COCK FIGHTING—
§§828.12-828.15, F.S.**

To: Harry E. King, Senator, 7th District, Winter Haven

QUESTION:

Do the statutes of this state prohibit cock fighting in this state, where neither of the cocks is equipped with sharpened or artificial spurs and there is no gambling upon the outcome of the fight?

You will note that we have restated your question so as to include the element of equipping the cocks with artificial or sharpened spurs. Sections 828.12-828.15, F.S., in so far as they relate to poultry, were construed in *Mikell v. Henderson*, Fla., 63 So. 2d 508, as not prohibiting ordinary cock fighting, where the birds are not equipped with artificial or sharpened spurs. The opinion leaves open the question of the legality of fighting cocks equipped with artificial or sharpened spurs or other artificial fighting equipment and when held in connection with gambling. The above question, upon the authority of the above opinion of the supreme court of this state, must be answered in the negative. As the above mentioned opinion appears to have been primarily based upon the exemption contained in §828.15, F.S., we see no reason why the legislature may not prohibit the exhibition of fighting cocks in public.

Notwithstanding the opinion in *Mikell v. Henderson*, supra, we feel that the fighting of cocks equipped with artificial or sharpened spurs probably constitutes cruelty to animals within the purview of §828.12, et seq., F.S. This seems to be another question that might be clarified by legislation.

055-3—January 7, 1955

STATE AND COUNTY OFFICERS AND EMPLOYEES
RETIREMENT—COUNTY HEALTH UNIT—STATUS

To: C. M. Gay, State Comptroller, Tallahassee

QUESTIONS:

1. Should county health officers be members of the

county officers and employees retirement system or of the state officers and employees retirement system?

2. Should other employees of the county health units, who are paid with state warrant, be members of the county officers and employees retirement system or of the state officers and employees retirement system?

The letter of this office to the state budget commission under date of December 6, 1954, is not controlling as it was primarily based upon Ch. 26592, 1951, which is only applicable to counties having a population of 325,000 or more according to the last preceding federal census, and which chapter related specifically to the salary of the directors of county health units in such counties when the county contributes not less than 70% of the operating expenses of such health units.

Although county health units appear to be a county function and not a department or branch of the state government (§§1, 2 and 3, Art. XVI, State Const.; Ch. 154, F. S.; *State v. Florida State Improvement Commission*, Fla., 48 So. 2d 165; *Whisnat v. Stringfellow*, Fla., 50 So. 2d 885) this does not necessarily determine which retirement system (Ch. 121 (state) or Ch. 134 (county), F. S.) they are under. County health officers and employees are employed by the boards of county commissioners, *with the approval of the state health officer*, and their compensation is fixed by the state board of health *upon the approval of the board of county commissioners* (§154.04, F. S.). Although the funds from which the county health officer and the county health unit employees are paid are deposited in the state treasury and paid out by state warrant they are designated as "the full-time local health unit funds of such county" (§154.03, F. S.). Two or more counties may cooperate and form a single health unit for such counties (§154.05, F. S.).

The definition in §134.02, F. S., seems to be broad enough to embrace county health unit employees and the county health officers; and the definition in §121.02, F. S., may also be extended to such persons by reason of their being paid partly with state funds and with warrants issued against the state treasury. Although we have a feeling that county health officers and county health unit employees might properly be held to be within the county officers and employees retirement system (Ch. 134, F. S.), we are advised that they have long since been classified, through departmental construction, as being within the state officers and employees retirement system (Ch. 121, F. S.). They have been carried on the rolls of the state officers and employees retirement system since its creation in 1945, have made contributions to such system and have had their said contributions matched by state funds. Four sessions of the state legislature have been held without any attempt on the part of the legislature to require their transfer to the county officers and employees system. Administrative construction is of great value in determining real meaning of a statute (*State v. Lee*, 114 Fla. 855, 155 So. 138; *Marion Mortgage Company v. State*, 107 Fla. 472, 145 So. 222; *Robinson v. Fix*, 113 Fla. 151, 151 So. 512;

Amos v. Moseley, 74 Fla. 555, 77 So. 619; State v. Lee, 123 Fla. 252, 166 So. 565; State v. Lee, 137 Fla. 658, 188 So. 775; State v. Stein, 144 Fla. 387, 198 So. 82; King v. Seaman, Fla. 59 So. 2d 859; Gay v. Canada Dry Bottling Company, Fla., 59 So. 2d 859). "A departmental construction of a . . . statute acquiesced in for a long time by those affected by the statute is entitled to great weight when the statute is reasonably susceptible to two constructions . . ." (L. B. Price Mercantile Company v. Gay, Comptroller, Fla., 44 So. 2d 84, text 90). The fact that officers charged with the execution of the retirement system statutes construed them as placing the county health officers and employees of county health units within the state instead of the county retirement system is evidence of the possibility of construing Ch. 121, F. S., as including them; while a reading of the definition in §134.02, F. S., reveals the possibility of construing the county retirement system as embracing the same officers and employees.

In the light of the above facts, circumstances and authorities, we do not think that we would be justified in disturbing the departmental construction above referred to. The above questions are answered by advising you to continue to carry county health officers and employees of the county health units in the state officers and employees retirement system.

055-4—January 7, 1955

LEGISLATURE

EXPENSES, SALARIES, ETC., PREPARATORY TO LEGISLATIVE SESSION—§11.15, F.S.

To: *Kenneth Ballinger, State Representative, Tallahassee*

QUESTIONS:

1. May the sergeants at arms of the senate and house of representatives of the state legislature, prior to the 15 days mentioned in §11.15, F.S., employ personnel and have them paid from the appropriation for legislative expense in connection with the making of preparations for the meeting of the state legislature?

2. Who must approve the pay rolls or vouchers for the payment of the salaries of such personnel, if the first above question is answered in the affirmative?

Section 11.15, F. S., provides in part that "the sergeants at arms of the senate and house of representatives . . . shall be entitled to pay not to exceed 15 days in advance of any regular or special session of the legislature for service to be performed by them in order to prepare for said session. They shall also be entitled to such necessary expenses as may be paid out and incurred by them as may be approved by the committee on legislative expenditures" of the respective houses of the legislature. Similar provision is made by the same section of the statutes in order for them to store and preserve the property of the legislature after each session and to complete the details of their of-

fices. Although the statutes providing for the 15-days pay and expenses for the sergeants at arms have existed for many years, there was added, by Ch. 21933, 1943, and now brought into the said section of the statutes, the provision authorizing either the senate or house committee on legislative expenses, "with the approval of the president of the senate *and* speaker of the house of representatives, may (to) extend the 15-day periods herein provided, if the same is found necessary to carry out the provisions of this section." The "provisions of this section" evidently relate to the necessary preparations for the meeting of the legislature and the winding up of its affairs and storing its property and equipment after the session.

Although §11.12, F. S., makes a continuing appropriation of \$850,000 biennially to meet legislative expenses, which sum "is made available as needed *at any time during the session* of the legislature," the general appropriations act of 1953 (Item 35, §1, Ch. 28115, 1953; Item 35, §282.01, F. S.) appropriates a total of \$900,000 for the biennium beginning July 1, 1953, and ending June 30, 1955, to be "used during the session of the legislature as provided by law and during the interim between sessions of the legislature to pay expenses as provided and properly authorized by resolution to reimburse members of interim committees the provisions of §§11.12, 11.13 and 11.18, to the contrary notwithstanding." (Emphasis supplied.)

The above quoted provisions of §11.15, F. S., clearly show a purpose and intent on the part of the legislature to give the sergeants at arms not less than 15 days before and after sessions of the legislature to make preparations for the holding of such sessions. The latter part of this section of the statutes authorizes the respective committees on legislative expense, "with the approval of the president of the senate *and* speaker of the house of representatives," to extend such 15-day periods "if found necessary in order to carry out the provisions of" said section; that is, to prepare for the meeting of the legislature and to wind up its affairs and protect its property after each session. Although the said respective committees on legislative expense are not designated as continuing committees, the fact that they may act, together with the president of the senate and speaker of the house, to extend the said 15-day periods of time seems to require that they be in the nature of continuing committees.

The above statutes only appear to authorize the payment of a salary to the two sergeants at arms of the respective houses of the legislature; however, such sergeants are also "entitled to such necessary expenses as may be paid out and incurred by them as may be approved" by the respective committees on legislative expenditures. If the nature of the services and work required to prepare for the sessions of the legislature are such that they cannot be personally performed by the sergeants at arms one of their necessary expenses would seem to include the procurement of the necessary labor and assistance to properly perform and complete the tasks imposed upon them by the legislature. The primary intention of the legislature in enacting

the above provisions was to have the house and senate chambers and committee rooms and all equipment ready and in place so that there will be no delay in the business of the legislature upon its convening.

The reference in the latter part of §11.15, F. S., to the *committees on legislative expenditures* refers to the duly constituted committees of the session last past. Section 11.15, F. S., treats the committees on legislative expense as being in the nature of continuing and interim committees when it gave them the power to extend the said 15-day periods of time.

The 1st question should be answered in the affirmative when such expenses are incurred within the 15-day periods of time mentioned in §11.15, F. S., or within any extension of said time as provided in said statute with the approval of said legislative expense committee and the presiding officer of the preceding session.

As to the 2nd question, it appears that the expenses of the sergeants at arms must be approved by the proper committee on legislative expense (§11.15, F. S.); it is our information that such committee approval has in the past usually been evidenced by the signature of the committee chairman or vice-chairman.

As a matter of practical procedure and in accordance with custom, it is recommended that the legislative expense committees of the respective branches of the legislature secure approvals from the president designate of the senate and the speaker designate of the house before making additional expenditures.

055-5—January 7, 1955

HIGHWAYS, BRIDGES AND FERRIES

STATE ROAD DEPARTMENT—BUDGET—CONTRACTS— PRIMARY PROJECTS—CONTRACTORS' COMPENSATION—§341.20, F. S.

To: Wilbur Jones, Chairman, State Road Department, Tallahassee

QUESTIONS:

1. Can the state road department legally construct a primary project other than that set forth in the department's annual budget (except for emergency work) until such budget has been completed?

2. Is the state road department legally obligated to pay contractors' estimates for work done under contracts for construction of primary projects not set forth in the department's annual budget, for the year in which said contract was awarded, (except for emergency work) until such budget has been completed?

We are bound by the applicable decisions of the supreme court of Florida in answering public legal questions.

We think your questions are answered by the recent decision of *Webb v. Hill* (Fla.) 75 So. 2d 596, wherein, in interpreting the budget of the state road department statute, (§341.20, F. S.) it said:

"This section requires that the road department at the meeting held in January make an estimate of its resources for the ensuing year which are available for the construction and maintenance of roads and shall at such meeting make up a budget of maintenance and construction work to be done during the ensuing year; that the budget of work should be so planned as to exhaust the estimated resources of the department for the year with the exception of 10% which shall be held in reserve to do emergency work not included in the budget; and that the budget of work above mentioned shall be published in the manner therein specified. It requires that the department appoint a time and place for public hearings as to the said budget of work at which time it shall hear all complaints and suggestions offered by the public as to any changes desired in such budget. The bill of complaint alleges that all this was done but that the road in question was not in this budget of work. It does not show who, or if anyone, appeared to make complaints. If the section of the statute stopped there, the budget of work as published may have become the final budget for the year, but it did not stop there. The section, F. S. §341.20, F. S. A., then provides:

"Upon completion of such hearing, the department shall decide upon and make up a *final* budget of work for the ensuing year, and no construction or maintenance work shall be undertaken by the department other than that set forth in *such* budget of work until *such* budget has been completed. ***"

"This section provides for two budgets. The first budget is sometimes referred to as the 'preliminary budget' which is to be published and an opportunity for a hearing thereon given. Upon the completion of the hearing, whether anyone makes complaint or not, the department shall decide upon and make up a final budget of work for the ensuing year, and '*no construction or maintenance work shall be undertaken by the department other than that set forth in such budget of work (final budget of work) until such budget has been completed.*' This section must be construed as a whole and not in isolated sentences or paragraphs. . . .

"The section in question does not prohibit the doing of any work not set forth in the first budget or preliminary budget. The limitation is 'such budget of work', and that refers to the '*final budget of work*' contained in the same paragraph and the same sentence. The words quoted are meaningless and unnecessary if the road department

could not undertake any work not included in the first, or preliminary, budget. In other words, if the first, or preliminary, budget, after publication and opportunity of a hearing became the final budget, then it would not be necessary for the state road department to 'decide upon and make up a final budget of work for the ensuing year.'"

From this language I think it fairly appears that unless a road project is included in the *final* or official annual budget of the department, as such budget is contemplated or defined by the quoted language of *Webb v. Hill*, its construction cannot be undertaken until the road projects included in said *final* budget have been completed. It can, however, be constructed as an emergency work project, provided the department for good and sufficient reasons timely and by proper resolution designates it as an emergency project.

Assuming that the road department legally and properly made a *final* budget as defined and contemplated in *Webb v. Hill*, *supra*, and has not completed the projects included therein, I do not see how the express language of §341.20, F. S., can be ignored; assuming that the work is not emergency work or work to be paid for out of 2nd gas tax funds, pursuant to §16, Art. IX, State Const., or out of the 7th cent of the gasoline tax (§208.44(3), F. S.). I believe these latter funds are not necessarily contemplated by or subject to §341.20, F. S., and can be considered exceptions.

I do not believe the decision of *Hathaway et al. State Road Department v. Munroe* (Fla.) 119 So. 149 is now controlling in the light of the rather positive language relative to the force and effect of the *final* budget in *Webb v. Hill*.

It is, therefore, my opinion, based on *Webb v. Hill*, *supra*, that the department is not strictly obligated to pay contractors' estimates for projects not included in the final budget and that do not come within said recognized exceptions.

Assuming that the projects in question do not represent authorized exceptions, my opinion is that said questions must be answered in the negative.

Of course, it is assumed that you will examine each contract with great care and be certain of the particular facts in each case before adverse action is taken. If there is a desire to continue in operation a contract which has not been properly budgeted it would seem that the same can be corrected by inclusion in the department's 1955 budget. Even where the budget statute has been ignored you may find that in certain cases that to void the contracts (particularly where the work has been underway for some time) would cause hardships which could better be handled by negotiation and settlement than outright rescission.

055-6—January 12, 1955

EXECUTIVE DEPARTMENT

**GOVERNOR'S APPOINTEES—COMMISSIONS—
ISSUANCE—LEGALITY**

To: R. A. Gray, Secretary of State, Tallahassee

STATEMENT OF FACTS:

As you have been informed through the press and otherwise, Acting Governor Johns appointed and commissioned Thomas T. Tappy, county judge to succeed Judge Wingfield resigned effective midnight January 3, 1955. Governor Collins appointed John S. Byington to be county judge of Volusia Co. stating in the appointment the one made by Acting Governor Johns was void for lack of authority. Also, an appointment was likewise made of a jury commissioner in Hillsborough Co. to fill a term beginning on January 4, 1955 by Acting Governor Johns. Governor Collins has also made an appointment to this position stating Acting Governor Johns was without authority to appoint for a term beginning January 4, 1955.

QUESTION:

Please advise if I should prepare the commissions for the appointees of Governor Collins in the above two instances.

The question appears to have been answered by our supreme court in *State ex rel Fleming, Governor v. Crawford, Secretary of State, Fla.*, 10 So. 118. The situation which existed in that case is tersely set forth in the 4th headnote thereof which is quoted:

"Where there has been an election of a United States senator by the legislature, and afterwards the governor, holding that there is a vacancy in the office on account of the illegality of such election, signs an appointment or commission of a United States senator, and requests the secretary of state to seal the same with the great seal of state, and to countersign it, it is the duty of the secretary to do so, and he has no right to refuse because he deems the governor's action illegal. If he refuses the performance of the duty, it may be required by mandamus."

The following portions of the text of the opinion in the case, here relevant, are quoted:

"It is in our judgment clearly the official duty of the secretary to affix the seal of the state to the appointment, and to countersign or attest the same as evidencing the official act of the executive authority of the state in appointing a senator in the congress of the United States, and this duty is one involving no official discretion or

judgment on his part. In the case of *State v. Wrotnowski*, 17 La. Ann. 156, a mandamus was sought to require the secretary of state of Louisiana to affix the seal of state, and countersign a commission signed by the governor appointing the relator sheriff of the parish of Orleans. The secretary replied that the governor was attempting to issue the commission without warrant or authority of law, and in direct violation of the constitution and laws of the state; that the office of sheriff was then held by another person under a commission which would not expire until the next regular election for the office in question; and that the governor had no authority to supersede the incumbent sheriff. The statutes of Louisiana enacted that there should be a public seal for authenticating the acts of the government, and that the secretary of state, who, as in Florida, was a constitutional officer, should be its keeper, and affix it to all official acts, the laws alone excepted. The governor was vested with the appointing power in certain cases, but it was not shown or pretended in the opinion that he had legally exercised it in the case. *'The secretary of state,'* said the court, *'is not to suspend his action to inquire why and wherefore any appointment by the governor is made. His duty is plain. He is not directed, but ordered, by law, to perform it. When commissions from the governor need authentication, he shall affix his official signature and the public seal of state, for these are official acts. Whatever improvidence or illegality there may be in the issuing of commissions, that concerns him not. His authenticating any official act can never compromise him; for he has no discretion to exercise regarding it.*
* * * *Were this right of supervision, which is almost equivalent to a veto power, in the secretary of state, as it is seriously contended it is, it would, indeed, produce startling consequences. The secretary of state could paralyze at will constitutional appointments made by the executive.*
* * * *The secretary of state cannot go behind commissions officially presented to him for authentication.*
* * * (Emphasis supplied.)

"The duty devolved upon the secretary of state in the case before us is merely to authenticate the commission signed and presented to him by the admitted rightful executive of the state. It is purely ministerial, and involves no exercise of discretion. There is from the very nature of the duty no place in it for the exercise of judgment. It involves nothing but affixing the seal and signing officially. It is entirely impossible for any one to infer from, or to find implied in, the simple duty of authenticating this evidence of an appointment to an office known to exist, and which, under certain circumstances, the executive of the state has authority to fill, the further duty or the power to question the legality of the exercise of the authority to appoint. If such duty or

power of inquiry exists at all, then it covers every question as to legality of the appointment that can be made. It extends not only to the question of whether or not there is a vacancy, but also to the appointee's qualifications as to age, residence, or citizenship. * * * *If this power obtains in the case of the appointment of a senator, it, arising as it must and alone can from the mere duty to authenticate a commission, exists also in the case of every justice of the peace, county commissioner, or other county officer, and of every state officer of whom under any contingency the governor may have the power to make an appointment.* * * * (Emphasis supplied.)

"In authenticating the executive appointment of a senator, the secretary of state in no wise commits himself to the legality of such act. The governor is not responsible to the secretary, nor the secretary for him. If the act is illegal, the authentication of the secretary is the evidence of its consummation; it proves what the governor has done, but it does not involve the secretary in responsibility for it. . . ."

It is to be noted that while the power of the governor to appoint in the above case derived from the U. S. constitution, the principles therein announced are here applicable.

It is to be noted further that in the above case it is stated in effect that the power to determine the legality of election or appointment of a person to the U. S. senate rests alone in that legislative body. In this connection, the following is cited from said case (which is quoted from the mentioned *State v. Wrotnowski*, 17 La. Ann. 156):

"When two commissions, duly authenticated, for the same office, are extant, and it becomes necessary to determine which of the two appointees is legally entitled to the office, that issue, presented in a proper manner and at a proper time, can be entertained; * * * but the courts will not inquisitively seek to know upon what evidence the executive acted in the performance of a constitutional duty; at all events, in advance of the consummation of an official act.'"

It is to be noted further that apparently there was involved in the Crawford case only the matter of a commission. It is recognized that under our constitution and laws appointees to office must qualify by filing prescribed oaths and bonds (if required) in proper form, duly approved, with the secretary of state, as prerequisite to issuance to such appointees of commissions. The reasoning employed in the Crawford case in relation to the purely ministerial duties of the secretary of state obtain with equal force in relation to the secretary of state's transmitting to these appointees proper forms to permit them to qualify and, upon receipt of such forms properly executed as required by law, to file them. When such qualifying papers

have been so filed, thereupon the ministerial duty devolves upon the secretary of state to attest and to affix the seal to such commissions as may be issued by the governor; and while such commissions evidence acts of the governor, there exists no legal impediment to the secretary of state's preparation of them for the governor.

055-7—January 13, 1955

**STATE AND COUNTY OFFICERS AND EMPLOYEES
RETIREMENT ELIGIBILITY—REFERENDUM ELECTION
—SOCIAL SECURITY—§112.05, F.S.**

To: Herbert W. Miller, Assistant General Counsel, Florida Industrial Commission, Tallahassee

QUESTIONS:

1. Do the provisions of §112.05, F. S., constitute a "retirement system" within the meaning of §218 of the federal social security act as amended?

2. If the answer to question 1. is in the affirmative, what would be the basis for determining which state employees are members of this system and eligible to participate in a referendum election on whether to extend social security coverage to service in positions covered by such retirement system?

Recent amendments of the federal social security act have made it possible, after January 1, 1955, to extend social security coverage to positions of public employees now covered by a retirement system. Such federal act provides, in cases where OASI coverage is to be added to an existing system, for an employee-referendum on the question of whether additional coverage shall be effected, participation in such a referendum being limited to those who are members of the retirement system on the date of notice of the referendum and on the date the referendum is held. (Sub §218(d), as amended social security act) With these explanatory remarks, the significance of the above questions is apparent.

Section 112.05, F.S., derived from Ch. 12293, 1927, as amended by Ch. 17274, 1935, Ch. 20499, 1941, Ch. 22828, 1945 and Chs. 28147 and 28148, 1953. It is sufficient here to state that without the requirement of contributions by officers or employees of the state, pension or retirement benefits are provided to such officials and employees after required years of service for the state and the reaching of certain ages, where age is a factor, as provided in said section. This law further stipulates that it shall apply only to persons retired or persons on a state payroll on June 30, 1953, and who remain continuously on a state payroll until eligible to retire.

The following definition is quoted from sub §218(b) of the social security act, under the heading of "Definitions": "(4) The term 'retirement system' means a pension, annuity, retirement, or similar fund or system established by a State or by a political

subdivision thereof." While our supreme court has had occasion to deal with aspects of retirement systems of Florida requiring contributions by participants therein, as far as we have been able to ascertain the nearest approach of the court to a law of the general nature of §112.05, F.S., was in Advisory Opinion to the Governor, Fla., 124 So. 728. In that case the court held constitutional Ch. 14533, 1929, granting to one Eugene Hawkins, private citizen, pension of \$40 per month, payable each month on his own requisition. The court in discussing the question remarked, among other things, that a pension "has been defined as a periodical allowance from the government for services rendered in the past." Technically it is generally recognized that a "pension" is a gratuitous allowance by a governing authority; and where such is provided *after* the performance of the service to which the pension may relate, the weight of authority seems to be that even after said pension rights have accrued to an individual such an individual acquires no contractual rights therein from a constitutional standpoint and the same may be changed or abolished at the will of the governing authority. However, it is quite doubtful that the benefits provided by §112.05, F.S., fall within the purview of such holdings. The provisions of said section are reasonably to be construed as a part of the employment agreement or provision for compensation for service in relation to those officers and employees to whom it may be applicable. That conclusion places such benefits which may have accrued to an individual thereunder in the same category as benefits payable under one or the other of our retirement systems requiring contribution by participants; that is to say, that after benefits have accrued, while the amount of the benefits may be changed, the benefits may not be abolished as to such an individual. Since reasonably it appears that once benefits accrue in favor of an individual under §112.05, F.S., a contractual relation in a constitutional sense exists in favor of such individual, it follows that the provisions of this section provide for a "retirement system" within the meaning of the definition above-quoted from the social security act. With respect to the foregoing conclusions, attention is directed to *State v. City of Tampa, Fla.*, 159 So. 292; *State v. Lee, Fla.*, 24 So. 2d 798; *State v. Lee, Fla.*, 2 So. 2d 127; *Gay v. Whitehurst, Fla.*, 44 So. 2d 430; cases and annotations to be found in 54 A.L.R. 943, 98 A.L.R. 505, 112 A.L.R. 1009, 137 A.L.R. 249; 67 C.J.S. 332; 70 C.J.S. 424, 425. It is to be understood that the conclusions set forth in this paragraph are to be accepted strictly in relation to the question dealt with; and are not to be construed as adjudicating the pension or retirement benefits of any individual under §112.05, F.S.

Thus, it appears that the legislature by its 1953 amendments of §112.05 F. S., (Chs. 28147 and 28148) intended that the retirement provisions of said amended section, in relation to the officers and employees covered thereby, should be recognized as a cognate part of the state's general retirement system. In the amendment of said section, had the legislature required of the officials and employees affected thereby a transition from a non-contributory to a contributory system, such would have visited a hardship upon those who were eligible or who were soon to become eligible for retirement. Hence, such amendatory acts did

in effect integrate such officials and employees into the state's general retirement system by recognizing and maintaining their rights without changing their non-contributory status.

In relation to the 2nd question another definition from sub §218(b) of said social security act is quoted: "(3) The term 'employee' includes an officer of a state or political subdivision." It thus is evident that the use of the word "employee" in this opinion in relation to the provisions of the federal act and §112.05 F. S., is to be construed as applicable with equal force to state officials as distinguished from employees.

My immediate predecessor in office on one or more occasions held that it was not the legislative intent in providing retirement systems for county officers and employees (Ch. 134, F. S.) and state officers and employees (Ch. 121, F. S.) that such officers and employees should also enjoy the benefits of other retirement systems. (e. g., opinion 048-146, April 21, 1948, 1947-48 Biennial Report, 137) I agree with such conclusion. The use of the terms "state officer or state employee" and "a state payroll" in §112.05, F. S., are construed by me to confine the benefits payable under said section to state officials and employees as distinguished from officials and employees of counties or other political subdivisions not constituting a department or agency of the state.

We feel it is quite likely that an officer or employee presently under the coverage of one of the state retirement systems might, if he meets the requirements of the provisions of §112.05, F. S., elect to surrender such claims as he might then or thereafter be able to assert under one of such retirement systems and accept the benefits provided by §112.05, F. S. However, for the purposes of the referendum contemplated by said sub §218(d) of the social security act, a state officer or employee who is, at the date of notice of such referendum and date of holding of such referendum, a member of another state retirement system, is not to be considered as in "service performed by employees in positions covered by (the) retirement system" provided by §112.05, F. S.

In view of the foregoing, in my opinion the questions are answered as follows:

1. The provisions of §112.05, F. S., constitute a "retirement system" within the meaning of §218 of the federal social security act, as amended.

2. State officers and employees who, at the time of the date of notice of the referendum and the date of holding of such referendum, as contemplated by the provisions of sub §218(d) of the federal social security act, are not members of the state officers and employees retirement system provided by Ch. 121 F. S., or members of any other retirement system provided by law for state officers and employees, who are not excluded from OASI coverage by the provisions of said amended social security act, who have not yet qualified to claim pension or retirement benefits under §112.05, F. S., and who were on a state payroll on June 30, 1953, and have continuously remained on a state

payroll, are members of the "retirement system" provided by §112.05, F. S., within the purview of said sub §218(d) of the social security act.

055-8—January 17, 1955

COUNTY ORGANIZATION, OFFICERS AND REGULATIONS
COUNTY ANNUAL BUDGET—COUNTY TAX ASSESSOR AND
COLLECTOR—COMMISSIONS—PAYMENT—§§129.01,
129.02, 130.10, 145.07, 155.05, 155.12, 193.32,
193.65, 227.14, 237.13, 237.28

To: Bryan Willis, State Auditor, Tallahassee

QUESTION:

From what county funds should commissions due the county assessor of taxes and the county tax collector be paid, for assessing and collecting taxes for the following county funds:

1. County general fund;
2. County road and bridge fund;
3. County fine and forfeiture fund;
4. County capital outlay reserve fund;
5. County bond interest and sinking fund;
6. County general school fund, composed of:
 - a. County current school fund;
 - b. County bond interest and sinking fund; and
 - c. County building and reserve fund;
7. County hospital fund, composed of:
 - a. Maintenance fund; and,
 - b. Bond interest and sinking fund.

The first five of the above mentioned funds were established by §129.01, F. S., as amended by §1, Ch. 26874, 1951, which established a budget system for the control of the finances of the boards of county commissioners of the several counties of the state; the 6th was established by sub §§(14) and (15), of §227.14 and §§237.13 and 237.28, F. S.; and the last by §§155.05 and 155.12, F. S. The first 5 of the above mentioned funds are set out in some detail in §129.02, F. S., as amended, and appear to be funds designed for county operation.

Section 193.32, F. S., provides for tax levies, and limits the millages therefor, for the general fund (which appears to be the "county general fund" mentioned in the above question); the fine and forfeiture fund (which appears to be the "county fine and forfeiture fund" mentioned in said question); the general road and bridge fund (which appears to be the "county road and bridge fund" mentioned in said question); the outstanding indebtedness fund or funds (which appears to include the "county bond interest and sinking fund" mentioned in said question). The general county school fund, mentioned by said §193.32, F. S., appears to be the general county school fund mentioned in said question. We are of the opinion that the bond interest and sinking fund mentioned in §130.10, F. S., is the same as the outstand-

ing indebtedness fund or funds, mentioned in said §193.32 and substantially the same, if not identical with the "bond interest and sinking fund" provided by §129.01, F. S. When Ch. 155, F. S., is read and construed as a whole, including the title to Ch. 17834, 1937, from which it was derived, in the light of the opinions in *Crowder v. Phillips*, 146 Fla. 440, 1 So. 2d 629, *Crow v. Dade County, Fla.*, 54 So. 2d 753, and *State v. Seminole County, Fla.*, 67 So. 244, we are led to the conclusion that it provides for county hospitals for which a county tax is levied and collected. The county general school fund is the recipient of the proceeds from the taxes levied and assessed pursuant to §8, Art. XII, State Const. The funds mentioned in §§227.14(14), 237.13 and 237.28, F. S., appear to be component parts of the county general school fund.

Under §193.65, F. S. the "commissions for assessing and for collecting the county taxes shall be audited and paid by the boards of county commissioners of the several counties of the state. The commissions for assessing and for collecting all special school district taxes shall be audited by the board of public instruction of each respective county and taken out of the funds of the respective school districts under its control . . . ; and the commissions for assessing and for collecting all other district taxes, whether special or not, shall be audited and paid by the governing board or commission having charge of the financial obligations of such district." (Emphasis supplied.)

Making reference to §145.07, F. S., relating to the division of excess fees of the offices of the county assessor of taxes and the county tax collector, the court, in *Moreland v. Volusia County, Fla.*, 48 So. 2d 151, said that "the tax levied by the Board of County Commissioners under §193.32, F. S., is a county and not a school tax within the meaning of §145.07, F. S. . . ." The court in this case presumed, if it did not hold, that the fees for assessing and collecting school taxes levied under the constitution are audited and paid by the boards of county commissioners as county taxes under §193.65, F. S. The said fees are paid from county funds and not from such school funds. See also opinions of this office of November 8, 1932 (1931-2 Biennial Report 1055), January 10, 1942 (1941-2 Biennial Report 175), July 10, 1942 (1941-2 Biennial Report 474) July 10, 1946 (1945-6 Biennial Report 302), and August 24, 1949 (049-403; 1949-50 Biennial Report 229). The said opinions of November 8, 1932 and July 10, 1942, held that such fees should be paid from the county general revenue fund. Unless §193.65, F. S., or some other statute or law, provides a commission for assessing and collecting a tax, no fee may be paid (*Rawls v. State*, 98 Fla. 103, 122 So. 222).

Commissions for assessing and collecting county taxes (including the school assessment under §8, Art. XII, State Const.) are payable from the county general fund by the board of county commissioners; commissions for assessing and collecting school district taxes are payable by the county board of public instruction from the funds of the respective school district for which the taxes are levied and collected; and commissions for assess-

ing and collecting all other district taxes are payable from the funds of each respective district by its governing board.

We are, therefore, of the opinion that commissions for assessing and collecting the taxes for the funds mentioned in the above question (unless there be district funds in one or more of such funds) are payable from the county general fund by the board of county commissioners. As above stated the "County Hospital Fund," provided in Ch. 155, F. S., appears to be a county and not a district fund.

055-9—January 21, 1955

PUBLIC HEALTH

NARCOTIC DRUG LAW—VIOLATION—FORFEITURE OF AUTOMOBILE—§§398.13, 398.14, 398.24, F. S.

To: *Raymond J. Dwyer, Assistant County Solicitor, Dade County,
Miami*

QUESTION:

Recently the Miami Beach police arrested Dr. Dewey H. Grimes for unlawful possession of narcotics in that the defendant had in his personal possession marijuana cigarettes and some powdered leaf marijuana weighing approximately 20 grains. At the time of this arrest, Dr. Grimes was in a semi-stupor and reclining in his automobile, a 1952 Cadillac convertible, 1954 Florida license tag No. 1W-33208. Under these facts would a forfeiture of the automobile be authorized?

The forfeiture provision of our law, §398.24 F. S., provides in part:

"Any vehicle, boat or aircraft which has been or is being used for or in the violation of the Uniform Narcotic Drug Law of Florida, shall be seized and forfeited to the State of Florida." (Emphasis supplied.)

I believe that this section and its language are broad enough to cover the situation which has been outlined by you to me above.

It seems to me that it is quite clear that the doctor was possessing the marijuana in contravention of our law. See §398.13 F. S. It is my belief that any use of a vehicle in Florida which is connected in any way in a violation of the narcotic drug law subjects the vehicle to forfeiture. Compare *United States v. One Cadillac Automobile*, 2 Fed. 2d 886.

It also seems that a legitimate inference can be drawn that the doctor was resorting to the vehicle for the purpose of using narcotic drugs as condemned by §398.14 F. S. If this is true, certainly a forfeiture of the automobile would be authorized.

It should be noted that the forfeiture provision of the Florida law is not contained in the Uniform Law. See 9A ULA, pp. 186-224; Suppl. pp. 32-46.

It does seem to me that our law is somewhat broader and

somewhat different from the federal law. I would, therefore, answer your question in the affirmative.

055-10—January 21, 1955

CONSERVATION

GAME AND FRESH WATER FISH—LICENSES— HUNTER'S GUIDE

To: E. B. Jones, Director, Game and Fresh Water Fish Commission, Tallahassee

QUESTIONS:

1. Is a person who is employed on a year-round basis to train dogs, plant game food, maintain quail feeders, and do other incidental chores, required to purchase a guide license if he renders a guide service to his employer as a part of his year-round employment?

2. Is a person who is employed by a professional hunter's guide to drive said guide and his hunting party in said guide's vehicle required to purchase a guide license?

Section 372.62, F. S., provides in part that "No person shall engage in the business of guiding hunters or hunting parties until he has secured a license to do so from the game and fresh water fish commission." (Emphasis supplied.)

Rule 3.01, Rules and Regulations of the Game and Fresh Water Fish Commission of the State of Florida, defines guide as "Any person engaged in the business of guiding hunters or hunting parties for compensation by money or other thing of value." (Emphasis supplied.)

It appears that a person such as described in your 1st question is an employee of a private individual, employed on a year-round basis to train dogs, carry on activities conducive to propagation and conservation of game and to guide his employer while hunting, as distinguished from the activities of a person primarily occupied in the business of professional guide. While it is true that, as a small part of his employment, the person in question performs a service to his employer much the same as that rendered by a professional guide, and that he receives compensation therefor in his general employment, it hardly can be said that such a person's limited duties as guide places him in the business of guiding hunters and hunting parties as to require him to secure a license. It does not appear that this person holds himself out for hire as a guide or otherwise engages as a hunting guide as a regular occupation. Based upon the above observations, your 1st question is answered in the negative.

In answering question 2, it does not appear that the driver of the vehicle in said question performs any duty peculiar to that of guide. Consequently, I see no reason why such person should be required to purchase a guide license. This answers your 2nd question in the negative.

055-11—January 25, 1955

INSURANCE

SOCIAL SECURITY FOR PUBLIC EMPLOYEES—OASI— REFERENDUM BY PUBLIC EMPLOYEES—CH. 650, F. S.

To: *Herbert W. Miller, Assistant General Counsel, Florida Industrial Commission, Tallahassee*

QUESTION:

Has the governor or an agency or individual designated by him authority under present Florida law to call, conduct, supervise, or certify the results of a referendum election for social security coverage purposes, as provided in and contemplated by the 1954 amendments to the federal Social Security Act?

It is sufficient to state here that the effect of certain of the 1954 amendments to said act permit OASI coverage of public employees in positions now covered by a retirement system, "if the Governor of the State certifies to the Secretary of Health, Education and Welfare that the following conditions have been met: (A) A referendum by secret written ballot was held on the question of whether service in positions covered by such retirement system should be excluded from or included under an agreement under this section; (B) An opportunity to vote in such referendum was given (and was limited) to eligible employees; (C) Not less than 90 days' notice of such referendum was given to all such employees; (D) Such referendum was conducted under the supervision of the governor or an agency or individual designated by him; and (E) A majority of the eligible employees voted in favor of including service in such positions under an agreement under this section."

1950 amendments of the Social Security Act (§218 of the act; 42 U.S.C.A. 418) provided for voluntary agreements for coverage of state and local employees, as therein described; said section beginning as follows:

"Sec. 218 (Sec. 418, 42 USCA) (a) (1) The Administrator shall, at the request of any State, enter into an agreement with such State for the purpose of extending the insurance system established by this sub-chapter to services performed by individuals as employees of the State or any political subdivision thereof. Each such agreement shall contain such provisions, not inconsistent with the provisions of this section, as the State may request."

It does not appear that this subsection was changed by the 1953 amendments.

To place the state in position to make available to public employees the extended coverage provided by said 1950 amendments, Ch. 26841, 1951, was adopted (now Ch. 650, F. S.). Attention is directed to §650.01, F. S., and the broad language in the "Declaration of Policy" therein set forth; to §650.02, F. S.,

as amended, designating Florida industrial commission as the "state agency" to function for the state in respect to federal-state agreements contemplated by the law; and defining "Social Security Act" as used in said Ch. 650, as including future amendments thereof; and to §650.07, F. S., granting to the state agency rule-making powers.

Attached to the request for opinion is a copy of memorandum, dated December 16, 1954, from the office of the general counsel (OASI) to the regional representative (OASI), in response to a memorandum of the latter upon request of the state agency concerning the above question, the request apparently deriving from a statement of federal authorities that "*such a referendum must be authorized by State law.*"

The effect of certain comments of said general counsel in said memorandum is mentioned: That the term "authorized" as used in the above-quoted wording was intended to convey the idea that the governor's action be within his legal authority; that the federal law does not require that the governor's action be explicitly authorized by specific statute; that the general counsel understood that the Alabama attorney general had construed the Alabama enabling act, similar to Florida's, as impliedly authorizing the Alabama governor to take necessary steps pertaining to a referendum for employees covered under the state retirement system; that while said attorney general's opinion has apparently not been questioned, it was considered unlikely that anyone would have questioned the action of said attorney general if he had ruled that the governor was not authorized to call the referendum in the absence of further legislation; that the authority of the Florida governor under the federal act, as well as his authority under the laws of the state, is subject to interpretation by the Florida attorney general or other appropriate state legal officer; that said quoted wording was intended as nothing more than a statement of the obvious; that should Florida officials consider it necessary to provide legislation in relation to such referendum, attention was directed to the discussion and recommendations of the council for state governments in its "Suggested State Legislation Program for 1955."

Had the federal act by appropriate wording made it mandatory that the state agency be designated by the governor to hold, supervise, etc., such a referendum, in view of broad and comprehensive wording of Ch. 650 and the provisions of §650.07, F. S., such agency could have adopted necessary rules in relation to the initiation, call, holding, etc., of such referendum, within the principles and limitations prescribed by our supreme court in *State v. A.C.L. R. Co., Fla.*, 47 So. 969, and a number of subsequent cases in harmony therewith.

It is recognized that "Laws of the United States," enacted in pursuance of the federal constitution, constitute a part of the "supreme Law of the Land." (Art. VI, U. S. Const.) Hence, the above-quoted provision that such a referendum shall be conducted "under supervision of the governor or an agency or individual designated by him" as effectively empowers the governor as a state constitutional provision would. Within the reasonable intendment of

such quoted words he is granted full authority; and he may not be coerced by state legislation with respect to that authority. Since the federal act did not make mandatory designation by the governor of the state agency to hold, supervise, etc., such a referendum, then the question centers on the powers of the governor under and in the light of the federal act and state law, including state statutory and constitutional provisions. Quite obviously, there is no specific state statute or constitutional provision relating to such a referendum.

The holding of any such referendum involves details not provided in the federal act, certain of which, not to the exclusion of possible others, are mentioned: (1) Any such referendum would involve the question of OASI coverage for members of an existing Florida system. Nothing in the federal act reasonably indicates that the governor of his own motion may precipitate such an election. Hence, there is involved the manner in which such a referendum may be initiated by and for the benefit of such a Florida group. (2) Procedure fixing time, place and manner of voting to meet the express and implied requirements of the federal act, including voting by "secret written ballot." (3) Procedure relating to receipt, safe-keeping and counting of such ballots and declaration of the results evidenced thereby. (4) Reasonable procedural methods to be employed by participating members desiring to challenge the validity of the referendum or accuracy of the declared results thereof. Certainly, in the interest of necessary and orderly procedure, such details should be provided by state legislation or rules validly promulgated.

It may be that implicit in this explicit federal grant of power is the authority and power of the governor to promulgate such necessary rules; however, considerable doubt exists with respect to the point. The 1955 session of the legislature will soon convene; and in order to remove all doubt concerning the question, it is suggested that proper state law to implement the federal law in the mentioned particulars be prepared for introduction at said session. Reasonably any such proposed law would not be controversial.

There is a further feature which warrants consideration. If the participating members of a system in Florida should desire OASI coverage in addition to benefits payable under the local system, such federal coverage would be available when the requirements of the federal act have been met. However, should the members of such a Florida system desire to obtain OASI coverage so that a part of the benefits payable under a Florida system as now constituted would be payable under the federal coverage, state legislation would in all likelihood be necessary to accomplish such an integration. It is suggested that this be considered in the preparation of any such proposed legislation mentioned in the preceding paragraph.

In view of the above conclusions and suggestions, the question is answered in the negative.

055-12—January 27, 1955

TAXATION

LICENSE TAXES, CREDITS AND DEDUCTIONS—PRUDENTIAL INSURANCE COMPANY OF AMERICA—§205.432, F. S.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTION:

Since January, 1954, The Prudential Insurance Company of America (hereinafter referred to as "Prudential") has maintained its South-Central regional home office in Jacksonville (within the contemplation of §205.432, F.S.) serving 10 states, occupying as its said office a building constructed by it at a cost in excess of \$350,000, located at 825 San Marco Blvd., in said city. During said period Prudential has been engaged in the construction of a 22-story building on Miami Road in said city to be substantially occupied by it as a regional home office when completed. Under the provisions of §205.432, F.S., is Prudential entitled to credit against its 1954 premium receipts tax (i.e., payable on or before March 1, 1955) of an amount equal to the 1954 ad valorem taxes paid by it on the above described real property on Miami Road?

Section 205.432 (Ch. 27984, 1953) for instant purposes is sufficiently described as providing that if any foreign insurance company which is subject to the premium receipts tax imposed by §205.43, F.S., establishes by August 1 of any calendar year a building in Florida as its regional home office, as defined in §205.432, it shall be entitled to certain credits and deductions as follows: "(a) An amount equal to 50% of the amount of the tax (premium receipts tax) as determined under sub §(2) of said §205.43; and (b) An amount equal to the full amount of all ad valorem taxes paid by such a foreign insurance company during the year next preceding the filing of the return required by §205.43(3); 1. upon any building and the land on which it stands in the state owned and substantially occupied by such foreign insurance company in the said tax year as a regional home office, *together with any adjacent land as may be required for the convenient use and occupation thereof, and, 2. upon any property used in connection with the operation and maintenance of such regional home office; . . .*" (Emphasis supplied.) There is the proviso that in no event shall such credits and deductions reduce the amount of such premium receipts tax payable to less than 20% of the amount of the tax as determined under §205.43(2), F.S.

It is the position of Prudential that it is entitled to credit (in addition to other credits and deductions) against its 1954 premium receipts tax of a sum equal to the 1954 ad valorem taxes paid by it on the Miami Road real property. The position would appear to derive from construction by Prudential's counsel of the italicized quoted language above. Counsel for Prudential has submitted a memorandum in support of such position.

Since we do not agree with the position of Prudential for

reasons dissociated from the meaning of the word "adjacent" as used in said above-quoted part of §205.432, F. S., no attempt is here made to construe it as used in the statute and in relation to the respective locations of Prudential's present regional home office building on San Marco boulevard and its property on Miami Road.

This is the first formal request for opinion concerning the application of the provisions of §205.432, F. S., which this office has received. While, for the reasons set forth below, we do not consider that such doubt exists as to require the resort to recognized rules of construction, since a rule of construction is urged by counsel for Prudential we consider this is an opportune and proper time to establish the position of this office with respect to the application of the statute in relation to future questions which may entail resort to such rules of construction.

We are here dealing with a tax exemption statute. In *Rast v. Hulvey*, Fla., 80 So. 750 (involving a tax exemption statute adopted in pursuance of §1, Art. IX, Fla. Const.) our court stated in effect that all laws exempting property from taxation should receive a strict construction, and that no property should be held to be within the exemption, unless it is clearly within the terms of the statute granting the immunity from taxes. In *Steuart v. State*, Fla., 161 So. 378 (involving construction of §7, Art. X, Fla. Const.) our court stated: "Exemptions from taxation, whether stated in the Constitution or in statutes, are to be construed against the claimant and in favor of the taxing power in cases of doubt." In *City of Jacksonville v. Continental Can Co.*, Fla., 151 So. 488 (involving the question of whether metal containers, consisting of 98½% steel and 1½% tin, were "steel vessels" within the meaning of §12, Art. IX, Fla. Const.) the court answered the question in the affirmative and stated that, "The words and terms of a Constitution are to be interpreted in their most usual and obvious meaning, unless the text suggests that they have been used in a technical sense." To same effect, see *American Can Co. v. City of Tampa*, Fla., 14 So. 2d 203, and *City of Tampa v. Tampa Shipbuilding Co.*, Fla., 186 So. 411, the court in the latter case remarking, "Without giving the above-quoted amendment of the Const. an unduly liberal construction, and following the rule heretofore announced in *City of Jacksonville v. Continental Can Co.*, supra, that a strict construction should not be invoked but the real intention of the people carried out . . ." In these last-mentioned cases involving construction of §12, Art. IX, Fla. Const., the court stressed the fact that they were dealing with a constitutional provision adopted by the people; and in *City of Jacksonville v. Continental Can Co.*, supra, distinguished between rules of construction applicable to statutory and constitutional provisions.

The apparent purposes of §205.432 and §§12 and 14, Art. IX, (during their effective periods) were similar, viz., to encourage the location in this state of new industry. The tax exemptions provided by the mentioned constitutional provisions could have been held invalid only upon a showing that their provisions were in conflict with the U. S. Const. or some valid act of congress. No such assurance attaches to the exemption provi-

sions of § 205.432. The exemption is related to a license or privilege tax, which does not involve the uniform taxation requirement of § 1, Art. IX, Fla. Const. *Jacksonville Gas Co. v. Lee*, Fla., 148 So. 188; *Gray v. Central Florida Lumber Co.*, Fla., 140 So. 320, certiorari denied, 287 U. S. 634, 77 L. Ed. 549. Hence, if the law is ever subjected to court challenge, such apparently will be grounded on the theory that the classification fixed by the statute for tax purposes is arbitrary and unreasonable, and in conflict with constitutional equal protection provisions.

Reasonably it appears that properly construed the statute prescribes a valid classification for tax purposes. *State v. A.C.L. R. Co.*, Fla., 54 So. 394; *Dutton Phosphate Co. v. Priest*, Fla., 65 So. 282; *S.A.L. Ry. Co. v. Simon*, Fla., 60 So. 759; *Louis K. Leggett Co. v. Lee*, Fla., 149 So. 8. Also see *Quong Wing v. Kirkendall*, 223 U. S. 59; *Brown-Foreman Co. v. Kentucky*, 217 U.S. 563; *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32; *Southern R. Co. v. Greene*, 217 U.S. 400; *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389; *Colgate v. Harvey*, 296 U.S. 404; *Royster Guano Co. v. Virginia*, 253 U.S. 412; *Keeney v. New York*, 222 U.S. 526.

However, no such ambiguity exists in the language of this statute in relation to the question as to require resort to any such rules. Where the words employed in a statute have a well-defined meaning, and where the legislative intent is clearly manifest from the language used when considered in its ordinary and grammatical sense, rules of construction are unnecessary and are inapplicable. *Van Pelt v. Hilliard*, Fla., 78 So. 693; *State v. Burr*, Fla., 84 So. 61; *State ex rel Southern Roller Derbies v. Wood*, Fla., 199 So. 262; *Smith v. Ryan*, Fla., 39 So. 2d 281.

Attention is again directed to certain of the language found in §205.432(1)(b) 1. and 2. The ad valorem taxes described are those levied "upon any building and the land on which it stands . . . owned and substantially occupied . . . as a regional home office building, together with any adjacent land as may be required for the convenient use and occupation thereof and . . . upon any property used in connection with the operation and maintenance of such regional home office." The italicized word "thereof" clearly refers to the "building . . . occupied . . . as a regional home office"; and the italicized word "property" as used above refers to the "operation and maintenance of such regional home office." It is admitted that the present regional home office building is located on San Marco Blvd. Even though such building is not large enough to accommodate the present required activities of Prudential, and while the ultimate occupation of the Miami Road building will relieve such congestion, the construction of the latter building has no relationship to the "convenient use and occupation" of the former building; and the real property upon which the Miami Road building is being constructed is not property "used in connection with the operation and maintenance" of Prudential's regional home office building located on San Marco Blvd. In arriving at such conclusion we have not ignored the excellent memorandum submitted by counsel for Prudential. The conclusions above have been

reached only after giving serious consideration to such memorandum.

For the reasons stated above, in my opinion Prudential is not entitled to claim credit against its 1954 premium receipts tax for the amount of 1954 ad valorem taxes paid by it on the Miami Road property, even though the inclusion of the amount thereof with the other credits and deductions allowed by §205.432 F.S., would not exceed the 80% limitation with respect to such credits.

055-13—January 26, 1955

INSURANCE

INSURANCE COMMISSIONER—REINSURANCE AND RETROCESSION AGREEMENTS—§626.10, F.S.

To: *Frank de Veer, Chief Auditor, Insurance Department, Tallahassee*

QUESTIONS:

1. Must reinsurance treaties in pursuance of which domestic Florida insurance companies reinsure their business, be approved by the insurance commissioner?

2. Must retrocession agreements, in pursuance of which domestic Florida insurance companies or reinsurance companies retrocede business, be approved by the insurance commissioner?

Section 626.10, F.S., is quoted:

"No insurer authorized to do business in this state shall reinsure substantially all its risks on property or life located in this state until such reinsurance agreement shall have been submitted in advance to, and has the approval of the insurance commissioner; provided, that no such contract or agreement of reinsurance shall be made with a company not authorized to do business in this state, and no such contract or agreement shall be valid until approved by the insurance commissioner."

Obviously the statute is ambiguous. An examination of Ch. 7875, 1919, from which the section derived, contributes no assistance in the construction of the statute. With immaterial exceptions, §1 of Ch. 7875 is similar in wording and punctuation to §626.10. The title of Ch. 7875 is quoted: "An act requiring all insurance companies to have reinsurance agreements approved by the State Treasurer."

This is the first time I have been called upon to construe the statute. My immediate predecessor considered its effect in opinion 048-95, dated March 16, 1948 (1947-1948 Biennial Report, 534), copy of which is attached. It is to be noted that such opinion dealt with the question of a domestic insurer reinsuring 95% of its risks with Lloyds of London. I agree with the discussion and conclusions reached therein.

In my judgment the questions are answered as follows:

1. Where a domestic insurance company reinsures substantially all of its risks with a company authorized to engage in the insurance business in this state, the agreement or agreements executed in connection with such reinsurance must be approved by the insurance commissioner. With respect to the question of what constitutes "substantially all" the risks of an insurer, reference is made to the conclusions on the point expressed in said opinion 048-95. Any agreement effecting reinsurance of *any* risk or risks of a domestic insurer by an insurance company "not authorized to do business in this state" must be approved by the insurance commissioner.

2. Quite apparently §626.10, F. S., deals only with a primary insurer "authorized to do business in this state" and the reinsuring by it of its risks. We are informed that the words "retrocession" and "retrocede", as used in this question, are to be construed as referring to the ceding by a reinsurer of risks it has reinsured to other reinsuring companies. Such retrocession of business as contemplated by this question is not covered by §626.10, F. S.; hence, any agreement accomplishing such retrocession of business is not required to be approved by the insurance commissioner.

3. With respect to both the above questions it is to be understood that we deal with them strictly in relation to the provisions of §626.10, F. S. This opinion is not to be construed as attempting to determine or declare the right of any insurer to credit against its premium reserve for the consideration required for the reinsuring of all or any portion of its risks. That is a subject falling within the specialized fields of the insurance examiner and insurance accountancy.

055-14—January 28, 1955

INSURANCE

REGULATION OF TRADE PRACTICES—INSURANCE BUDGET PLAN AGREEMENT—VALIDITY—§§643.04 AND 643.09, F. S.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTION:

Is the proposed agreement, described below herein, authorized by the insurance or other laws of Florida?

At the outset, it is stated that the assistant who prepared this opinion conferred with the insurance agent who proposes, subject to absence of legal impediments, to enter into said agreement with policyholders. To avoid the construction by anyone that the conclusions reached in this opinion imply proposed irregular practices on the part of said agent, it is asserted that such conference evidenced the conviction on the part of said agent that the proposals in such agreement did not offend any of our laws; further, it is obvious that the agent in presenting the matter to the insurance commissioner has acted with sincerity, fairness and honesty.

The agent is duly licensed under the laws of Florida to handle all lines of insurance, including fire, casualty and life coverages. The proposed agreement is here sufficiently described as follows:

The purpose of the agreement is to permit an insured to make payments to the agent in a level amount periodically as agreed and to have the agent act as the insured's "escrow agent" for the payment of premiums on the insured's insurance policies, and to have the benefit of an insuring counseling service by the agent, *"on all policies now in existence and such additional policies as may hereafter be purchased by the insured from the agent."* (Emphasis supplied.)

To accomplish such purpose, the insured agrees: To deliver to the agent all policies of insurance in effect and to furnish the agent with required information for analysis purposes; to deliver to the agent regular monthly installment payments in accordance with the budget plan schedule as submitted by the agent and approved by the insured; to advance to the agent sufficient sums to set up a reserve so that, together with said installment payments, the agent will have sufficient funds on hand to pay all insurance premiums as they fall due; to pay to the agent sufficient funds to enable the agent to remit all premiums on an annual basis, if not already on that plan; and to do and perform other and further things relating to life policies and the renewal of policies.

And the agent agrees: To furnish the insured a schedule of premiums on policies submitted to the agent showing the budget plan; to deposit such amounts received from the insured in his escrow account, and from said account to remit all premiums for insured's insurance in accordance with said budget plan schedule; at the end of each current year, to render the insured an accounting of receipts and disbursements by the agent on behalf of the insured, and showing any balance remaining; to advise the insured in writing of the termination date of existing policies 30 days prior to such date; to perform the work of keeping a record of insured's insurance policies and all payments of premiums thereon, and to submit recommendations as to existing policies; to service the insured's claims on policies handled by the agent; and then the following provision:

"Nothing herein stated shall be deemed or construed as an offer or inducement on the part of the Agent to procure the Insured's insurance on any risk. On the contrary the Agent shall be entitled to receive only the usual commissions on such insurance as the Insured may wish to purchase from the Agent."

There are provisions for termination of the agreement. This service is to be performed by the agent for the insured without charge.

The plan proposed by this agreement would not seem to offend specific statutes relating to particular types of inducements therein described. However, we must look to the practical

effect of such plan in operation. Should an insured enter into such an agreement with the agent and accept the valuable services to be furnished by the latter without charge, it would be remarkable indeed if such insured, on the expiration dates of his policies issued by insurers not represented by the agent, did not obtain coverage from an insurer represented by the agent; and this would seem to be particularly true by reason of the quoted italicized part of the agreement set forth above. Or to express it differently, the reasonable effect and result of such an arrangement would be an inducement for an insured to purchase insurance from the agent in consideration of the gratuitous and valuable services performed by the agent for the insured. Since the plan would appear to result in such an inducement, the insurance commissioner reasonably may determine that if put in operation the plan would constitute an unfair method of competition within the purview of §643.09, F. S., a part of sub §(1) of that section being quoted:

"Whenever the commissioner shall have reason to believe that any person engaged in the business of insurance is engaging in this state in any method of competition or in any act or practice in the conduct of such business which is not defined in §643.04, that such method of competition is unfair or that such act or practice is unfair or deceptive and that a proceeding by him in respect thereto would be to the interest of the public, he may issue and serve upon such person a statement of the charges in that respect and a notice of a hearing thereon to be held at a time and place fixed in the notice, which shall not be less than twenty days after the date of the service thereof . . ."

The remainder of the section is concerned with such a hearing and the procedure to be followed.

In view of the foregoing, in my opinion the question is answered as follows: The question of whether the plan in operation contemplated by this agreement would constitute an unfair method of competition within the purview of §643.09, F.S., lies within the judgment and discretion of the insurance commissioner. If he shall determine that such plan would constitute such an unfair method of competition, he will be justified in refusing to approve said agreement.

055-15—January 28, 1955

HIGHWAYS, BRIDGES AND FERRIES

TURNPIKE AUTHORITY—MEMBERS—SALE OF MATERIAL
TO STATE ROAD DEPARTMENT—§§340.05, 340.26,
839.07-839.10, F. S.

To: *W. H. Frankland, Tampa*

QUESTION:

Is a company, one of whose members is a member of the Florida state turnpike authority, prohibited from selling products to the state road department?

You explain that you are a member of the turnpike authority and that the state road department is interested in purchasing certain materials for its own use from a company of which you are an officer.

Section 340.26 F. S. prohibits any member of the turnpike authority from being "interested either directly or indirectly" in any contract with the authority, or in the sale of any real or personal property to the authority. There are other statutes relating to transactions between public officers and public agencies, such as §§839.07 and 839.10, F. S., which prohibit a public officer from bidding or being interested in a contract for public works if the officer is a member of the agency letting the contract; §839.08 F. S. which prohibits a public officer from purchasing supplies for public use from himself; or §839.09 which prohibits any state board or agency from making purchases of materials for public use from any of its members.

Neither of these nor any other statute prohibits a company in which you are interested from making sale of materials for public use to the state road department, provided, of course, that the materials are not purchased by the road department for the turnpike authority, or transferred to the turnpike authority.

Section 340.05, F. S., provides that one member of the state road department, designated by the governor, shall be a member of the Florida state turnpike authority. If you were that member the answer to your question would be different—but you are not a member of the state road department.

055-16—January 28, 1955

CRIMINAL PROCEDURE

BAIL BONDS—APPROVAL BY CONSTABLE

To: *Park H. Campbell, Miami*

QUESTION:

May a constable approve a bail bond of a person arrested by him by virtue of a warrant placed in his hands for execution upon which has been indorsed the amount of bail?

We have carefully examined the statutes of this state (§§26.41, 32.27, 32.28, 901.07, 901.08, 902.06, 902.14, 903.03, 903.34, 907.04 and 937.04, F. S.,) and find no provision therein directly authorizing the approval of criminal bail bonds by constables. We doubt that the power and authority of police and peace officers to approve bail bonds is inherent (8 C.J.S. 85, §40) and feel that it is usually statutory.

Beginning with an opinion of this office under date of December 10, 1929 (1929-30 Biennial Report 345) it was held, in the light of *Ex Parte Hatcher*, 86 Fla. 330, 98 So. 72, that where a criminal warrant is delivered to a constable for execution, with the amount of the bail to be required endorsed on it as required by statute, that such constable may take and approve a bail bond in said amount. This rule has been concurred in by subsequent

attorneys general to and including an opinion of August 21, 1950 (050-408). These opinions are based upon the constitutional right of all persons charged with criminal offenses, except certain capital offenses, to bail without delay. The statutes requiring that the amount of bail to be required be endorsed on warrants for arrest recognize the said constitutional right and provide the machinery for promptly carrying the said constitutional right into execution.

Let us take as an example two persons residing 40 miles from the office of a county judge in a county for whom warrants of arrest have been issued, one of such warrants being delivered to the sheriff of the county and the other to a constable of the county. The sheriff serves one of the said warrants, taking and approving a bail bond at the place of arrest; the constable serves the other warrant and, if he is unable to take and approve a bail bond, carries the person so arrested back to the county seat where bail is taken and approved by either the county judge or sheriff. Everything being equal the person arrested by the constable is put to considerably more trouble and delay than was the one arrested by the sheriff. These facts suggest a denial of the equal protection of the laws, if not an actual denial.

A bail bond does not have to be approved to make it valid (West v. State, 75 Fla. 379, 78 So. 285).

The rule adopted and followed in this state for more than 25 years, pursuant to the rule adopted by this office, should not now be overruled. The above question should be answered in the affirmative; however, the right of the constable to approve bonds should be limited to the above question and not extended to the approval of bail bonds under other circumstances.

055-19—January 28, 1955

CONSERVATION

GAME AND FRESH WATER FISH—WILDLIFE OFFICER— POWER TO ARREST FOR RESISTING ARREST— §§843.01, 843.02, 372.07, F. S.

To: *E. B. Jones, Director, Game and Fresh Water Fish Commission, Tallahassee*

QUESTION:

May a charge of "resisting arrest" be made against a person resisting arrest by a wildlife officer engaged in his lawful duty of enforcing game and fresh water fish laws and regulations?

Sections 843.01 and 843.02, F. S., provide among other things that any person knowingly and willfully resisting, obstructing or opposing any officer legally authorized to execute process or in the lawful execution of any legal duty shall be punished as provided in said sections.

Section 372.07, F. S., prescribes the powers of the game and fresh water fish commission and its agents. Among those powers

is the power to execute warrants and search warrants for the violation of laws relating to game and fresh water fish.

In view of the foregoing, it is my opinion that a person resisting lawful arrest by a duly authorized agent of the game and fresh water fish commission for violation of a law or regulation relating to game and fresh water fish may be charged with resisting arrest by said officer.

055-20—February 1, 1955

CRIMES

FELONY—DEFINITION UNDER FEDERAL PENAL CODE

To: Wilson McGee, Assistant City Attorney, Miami Beach

QUESTION:

Has a person been convicted of a federal felony when he has been convicted of a federal offense which may be punished by imprisonment for a term exceeding one year if the statute which he has violated specifically states that a violation thereof is a misdemeanor?

In the year 1909 Section 335 of the Federal Penal Code, later Section 541, Title 18, U.S.C.A., was enacted. *It went into effect January 1, 1910 and it read as follows:*

"Felonies and misdemeanors. All offenses which may be punished by death or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors."

In the case of *Hoss v. United States*, 232 Fed. 328, the United States circuit court of appeals for the 8th circuit held in 1916 that said statute made a felony of an offense punishable by imprisonment for more than one year despite the fact that the statute creating the offense had denominated it a misdemeanor.

Also in the year 1916 the U. S. circuit court of appeals for the 9th circuit handed down a decision in *Sheridan v. U. S.*, 236 Fed. 305, to the same effect as the decision in the *Hoss* case, *supra*.

However, in the year 1931 the U. S. district court for the southern district of Alabama had under consideration in *United States v. Venturini*, 1 F. Supp. 213, the question of whether the violation of a federal statute was a felony or a misdemeanor when said statute, providing for imprisonment for more than one year and specifically stating that a violation thereof constituted a misdemeanor, had been amended after the enactment of the above quoted statute. The court held that because of such amendment the offense was a misdemeanor. This decision was followed by the same federal district court in 1931 in the case of *United States v. Chapman*, 3 F. Supp. 900. In both of these cases, the court took into consideration but, because of the amendment of the statute creating the offense after the enactment of §541, Title 18, did not follow the holdings in the above cited *Hoss* and *Sheridan* cases. The district court's reasoning was per-

suasive and it may well be that either the supreme court of Florida or the U. S. supreme court would rule the same way if a like question should be presented.

The above quoted statute was amended in 1930, but the amended section left the definition of felony unchanged.

In 1948, the congress enacted what is now §1, Title 18, U.S.C.A., which became *effective September 1, 1948* and which reads as follows:

"Notwithstanding any Act of Congress to the contrary:

"(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.

"(2) Any other offense is a misdemeanor.

"(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of 6 months or a fine of not more than \$500, or both, is a petty offense."

The authorities considered, it is my view that:

1. If an offense was created after Jan. 1, 1910, by a statute which provided for imprisonment for more than one year but denominated the offense a misdemeanor, then a violation of said statute prior to Sept. 1, 1948, was a misdemeanor, while such a violation occurring after Sept. 1, 1948, was a felony.

2. If an offense was created before Jan. 1, 1910, by a statute which provided for imprisonment for more than one year and denominated the offense a misdemeanor, then said offense was a felony from Jan. 1, 1910, until Sept. 1, 1948, except, however, that if it was amended after Jan. 1, 1910, by an amendatory act which brought forward the provisions for imprisonment for more than 1 year *and* denominating the offense a misdemeanor, then from the effective date of the said amendatory act until Sept. 1, 1948, the offense was a misdemeanor but was thereafter a felony.

055-23—February 9, 1955

CRIMINAL PROCEDURE

EVIDENCE, ADMISSIBILITY—TRIAL COURT—SUBMISSION TO JURY—SEARCH AND SEIZURE

To: Paul B. Johnson, County Solicitor, Tampa

QUESTION:

In cases where a motion to suppress evidence is heard and testimony is taken at a hearing prior to the impaneling of a jury in the trial of a criminal case, is it necessary to once more introduce this testimony at the trial of said cause in order to introduce seized contraband at said trial?

It is said in 23 C.J.S. 626-628, Criminal Law, §1134, that:

"The decision of a preliminary fact on which the admissibility of evidence depends is, as a general rule, for

the court, and should not be left to the jury; but it has been held that, where the evidence as to the preliminary fact is conflicting and doubtful, the court should submit the matter to the jury, with instructions to disregard the evidence offered unless they find in favor of the preliminary fact.

"Where the admissibility of the evidence depends on the legality of its seizure or other manner of procurement, the question whether it was legally obtained is ordinarily for the court; thus it is generally for the court to say whether there was probable cause for the issuance of the search warrant under which the evidence was seized, whether the warrant and affidavit were valid, whether the premises searched were the premises described in the warrant, whether there was probable cause for an arrest without warrant or a search without warrant, whether consent to a search without warrant was lawful, or whether a search without warrant was unreasonable or illegal; and evidence offered in support of motions for the return of evidence and suppression of evidence need not be submitted to the jury since such motions are for the consideration of the court alone. However, where there is conflicting evidence of the legality of the seizure the court may admit the evidence and submit the question of its unlawful seizure to the jury, leaving for the jury to determine, under proper instructions, such questions as whether accused consented to a search without warrant, whether a person consenting to a search of accused's premises was competent to do so, whether there was probable cause for a search without warrant, whether there was a lawful arrest of the accused so as to render admissible the evidence found thereafter as a result of the arrest, whether accused was committing a felony in the presence of the arresting officers, so that no warrant was necessary, whether there was a waiver of irregularities in the search warrant, whether the premises searched was accused's residence, or whether the place where the evidence was found was within the curtilage, where the warrant was insufficient."

In 53 Am. Jur. 143, Trial, §157, we find the following:

"Preliminary questions of fact, the constitutionality of statutes, questions falling properly within the province of judicial notice, and disputed facts on motion, are for the court."

53 Am. Jur. 154-155, Trial, §180, says that:

"§ 180. Relevancy, Competency, and Admissibility of Evidence; Competency of Witnesses.—It is the province of the trial court in a jury trial case to determine the admissibility of the evidence offered by the parties at the trial. The trial court must determine its competency under the established rules of evidence, and its relevancy to the issues in the case on trial, *leaving it to*

the jury to determine its credibility and weight if it is admitted.

* * * * *

"While the general rule is that matters preliminary to the admission of evidence should be determined by the court, the court may, when in doubt about the matter, submit the questions arising on the proof to the jury, under instructions to make no use of the evidence unless satisfied by the preliminary proof that it is competent." (Emphasis supplied).

The supreme court of Florida, in *Martin v. State*, 129 So. 112, said, "On the other hand, if he had denied the likeness (of certain photographs) as that of himself, the court, before the introduction in evidence, would have had to pass upon their admission in evidence." (Parenthetical matter supplied.)

In the case of *Livingston v. State*, 192 So. 327, the supreme court of Florida said, "But the correctness of the map or drawing, and whether or not it is proved to be a true representation, are questions to be decided primarily by the trial judge." Immediately following this statement, the supreme court of Florida quoted with approval from two Massachusetts cases, one of which held that whether a map or photograph is sufficiently verified is a preliminary question of fact to be decided by the judge presiding at the trial, and not open to exception, and the other of which held that the findings of the presiding judge on preliminary questions of fact material to the competency of evidence introduced at the trial are not open to revision in the appellate court. Our court concluded by saying that in order for it to find error a clear abuse of the discretion of the trial judge must be made to appear.

In *Mixon v. State*, 54 So. 2d 190, the trial judge, after a hearing upon a motion to suppress the seized evidence, found upon conflicting evidence that no lease existed as claimed by the defendant's witness, and the supreme court of Florida said that "His (the trial judge's) ruling on the admissibility of the evidence necessitated passing on the factual question of the existence of a lease, which function was entirely within his province. This Court will not reverse a finding of fact by the lower court unless error is patent on the record."

In *Johnson v. State*, 27 So. 2d 276, the defendant moved to suppress the evidence upon the ground, among others, that the officers who made the search under a search warrant broke open the outer door of the appellant's dwelling without first giving due notice of their authority and purpose as required by §933.09, F. S. After hearing evidence on the motion outside of the presence of the jury, the trial judge overruled it, his ruling having the effect of finding that the officers did not break in without first giving due notice of their authority and purpose. Nevertheless, both the state and the defendant introduced evidence before the jury as to whether the officers had broken into the house or not and at the conclusion of the trial the judge charged the jury that if they found from the evidence that the officers had forced

an entrance by the breaking of any fastening to the door on the premises then the execution of the search warrant would be illegal and it would be the jury's duty to disregard any and all articles taken by virtue of the search warrant, etc. On appeal, Johnson contended that it was error to pass the buck to the jury to determine the legality of the search and seizure. The state answered this contention by pointing out that, by overruling the motion to suppress, the trial judge had unequivocally found against the defendant on the question of whether the officers broke into the house, and by pointing out that if the court committed error by thereafter submitting the question to the jury, the error was invited by the defendant and was participated in by him and was not objected to by him and was favorable to him in that it gave him a second opportunity to escape conviction if the jury should find that the search and seizure were illegal on the ground that the officers broke into the house, an opportunity to which he was not entitled because the judge's ruling had conclusively established the legality of the search and seizure. The supreme court's opinion did not say anything about said question having been submitted to the jury but, in affirming the conviction, made it plain that it was the trial court's, not the jury's, province to determine from the facts whether the search and seizure was lawful or unlawful. In disposing of this question, and an allied question, the supreme court said:

"The court heard testimony pro and con as to these allegations. The testimony was conflicting but the court determined that the allegations were not sustained by proof. The court had the benefit of seeing the witnesses face to face and was in a better position than are we to judge who was and who was not telling the truth and *it was the court's province to determine this and the court, exercising its powers and judicial discretion in this regard* evidently reached the conclusion that the sheriff and those witnesses who supported his version of the transaction were telling the truth and that there was no breaking and entering of the house but the entry was peaceable and without breaking and also that the search warrant was read to Marion F. Johnson and a copy of it delivered to him inside the house before any search or seizure was made."

To my mind, the Johnson case not only held that it was for the trial judge to decide all facts necessary to be decided in order to determine the legality of the search and seizure but the affirmance also had the effect of holding that it was not error prejudicial to the defendant, if error at all, for the judge, after determining the facts involved and overruling the motion to suppress, to let the jury determine again these facts.

It is therefore my opinion that it is within the province of the trial court to finally determine all questions of fact which are necessary to be decided in order to pass upon the admissibility of the evidence obtained by a search and seizure, leaving it (in accordance with the above quotation from American Jurisprudence) to the jury to decide the credibility and weight of the evi-

dence determined to be admissible. However, I think that the trial judge, after hearing evidence on a motion to suppress and overruling it, may, without committing prejudicial error, require the evidence presented by the state at the hearing on the motion to suppress to be again presented to the jury, affording the defendant an opportunity to put before the jury his contrary evidence, and then to appropriately charge the jury to make no use of the evidence gained by the search and seizure unless they find in favor of the state on the preliminary facts essential to the admissibility of such evidence.

055-24—February 9, 1955

CITIES AND TOWNS

MUNICIPAL POLICE OFFICER—POWERS AND IMMUNITY— TOWN OF LEE—AUTHORITY TO ERECT JAIL—CH. 6067, LAWS OF FLORIDA 1909, §901.15, F. S.

To: *Prentice P. Pruitt, City Attorney, Town of Lee, Monticello*

QUESTIONS:

1. May a municipal police officer arrest for violation of Ch. 317, F. S., beyond the corporate limits of a municipality, where the violation occurs within the limits of the municipality and there the violator is immediately pursued to a point outside of said municipality?

2. Does a municipal police officer enjoy immunity from arrest by state or county officials for the offense of "speeding" described in §317.22, F. S., when such police officer exceeds the lawful speed limits therein provided, where pursuing and apprehending a violator of a municipal ordinance beyond such municipal limits?

3. Is the town of Lee incorporated under Ch. 6067, Laws of Florida, 1909, empowered to erect and maintain a municipal jail within its corporate limits?

AS TO QUESTION 1:

We have examined the charter of the town of Lee which is found in Ch. 6067, 1909, and find in §5 thereof, that the mayor may require the marshal to bring before him any person who "has been an offender against the ordinances of the town . . ." and to try such offender. We assume there is no ordinance which adopts the provisions of Ch. 317, F. S., and that the question is related solely to the right of a municipal police officer to arrest for violation of the state statute.

That a municipal police officer may arrest for a violation of a state law, see §901.15, F. S. However, this statute does not give the peace officer the power to extend his territorial limits of duty beyond the municipal boundaries. If he does go beyond the boundaries, he is no longer a peace officer and his powers for arrest are no more than those conveyed to an ordinary citizen.

Therefore, where no municipal ordinance exists creating vio-

lations similar to those of the state law as found in Ch. 317, F. S., a city police officer may make arrests for violations of said chapter, providing the arrests are made within the municipal boundaries. Upon making the arrests, this same officer would have to turn the violators over to the county or state authorities for prosecution, as no municipal jurisdiction exists until a city ordinance proclaiming that type of violation a crime against the municipality has been enacted. We so held in opinion 054-209.

In two opinions of my predecessor in office, opinions 046-458 and 047-154, (AGO 1945-1946, p. 737, and AGO 1947-1948, p. 593) he held that under the general law of this state a municipal police officer does not have the authority to pursue the violator of an ordinance outside of the municipal limits. I believe this to be a correct statement of the law and consequently concur in said opinions, provided there has been no power granted the officer either by the charter or any applicable special act. I find nothing in the charter indicating that such power has been granted a police officer. Accordingly, the question, subject to these observations, is answered in the negative.

AS TO QUESTION 2:

Since we answered the first question by stating that a municipal officer may not pursue the violator of a municipal ordinance beyond the corporate limits and there arrest, in the absence of charter provision or special legislative act, it follows that such police officer does not enjoy immunity. Hence, subject to the above, the question is answered in the negative.

AS TO QUESTION 3:

Your attention is directed to §8 of Ch. 6067, 1909, which, among other things, authorizes the town council to pass any ordinance necessary for the preservation of peace, health, safety and general good of the town. It seems to me this necessarily implies that where the town council, in its sound judgment and discretion, feels that a jail is necessary for the preservation of peace, safety and general welfare of the town, it may build such jail, provided the town does not have a contract with the county for the keeping of its prisoners, and provided further that it will not be necessary to levy millage for any and all purposes including the building of the jail of more than 15 mills. Section 9 of Ch. 9818, 1923, amending the charter of the town of Lee, provides "... that no more than fifteen mills shall be levied for any and all purposes unless a demand shall be initiated by the qualified voters of the town and a petition signed by a majority of them asking for such a rate." As qualified, the question is answered in the affirmative.

055-25—February 9, 1955

REGULATION OF TRADE, COMMERCE & INVESTMENTS

DOG RACING AND HORSE RACING—SUMMER DOG RACING

—PERMITS—VALIDITY—BROWARD COUNTY—

§§550.04, 550.05, 550.34, 551.12, F. S.

To: *Florida State Racing Commission, Miami*

QUESTION:

Is a permit for summer dog racing in Broward coun-

ty issued by the racing commission under provisions of §550.04, F. S., to the Dade Kennel Assn. valid?

On July 17, 1953, in opinion 053-159, this office advised the Florida state racing commission that the said commission was not empowered under the provisions of §§550.04 and 551.12, F. S., to issue a permit or license to an applicant to operate a summer jai alai fronton in Dade county. A copy of said opinion is enclosed herewith. Also enclosed is a letter from this office to Messrs. Landefeld and Kerr, attorneys at law, Hollywood, wherein they were advised that the racing commission has not asked this office to take part in the litigation involving the dog track summer permits, possibly because of our opinion 053-159 and that this office does not make it a policy of entering into the commission's litigation unless requested by it to do so. Further, we advised that if we were in the litigation we would of course take a position consistent with the opinion.

The construction that this office places upon the various provisos in §550.04, F. S., is that summer dog track meetings located in the state south of latitude 30 degrees north (see §550.34) may be held only in counties lying wholly east of the St. Johns river and south of Matanzas inlet, and in those counties only during the period June 1 up to and including Sept. 30 of the same year.

You will note that §550.05, F. S., provides, among other things, as follows:

"... and provided further that no application shall be considered and no permit shall be issued by the racing commission nor voted upon in any county to conduct running horse races, harness horse races or dog races at a location within 100 miles road travel via most practical route of another location for which a permit has been issued and a racing plant located, except that permits heretofore issued and ratified by a majority of the voters of any county shall not be affected by this proviso."

Section 550.04, F. S., expressly exempted applicants for summer dog racing permits in the area lying wholly east of the St. Johns river and south of the Matanzas inlet from the prohibitions of the foregoing provisions of §550.05, F. S. No mention is made in said statute as to any other territory of the state and under the rule of "Expressio unius est exclusio alterius," the expression of one thing is the exclusion of another, this statute further limits summer dog racing to the area lying wholly east of the St. Johns river and south of the Matanzas inlet with the exception of that section of the state authorized by §550.34, F. S.

It is therefore our opinion that when the applicable statutes are read as a whole and all pertinent provisions are considered together dealing with this subject matter and not singly or in isolation, permits for summer dog racing in Broward county should not be granted.

055-26—February 10, 1955

EDUCATION

STATE PLAN FOR PUBLIC EDUCATION—STATE ADVISORY COUNCIL—LAY COUNCIL—MEMBERSHIP—ELIGIBILITY—§228.15, F. S.

To: *LeRoy Collins, Governor of Florida, Tallahassee*

QUESTION:

Is a professor or a dean of one of the colleges at a state institution of higher learning eligible for membership on the state advisory council on education, established by §228.15, F. S.?

Section 228.15, F. S., was enacted in 1947 as §1 of Ch. 23726, 1947. After reaffirming the control of education in the state board, the board of control and the county boards, at their respective educational levels as they then existed, the act created "a lay advisory body to be known as the state advisory council on education..." It provided that the council should consist of seven prominent and representative citizens of the state appointed by the governor. After naming the duties of the council, the statute provides that the council shall have only advisory duties and provides further that the council shall be dissolved if and when a "lay non-ex officio state board of education is established by law..." etc.

A lay advisory council, as used in the statute means a board consisting of members who are not professionals in the educational field. The word "lay" is used in its ordinary meaning, that is, non-professional in the field of the subject matter, and that field in this case is education. The professor and dean described in your question are professionals in education and therefore ineligible. Your question is answered in the negative.

055-27—February 11, 1955

INSURANCE

BURGLARY INSURANCE PROVIDED WITH PURCHASE OF PORTABLE SAFE—ENGAGING IN INSURANCE BUSINESS

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*

QUESTION:

The Merlite Industries, Inc., of New York, has appointed salesmen in Florida to sell a portable safe known as "Alarm-O-Safe." To each purchaser of a safe there is furnished burglary insurance for one year, as described below. Does the sale of such safes in Florida, with the incidental insurance feature, constitute the negotiation of insurance contracts subject to regulatory insurance laws of this state?

Attached to the request for opinion are the following: (1) Printed advertisement concerning such safe, with the statement to the effect that at no additional cost each purchaser receives

a policy for \$1,000 protecting the contents of the safe against burglary for one year from date of purchase. (2) A card on which appears instructions concerning use of the safe; the words, "Your policy will be issued as soon as we receive the information requested on this card. Merlite Industries, Inc., 114 East 32nd Street, New York 16, N. Y."; and a perforated part of the card with lines for the purchaser to write in his name and address. (3) Form of "Certificate of Insurance", which among other things recites that, "This is to advise that insurance has been effected with Underwriters at *Lloyds, London*, and/or companies whose names and amounts of liability underwritten by them are on file in the office of Oakeley, Vaughan & Co., 1 Leadenhall Street, London, E.C.3"; and there follows thereafter name and address of a purchaser of such a safe, with policy terms, to be issued by Oakeley, Vaughan & Johnston, Inc.

In opinion 054-76, we dealt with the question of the propriety of the sale to residents of Florida of shares in a foreign investment trust, the plan for purchase of such shares having as an incident thereof an insurance feature under a master policy issued under the laws of another state, sales of such plans being made by agents of the investment company who were not qualified as insurance agents in Florida. We held that sale of such shares under the mentioned plan was permitted for the reasons set forth therein, which reasons are applicable to the situation here found, viz.: (1) A master policy has been negotiated either in New York or London, quite probably the latter. (2) Each purchaser of a safe, as an incident of purchase and without application, is furnished such insurance coverage as above described, the purchaser receiving a certificate confirming such coverage upon his mailing to Merlite Industries, Inc., his name and address as mentioned. (3) The purchaser of a safe transmits no premium to said insurer. (4) Since the purchaser of such a safe makes no application for said insurance, no application of a Florida resident could be made a part of the contract evidenced by such master policy.

For the above reasons, in my opinion the coverage issued to the purchaser of such a safe, as an incident of his purchase, under the circumstances mentioned, will not constitute the engaging in the insurance business in Florida, by the mentioned salesmen, within the purview of our regulatory insurance laws. Hence the question is answered in the negative.

055-28—February 14, 1955

CRIMINAL PROCEDURE
PROSECUTING ATTORNEYS—DUTIES—HABITUAL CRIMINAL STATUTES—§§775.09-775.11, F. S.

To: *Gunter Stephenson, State Attorney, Winter Haven*

QUESTIONS:

1. Where the facts justify the filing of a habitual criminal information, is it the mandatory duty of the

prosecuting attorney to file the same and, if so, at what stage of the proceedings?

2. What is the procedure to be followed in proving the fact of the previous convictions of the accused and the identity of the accused with regard to these previous convictions?

AS TO QUESTION 1:

When, at the time of filing an information or procuring an indictment for felony, the fact of a previous conviction or convictions of felony is known to the prosecuting attorney, he may allege such previous conviction or convictions in such information or indictment or he may wait and allege it or them in an information filed after conviction for the current felony pursuant to §775.11, F. S. Where the facts justify charging a person as a habitual criminal, it is the mandatory duty of the prosecuting attorney to make such a charge at one time or the other.

§§775.09 and 775.10, F. S., unequivocally require the imposition of enhanced penalties upon habitual criminals, and these enhanced penalties cannot be imposed unless the defendant is charged as a habitual criminal either in the information or indictment alleging the current felony or in an information filed subsequent to conviction for the current felony pursuant to §775.11, F. S.; hence, the duty to charge them at one time or the other.

Moreover, §775.10, F. S., provides as follows:

"... A person to be punishable under this and the preceding section need not have been indicted and convicted as a previous offender in order to receive the increased punishment therein provided, but may be proceeded against as provided in the following section."

Section 775.11, F. S., requires that if at any time after sentence or conviction it shall appear that a person convicted of a felony has previously been convicted of crimes as set forth either in §775.09 or §775.10, F. S., the prosecuting attorney "SHALL" file an information accusing such person of such previous convictions. These provisions plainly spell out the duty of the prosecuting attorney to file a habitual criminal information after conviction or sentence if he has not charged the previous convictions in the indictment or information charging the current felony.

Supporting our position is the case of *People v. Gowasky*, (NY) 155 N. E. 737. Our §§775.09-775.11, F. S., were modeled after the New York Baumes Laws which were under consideration in the Gowasky case, which case was decided before Florida adopted said statutes. Therefore, the New York court's interpretation of said statutes is to be presumed to have been adopted by Florida along with the statutes themselves. (82 C.J.S. 860, Statutes, §372).

Prosecuting attorneys and judges from time to time express

the thought that they ought to have some discretion as to whether the increased penalties required by the habitual criminal laws should be imposed upon defendants. In rejecting this theory, the New York court said in the Gowasky case:

"(13) This may work extreme hardship in certain cases where the sentencing judges would be justified in feeling that the punishment was too severe for the nature and circumstances of the crime or crimes committed, but these are matters for the Legislature or the executive. Courts have no inherent power to modify statutes to meet exceptional cases. Courts declare the law as it is."

So it is that, regardless of when it comes to the attention of the prosecuting attorney that the defendant has previously been convicted of a felony or felonies, it is the unqualified duty of the prosecuting attorney to allege such previous conviction or convictions either in the indictment or information for the current felony or to allege them in an information filed subsequent to the conviction for the current felony pursuant to the positive requirement of §775.11, F. S.

An information charging a defendant as a habitual criminal should comply with the requirement of *Joyner v. State*, 30 So. 2d 304.

AS TO QUESTION 2:

It is permissible in this state for an accused charged as a habitual offender to admit the fact of his prior conviction or convictions and such an admission is a sufficient basis for an adjudication that the defendant has been convicted of the prior offenses (*Adkison v. State*, 103 So. 121; *Cross v. State*, 119 So. 380).

Unless the defendant admits the previous convictions, evidence must be presented to establish them. A certified copy of a final judgment of conviction rendered in a circuit court of Florida is admissible as prima facie evidence of the entry and validity of such judgment (§92.05, F. S.) The same is true as to judgments of conviction rendered in the U. S. district courts of Florida (§92.06, F. S.). Therefore, in order to establish prima facie that the defendant has been convicted of a felony in a circuit court of Florida or in a U. S. district court of Florida, it is not necessary to do more than introduce a certified copy of the judgment of conviction.

As to all other convictions of felony, whether in courts in Florida other than circuit courts and U. S. district courts or whether in the state or federal courts in other states or whether in the courts of foreign countries, it is necessary in order to prove the conviction that the whole record of the judgment of conviction be put in evidence. This includes the indictment or information, plea of the accused, verdict of the jury, judgment and sentence of the court, and every matter necessary to show the jurisdiction of the court rendering the judgment. (See: *Watson v. Jones*, 25 So. 678; *Clem v. Meserole*, 32 So. 815; *Norwood v. State*, 86 So. 506; and *Warren v. State*, 74 So. 2d 688). In order to prove such whole record, it is permissible to use authenticated copies of the records of any court in this state or of another

state or of the U. S. (§92.10, F. S.) or of the courts of foreign countries (§92.032, F. S.).

When a record is offered in evidence to prove a prior conviction, it should be read to the jury and filed as evidence (*Ballard v. State*, 112 So. 47).

In order to prove a prior conviction or convictions, it is also necessary to prove that the defendant in the case at bar is the same person as the one who sustained the prior conviction or convictions. The mere fact of identity of names is not sufficient to establish that the accused is the same person as the one previously convicted; there must be other proof of identity (*Thompson v. State*, 63 So. 423).

Identity may be established by competent witnesses. For instance, a warden or guard or other employee of a penitentiary or jail who knows of his own personal knowledge that the accused is the same person who served time in such penitentiary or jail under a previous felony commitment, may testify to that fact in order to establish identity. In such case, the previous commitment, or a certified copy of it, should be put in evidence.

Other prison records, or certified copies thereof, are admissible where they help to prove identity. (24 C.J.S. 1163, Criminal Law, §1967).

Where they are of probative force, photographs of the accused may be introduced to help prove identity, as may be fingerprints. It is customary to photograph and fingerprint every prisoner when he arrives at a penitentiary to serve a sentence for felony. When fingerprints so taken at the time of the defendant's previous commitment under a felony sentence are properly identified, a fingerprint expert may qualify them for introduction in evidence by testifying as to their correspondence with the properly identified fingerprints that were taken at the time of the defendant's arrest for the current felony. Photographs so taken and properly identified are admissible upon proof or admission by the defendant that they are in fact photographs of the defendant and are true representations of him.

If the accused has suffered a prior conviction or convictions under a different name, that fact does not prevent the introduction of the record of such previous conviction or convictions but in such case it must be proved that the accused is the same person who suffered the previous conviction or convictions (*Wilkins v. State*, 78 So. 523).

It is necessary to establish beyond a reasonable doubt the fact of a former conviction or convictions, as well as the identity of the accused as the person formerly convicted, where these matters are not admitted. (24 C.J.S. 1164, Criminal Law, §1968).

Where the former convictions are included in an indictment or information charging the current felony, and the accused does not admit the previous convictions, the verdict should contain: (1) a finding of the commission of the particular present act charged in the indictment or information under which the ac-

cused is on trial; and (2) also a further separate finding of the prior conviction of the accused of felony as charged in the indictment or information; and the jury should be instructed as to the forms of verdict which may be rendered. (See: *Barnhill v. State*, 41 So. 2d 329, which, although it does not deal with the above-cited habitual criminal statutes, does deal with second offenders under another statute and states principles of law which are applicable to said habitual criminal statutes.)

055-30—February 15, 1955

TAXATION

TRANSFER TAX ON CORPORATE STOCK—OWNER INCORPORATED IN ANOTHER STATE—§201.04, F. S.

To: C. M. Gay, State Comptroller, Tallahassee

QUESTION:

A Michigan corporation, owning stock in a Florida corporation, becomes a corporation under the laws of Delaware, with the same stockholders, officers, assets, liabilities, etc. Is there such a transfer of the Florida corporate stock as to require the payment of a stock transfer tax pursuant to §201.04, F. S.?

Section 201.04, F. S., requires a documentary stamp tax "on all sales, agreements to sell, or memoranda of sales or deliveries of, *transfers of legal title to shares or certificates of stock . . . in any corporation . . . whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale . . .*" (Emphasis supplied.) Our primary question is whether there has been a transfer of the legal title to shares or certificates of stock in a Florida corporation from a Michigan corporation to a Delaware corporation; this in turn raises the question of whether the Michigan corporation when it became a Delaware corporation remained the same entity or became a different entity. Whether the Delaware corporation was a different entity from the Michigan corporation would seem to depend upon the statutes and laws of the respective states. In the absence of statutes specifically providing for the incorporation of a corporation of one state as a corporation of another state such may not be done, although the corporations be of the same name, have the same stockholders, officers, assets, liabilities, etc. (13 Am. Jur. 176, §22). In the absence of express statutory provision providing otherwise we must presume that there has been a transfer of the corporate stock of the Florida corporation from the Michigan corporation to the Delaware corporation of the same name.

This office held in an opinion of October 21, 1947, (1947-48 Biennial Report 224) that "transfers of certificates of stock, as described in §201.04, F. S., are taxable in this state only when they are made, signed, executed, issued, sold, removed, consigned, assigned or shipped in the State of Florida (§201.01, F. S.)." This office in said opinion of October 21, 1947, further said "that trans-

fers of certificates of stock by endorsement, by assignment or separate written instrument, when made in other states, are not subject to the foregoing stamp taxes; unless they are brought into this state for the purpose of transfer upon the records of the corporation or for the issuance of a new certificate or for some other purpose in connection with the transfer of such certificate."

Unless the statutes of Michigan and Delaware provide for the incorporation in Delaware of Michigan corporations without any change of entity we think that there must have been a transfer of the certificate of stock in the Florida corporation; however, doubtless that transfer was made in a state other than Florida and not subject to taxation unless and until the stock certificate of ownership is brought into this state for transfer upon the records of the Florida corporation. If the corporate entity of the Michigan corporation has been taken into Delaware and re-incorporated without any change in entity then there was no transfer of stock. These observations seem to answer the above question.

055-31—February 14, 1955

TAXATION

FEDERAL SAVINGS AND LOAN ASSOCIATIONS—ASSESSMENT OF DEPOSITS—§193.09, F. S.

To: C. M. Gay, State Comptroller, Tallahassee

QUESTION:

May funds placed with a federal savings and loan association be assessed in the name of said association under authority of §193.09, F. S.?

Federal savings and loan associations are organized and established under §§1464 et seq., Title 12, of the U. S. Code, and are chartered by the Home Loan Bank board. Such associations do not do a general banking business but are set up under the declared congressional purpose to provide thrift institutions in which people may invest their funds and provide for the financing of homes (North Arlington National Bank v. Kearny Federal Savings and Loan Association, CCA., 187 Fed. 2d 564). The federal act and the rules and regulations made pursuant thereto embrace the entire field and leave no field for state legislation and regulation (California v. Coast Federal Savings and Loan Association, DC Fed., 98 Fed. Supp. 311). Such associations are instrumentalities of the U. S. (California v. Coast Federal Savings and Loan Association, supra; Commissioner of Corporations and Taxation v. Flaherty, 306 Mass. 461, 28 N. E. 2d 461; State v. Minnesota Federal Savings and Loan Association, Minn., 15 N. W. 2d 568).

State statutes relating to ad valorem and other taxation are limited in their application to federal savings and loan associations to such as is permitted under and pursuant to the applicable federal statutes and laws. Section 193.09, F. S., being a state and not a federal statute, is applicable to federal savings and loan

associations only to the extent permitted under the federal statutes and laws. We find nothing in the federal statutes which may be construed as permitting the assessment of funds placed with a federal savings and loan association in the name of the association under authority of said §193.09, F. S. Subsection (h) of §1464, title 12, of the federal code, relating to the taxation of federal savings and loan associations, is not as extensive and broad as is §548 of the same title, relating to national banking associations.

The above question is answered in the negative.

055-32—February 23, 1955

REGULATION OF TRADE, COMMERCE AND INVESTMENTS
SALE OF SECURITIES—APPLICATION OF §517.05, F. S., TO
TEXAS TURNPIKE COMPANY'S TOLL ROAD
REVENUE BONDS

To: Florida Securities Commission, Tallahassee

QUESTION:

Are the Texas Turnpike Co.'s toll road revenue bonds, series "A" and "B" exempt securities under §517.05, F. S.?

The Texas Turnpike Co. appears to be a non-profit corporation organized and incorporated under and by virtue of the Texas toll road act of 1874 (Vernon's Statutes, Art. 1448-1465) and amended. Such corporations are organized and incorporated by not less than 5 subscribers, and no corporation except those organized under the said Texas toll road act "shall be authorized or permitted to construct, build, operate, acquire, own or maintain any toll road within" the state of Texas (Vernon's Statutes, Art. 1448). When a toll road becomes free from indebtedness and is in good repair it may be transferred to the state as a free public highway (§18 of the Texas turnpike authority act of 1953).

The Texas Turnpike Co. has or will enter into an escrow agreement with the Texas turnpike authority and the Republic National Bank of Dallas, wherein and whereby it is or will be agreed that none of the profits of the corporation will ever inure or be paid to any of the stockholders or subscribers of its corporate stock or to any other person or corporation, but will be used exclusively for the retirement of the indebtedness of the corporation, and that when the turnpike is free of indebtedness it will be turned over to the state of Texas as a free public highway. Under the statutes and laws of Texas "neither the state of Texas nor any of its political subdivisions, nor the Texas turnpike authority, shall be liable in any way for any indebtedness created by the corporation or for any claim, demand, or obligation of any kind which may arise or be asserted against the corporation" (see page 4 of prospectus). The corporate property is stated in the prospectus to be "subject to the payment of ad valorem, franchise and intangible asset taxes" under the laws of the state of Texas, estimated to amount to some \$570,000 for the year 1957.

So far as we are able to ascertain from the file neither the state of Texas nor any of its subdivisions or agencies have or will issue the bonds in question or guarantee their payment.

It does not appear that the securities in question are within either subsections (1), (2), (3), (4), (6), (7), (8), (9), (10) or (11), of §517.05, F. S. The said securities are not within said sub-§(1) because not "issued or guaranteed by the U. S. or any territory or insular possession thereof, or by the District of Columbia, or by any state of the U. S. or political subdivision or agency thereof. Although it is possible that the turnpike might be considered as a public utility, it does not appear that it is under the regulation of any public service commission, corporation or agency of the state, so as to be within the purview of sub §(4) above mentioned. Although the corporation may be classified as a non-profit association or corporation, it does not appear to have been organized "exclusively for religious, educational, benevolent, fraternal, charitable or reformatory purposes," so as to be within the purview of sub §(5) of said §517.05, F. S.

These observations seem to answer the above question in the negative.

055-33—February 18, 1955

CITIES AND TOWNS

OASI—RETIREMENT—§§112.05 and 165.25, F. S.—THE SOCIAL SECURITY ACT—ELECTIVE OFFICERS OF MUNICIPALITIES

To: *Herbert W. Miller, Assistant General Counsel, Florida Industrial Commission, Tallahassee*

QUESTIONS:

1. By reason of §165.25, F. S., are the positions of elective officers of the municipalities of Florida covered by a retirement system within the meaning of the social security act, in the absence of the budgeting or appropriation of funds, ordinance or other local implementation of the provisions of this section?

2. Should the answer to 1. be in the negative, at what procedural point would an elective officer of a given municipality be brought within the provisions of §165.25 F. S.? (For example, the date on which he completes accumulation of the requisite service; his resignation and filing of claim; the budgeting of funds; enactment of appropriate ordinance.)

The significance of the questions becomes evident with the following explanations:

42 U.S.C.A., §418(D) (part of the social security act), prior to the 1954 amendment thereof (Public Law 761, 83rd Congress, 2nd Session) provided in part that "no agreement with any state may be applicable . . . to any service performed by employees as

members of any coverage group in positions covered by a retirement system on the date such agreement is made applicable to such coverage group." The phrase "retirement system" for the purposes of said § 418 is defined as "... a pension, annuity, retirement or similar fund or system established by a state or by a political subdivision thereof." The request for opinion states: "Approximately 131 municipalities have included elective officers in their OASI coverage, in many cases retroactive to January 1, 1951." Thus, by reason of §165.25 there is concern with respect to such municipal officers so covered for the period beginning January 1, 1951, to the effective date of the amendment of said §418(D) by said Public Law 761.

Section 165.25, F. S., provides that, "From and after June 3, 1939, whenever any elective officer of any city or town of this state has held the same elective office of such city or town for a period of 20 years or more consecutively, such elective officer may voluntarily resign or retire from such elective office with the right to be paid, and he shall be paid on his own requisition, by such city or town, during the remainder of his natural life, a sum equal to one-half of the full amount of the annual or monthly salary that such city or town was authorized by law to pay said elective officer at the time of his resignation or retirement; and each city and town shall appropriate and provide in its annual budget sufficient moneys to meet the requirements of this section." This section has not been construed by our supreme court. An examination of Ch. 19247, 1939, from which the section derives, affords no assistance here; the session law and mentioned section are identical in wording with the exception that the words "city or village" appearing in the former are changed to "city or town" in the latter.

It is recognized that certain of these municipalities may have, by special acts (i.e., charters or individual acts relating to retirement of officers and employees) adopted retirement systems of their own or repealed expressly or by implication the effect of §165.25 F. S. Save for one feature, in view of the conclusions reached herein, no discussion of such possible action is here required. The feature which requires comment is this: If any of said mentioned municipalities, at the time they obtained the OASI coverage, had by ordinance and by reference therein made the provisions of §165.25 F. S. applicable to the officers of the municipality or if by such an ordinance and by appropriate reference such a municipality had made the provisions of §165.25 F. S. a part of the municipality's general retirement system for officers and/or employees, the effect of the provisions of said section in relation to the above question would have to be considered in the light of said possible ordinances; and while the chance that such happened is exceedingly remote, this opinion is conditioned upon said possibility.

Generally, for discussion of pension and retirement systems and supporting legal authorities, attention is directed to my former opinions 054-257, dated Dec. 2, 1954, and 055-7, dated Jan. 13, 1955. The two opinions are also presently relevant for other reasons as explained below.

Opinion 055-7 dealt with a question similar to the above in relation to §112.05, F. S. That opinion was directed to the above assistant general counsel and it is unnecessary to detail at length the particulars thereof. It is sufficient here to state that said section provides that, without the requirement of contributions, officers and employees of the state are provided pension or retirement benefits after required years of service and the reaching of certain ages, where age is a factor, as provided in the statute; "and sufficient money to meet the requirements of this section is hereby appropriated out of any moneys in the state treasury not otherwise appropriated." The effect of that opinion was to hold that §112.05 establishes a "retirement system" within the meaning of the mentioned federal statute. A casual reading of §§112.05 and 165.25 might urge the position that the statutes are sufficiently similar as to permit the conclusions reached in opinion 055-7 being applied to the latter section. However, the provisions of said statutes are to be distinguished by relevant differences.

In connection with the preparation of opinion 055-7, in a memorandum agreeing with the conclusions tentatively reached therein by the undersigned assistant who prepared it, Mr. Burns of this office made certain statements which are here relevant: "This section (112.05 F. S.) contains a continuing appropriation for the payment of said pension or retirement pay. The question is presented as to whether this section is a 'retirement system' within the purview of §418, Title 42, of the U. S. Code We have examined the legislative history of said §418, Title 42, of the U. S. Code (Legislative History, 2nd Session, 81st Congress, 1950, pp. 3292, 3301, 3302, 3406 and 3489; Legislative History, 2nd Session, 83rd Congress, of Ch. 1206 or Public Law 761) and feel that a 'fund or system' is contemplated and not a mere provision for pension. To come within the federal act the pension, annuity, or other compensation to be received by the employee must be in connection with some general system and not merely an isolated pension or annuity."

In mentioned opinion 054-257, the question of whether Ch. 175, F.S. (providing a relief and pension fund for municipal firemen) or Ch. 185, F.S. (providing a retirement fund for police officers of municipalities) in and of themselves and without further action on the part of a municipality to which they might apply, established in such municipality a "retirement system" within the meaning of said federal act. For reasons therein set forth to which attention is directed, that question was answered in the negative.

We apply the foregoing remarks and conclusions to the provisions of §165.25, F. S. An elective officer of a city or town of this state is entitled to the benefits provided by the section upon the coinciding of the following events and circumstances: (1) The consecutive holding of the same office for twenty or more years. (2) "Retirement" or "resignation" from said office. (3) The notification of such retired or resigned officer that he elects (he may not so elect) to claim the benefits provided by the section. (4) The providing by municipal authorities in the first "annual budget" *after* the happening of the preceding circumstances and

events, of "sufficient monies" to meet the requirements of said section in relation to such resigned or retired officers election to claim said benefits; and the accumulation by such a municipality as result of such appropriation and provision to meet such appropriation of sufficient money to pay said benefits. Certainly, until such an officer *elects* to claim the benefits, there would be no occasion or justification for municipal authorities to create a fund for the payment of possible claims under the section. Hence, under the section retirement or pension "fund" comes into existence only *after* such other events and circumstances happen. In no reasonable sense can there be a *presently existing* retirement or pension "system" within the meaning of the federal act without some sort of fund. Opinion 055-7 evidences a further distinction between §§112.05 and 165.25. The 1953 amendments of the former section evidence the legislative intent that the provisions of said section did in effect (as stated in opinion 055-7) "integrate such officials and employees into the state's general retirement system."

In view of the foregoing, in my opinion the questions are answered as follows:

1. The question is answered in the negative; that is to say, that the provisions of §165.25, F.S., do not provide a "retirement system" as such words are defined in the social security act (42 U.S.C.A. §418(D)). To the extent that no "fund" will come into existence under this section unless and until the prerequisite happening of the factors described above herein, the reasoning employed in opinion 054-257 in relation to the first question therein is here applicable, even though the circumstances there are different from those found here. Since no appropriation is reasonably available for benefits under §165.25 F.S. unless and until the happening of the facts and circumstances enumerated above herein, such benefits as may be rightfully claimed fall more in the category of isolated pensions mentioned above rather than in the field of retirement funds or systems.

2. Since no municipal officer could claim OASI coverage unless functioning as such at the time of the placing of said coverage, in the light of the provisions of §165.25 F.S. relating to "retirement" and "resignation" and the effect of the above reasoning and conclusions in relation to the first question, further answer to this question seems unnecessary.

055-34—February 18, 1955

PUBLIC BUSINESS

STATE ADVERTISING COMMISSION—FUNDS—GOVERNOR'S BASEBALL DINNER

To: *LeRoy Collins, Governor of Florida, Tallahassee*

QUESTION:

May the funds of the state advertising commission be used to defray an appropriate part of the cost of the governor's baseball dinner, in view of the publicity to the state resulting from such dinners?

The Florida state advertising commission was created, and its powers and duties fixed and established by Ch. 22558, 1945, now appearing as §§286.09-286.22, F. S. The primary responsibility of the commission is to create and build Florida industries, promote commerce and the sale of Florida products, encourage employment of Florida citizens, encourage visitors from other states and countries to come to Florida, and to raise the earning level of Florida residents (§286.14, F. S.). The powers and duties of the commission, as set out in §286.17, F. S., include a program of information, advertising and publicity relating to the business, industrial, commercial, agricultural, educational, recreational, scenic, historic, transportation, ports and residential facilities, advantages, products and attractions of the state and all parts thereof. One of its duties is to encourage and coordinate those engaged in publicizing and promoting the interests, facilities, attractions, products, etc., of the state and every part thereof. (§286.17, F. S.).

Section 286.19, F. S., provides that the advertising commission "shall limit its dissemination of information pertaining to Florida to the following media:

"(1) Newspaper advertising outside of the state of Florida.

"(2) Magazine advertising in magazines of national circulation.

"(3) Outdoor advertising outside of the state of Florida.

"(4) Radio advertising over out-of-state networks.

"(5) Preparing and circulating moving pictures.

"(6) Preparing, purchasing and distributing by mail, or by other means of advertising, literature and other material."

The request for opinion states that such dinners are the source of much valuable publicity to our state. This office is not in position to determine what publicity and advertisement the state stands to receive through the press, magazine articles, radio and television programs, moving pictures, and other means of advertising, within the purview of said §286.19, F. S., from persons who attend such dinners. It seems that newspaper, magazine, radio (including television which is a form of radio), moving pictures, and other means of advertising, mentioned in said §286.19, F. S., must under said statute be procured directly by the commission.

This seems to answer the above question in the negative.

055-35—February 18, 1955

TAXATION

CLERKS OF CIRCUIT COURT—ISSUANCE OF TAX DEEDS— PAYMENT OF TAXES—§§192.04, 192.21, 194.22, F. S.

To: *Jess Mathas, Clerk of Circuit Court, Volusia County, DeLand*

QUESTION:

May a clerk of the circuit court who issues a tax deed on March 1 of a given year for delinquent taxes for prior years redeem tax sale certificates issued for non-payment of taxes for the same year in which the tax deed was issued from surplus funds received by him when the tax deed was sold?

In your request for opinion it appears that the tax deed was issued on March 1, 1954; that there was competitive bidding at the tax deed sale, with a resultant surplus of funds which you are still holding; that the property sold was regularly assessed for taxes in 1953 but such taxes were not included in your calculation for the tax deed; and that on June 1, 1954, the properties were sold for non-payment of 1953 taxes.

All real property in Florida is subject to taxation as of January 1 of each year and such taxes are a lien upon such property superior to all others (§192.04 F. S.), and shall remain in full force until discharged by payment (§192.21, F. S.). It is obvious, therefore, that taxes on the lands for 1953 were a lien on the land when the tax deed was issued (March 1, 1954), although the tax sale certificate issued on June 1, 1954 was not issued until 3 months after the tax deed. The supreme court has held that all legally assessed state, county and municipal taxes shall be first liens prior to all other liens on property assessed, but without priority among such first liens whether taxes were assessed for the same or different years, and that a deed issued without payment of outstanding tax sale certificates or other tax liens on the land does not eliminate such outstanding tax liens (*Allison Realty Co. v. Graves Investment Co.*, 115 Fla. 48, 155 So. 745).

Although §192.21, F. S., provides that no act of omission or commission on the part of any clerk of the circuit court shall operate to defeat the payment of taxes properly assessed and that any such omission or commission may be corrected at any time by the officer or party responsible, we do not believe that such authorization to make correction contemplates the use of surplus money resulting from the sale of a tax deed for payment of taxes properly assessed at the time of the tax deed sale but not taken into consideration when the sum for which the tax deed would be issued was calculated.

Section 194.22, F. S., which provides for the disbursements of the proceeds of sales of property for taxes has been carefully considered by us, and we find no provision in that section which we think authorizes you to redeem the 1954 tax certificates (for 1953 taxes) with surplus funds which you have as a result of the tax sale on March 1, 1954.

We think the question should, in the light of the foregoing observations, be answered in the negative.

055-37—February 18, 1955

CRIMINAL PROCEDURE

JUDGMENT AND SENTENCE—COURT OF CRIMES—U. S. DISTRICT COURT—JURISDICTION TO MODIFY OR ALTER

To: *Ray H. Pearson, Judge, Court of Crimes, Dade County, Miami*
QUESTION:

Where a defendant was sentenced by the court of crimes on June 1, 1954, to serve a county jail sentence, and where on Dec. 31, 1954, said defendant was sentenced by the U. S. district court to serve 6 months in the same county jail in a case which was brought as a direct result of the court of crimes conviction, does the court of crimes have the power to order that its sentence run concurrently with the federal sentence?

The May, 1954, term of court at which said court of crimes sentence was imposed expired not later than the second Monday in July, 1954, because the July, 1954, term of court began that day. (§6 Ch. 11975, 1927.)

A judgment which is not void becomes an absolute verity and passes beyond the control of the court to disturb at the expiration of the term of court at which it was rendered unless steps be taken during that term to set aside, modify or correct it. The same rule applies to sentences. (See *Einstein v. Davidson*, 17 So. 563; *Alabama Hotel Co. v. J. L. Mott Iron Works*, 98 So. 825; *Tanner v. Wiggins*, 45 So. 459; *Tucker v. State*, 131 So. 327; *Sawyer v. State*, 113 So. 736; *Preston v. State*, 158 So. 135; 24 C.J.S. 134, Criminal Law, §1604; 24 C.J.S. 137-138, Criminal Law, §1605-b; and 49 C.J.S. 438, Judgments, §230-a).

Your letter and enclosure state no facts which would indicate that the said court of crimes sentence was void or that any application for modification was made during the term of court at which the sentence was imposed and is still pending undetermined and, assuming that neither of these situations exists, it is my opinion that the court of crimes is utterly without jurisdictional power to now order that said sentence run concurrently with the said federal sentence. This is so because under these circumstances the court of crimes completely lost jurisdiction to modify or mitigate its said sentence at the expiration of the term of court at which the sentence was imposed.

055-38—February 23, 1955

WELFARE

FOREIGN PUBLIC HOUSING BONDS—DEBENTURES, ETC.— TAX EXEMPTION—§§423.01-423.03, F. S.

To: *C. M. Gay, State Comptroller, Tallahassee*

QUESTION:

Are the bonds, debentures and other securities is-

sued by public housing authorities of other states entitled to tax exemption under Ch. 423, F. S.?

Section 423.03, F. S., provides that "the debentures of a housing authority, together with interest thereon and income therefrom, shall be exempt from taxes." This provision seems ambiguous as to whether it is applicable only to debentures of public housing authorities organized under Florida laws or to those organized under the laws of other states as well as under Florida laws.

An examination of §423.01, F. S., (§§423.01-423.03, F. S., were derived from the same legislative act, i. e., Ch. 17893, 1937) reveals that "it has been found and declared in the housing authorities law (Ch. 421, F. S.) and the housing cooperation law (Ch. 422, F. S.) that there exists in this state (the state of Florida) housing conditions which constitute a menace to the health, safety, morals and welfare of residents of the state . . ." After making the above finding the legislature determined that "the property and debentures of a housing authority are of such character as may be exempt from taxation."

Organic and statutory exemptions from taxation, being in the nature of special privileges or immunities, should be strictly construed (*Lummus v. Florida Adirondack School*, 123 Fla. 810, 168 So. 232; *State v. Doss*, 146 Fla. 752, 2 So. 2d 303), against the claimant and in favor of the taxing power (*Overstreet v. Tubin*, Fla., 53 So. 2d 913). To be entitled to tax exemption from ad valorem taxes in this state the property must be held for some educational, literary, scientific, religious, or charitable purpose (§1, Art. IX, and §16, Art. XVI, State Const.) or otherwise be entitled to exemption as being owned or issued by some governmental agency entitled to tax exemption as a sovereign. In this connection see also *State v. McDavid*, 145 Fla. 605, 200 So. 100; *State v. Campbell*, 146 Fla. 532, 1 So. 2d 483; *Burbridge v. St. Johns*, 143 Fla. 544 and 876, 197 So. 131 and 549, upholding the exemption of housing authorities when used for a municipal purpose.

Should we construe the statute in question as only applying to securities issued by housing authorities of this state it would probably be constitutional, but should we construe it as applying to such securities issued by housing authorities in other states its constitutionality would be doubtful; this being true the statute should be construed as having application to securities issued by Florida housing authorities only (*Florida Sugar Distributors v. Wood*, 135 Fla. 126, 184 So. 641; *Ex Parte White*, 131 Fla. 83, 178 So. 181).

The above question, upon the authorities and observations above, is answered in the negative; only the debentures of public housing authorities under the laws of Florida are entitled to the exemption mentioned.

055-39—February 23, 1955

CRIMINAL PROCEDURE

ARRESTS—MUNICIPAL POLICE OFFICERS—STATE POLICE
POWERS—BEVERAGE LAW—§561.25, F. S.

To: W. E. Headley, Chief of Police, Miami

QUESTION:

Are municipal police officers "officers with state police power granted by the legislature," and within the purview of §561.25, F. S.?

Under §561.25, F. S., "no sheriff or other officer with state police power granted by the legislature, shall be permitted to engage in the sale of liquors or beverages provided under the beverage law, nor shall they be employed, directly or indirectly, in connection with the operation of any business licensed under the beverage law. Nor shall they be permitted to own any stock or interest in any firm, partnership or corporation dealing wholly or partly in the sale or distribution of alcoholic beverages or distilled liquors . . ." (Emphasis supplied.) Alcoholic beverages include all beverages containing more than 1% of alcohol by weight (sub §(8), §561.01, F. S.). Under § 562.03, F. S., the licensed premises of any licensee under the beverage laws of this state "may be inspected and searched at any time by any supervisor, sheriff, deputy sheriff or police officer . . ." "Any sheriff, deputy sheriff, constable or police officer, upon the seizure of any property" under the state beverage statutes is required to report such seizure to the director. (§562.38, F. S.), and "every peace officer seizing property" pursuant to the state beverage statutes is required to report the same and deliver the seized property to the board of county commissioners of the county wherein seized (§562.39, F. S.). (Emphasis supplied.) See also §562.41, F. S., where "the director, supervisors and any sheriff or deputy sheriff" is mentioned in connection with searches of persons, places and conveyances, but no mention is made of police officers.

Under §901.15, F. S., "a peace officer may without warrant arrest a person" who has committed a felony or misdemeanor in his presence or who is suspected of having committed a felony which is known to have been committed. Violations of the beverage statutes constitute either a misdemeanor or felony (§562.45, F. S.) and are within the purview of §901.15, F. S. Section 901.15, F. S., appears to have been a revision of §6029, R. G. S., 1920, which authorized similar arrests by "any sheriff, deputy sheriff, constable, city marshal, police officer, or other executive officer in this state . . ." (Emphasis supplied.) Municipal officers have usually been held to be "peace officers" within statutes similar to said §901.15, F. S. See also *Osborne v. State*, 87 Fla. 418, 100 So. 365, and authorities therein cited. This office has held municipal police officers to be "peace officers" and within the purview of said §901.15, (1935-6, BR 634; 1935-6 BR 752 and 767; 1945-6 BR 737; 1947-8 BR 593, and 1951-2 BR 764). "Policemen are guardians of public safety and are directly charged with the enforcement of the laws. Among the duties of police officers are

the prevention of the commission of crime, assisting in the detection of crime, and disclosing all information known to them which may lead to the apprehension and punishment of those who have transgressed the laws." (62 C. J. S. 1109, §575). See also *Jacksonville v. Wilson*, 157 Fla. 838, 27 So. 2d 108, text 110.

In the light of the above statutes, authorities and observations we feel that the above question should be answered in the affirmative.

055-41—February 23, 1955

PENSIONS AND WAR VETERANS

MERIT SYSTEM—POSITIONS IN PROFESSIONAL AND SCIENTIFIC SERVICES—§295.08, F. S.

To: *Angus Laird, Director, Florida Merit System, Tallahassee*

QUESTION:

Does the position of chief of statistics of the workmen's compensation division of Florida industrial commission fall in the category of a position in the professional and scientific services for the purpose contemplated by §295.08, F. S.?

Chapter 295, F. S., is comprised of statutes relating to veterans. For instant purposes, it is stated that §295.08 F. S. is concerned with preference points provided for veterans, their wives or widows, under competitive examination systems, the part thereof referred to in the above question being quoted:

"provided, however, that except for positions in professional and scientific services for which the entrance salary is over \$3,000 per annum, the names of all qualified ten-point preference eligibles whose service-connected disability has been rated by the veteran's administration to be 30% or more shall be placed at the top of the appropriate register or employment list, in accordance with their respective augmented ratings." (Emphasis supplied.)

Attached to the request for opinion are a description of the position of chief of statistics of the workmen's compensation division; copy of letter from the particular veteran claiming preference point benefits under §295.08, F. S.; and copy of opinion of the general counsel, Florida industrial commission, concerning the above question. These and copies of other attached matters have been given thorough consideration.

In relation to said position of chief of statistics, we find the following in the attached data:

"Required Knowledge, Abilities, Skills, and Personal Qualities: Thorough knowledge of the methods and standards for interpreting and reporting statistical data. Working knowledge of the Florida Workmen's Law, and of other state and federal social and labor legislation. Working knowledge of the economy of the State of Florida and of

the industrial and occupational characteristics of employment in the State. Thorough knowledge of English grammar and rhetoric and of news and publicity media and methods.

"Ability to analyze and interpret statistical data and to present comments and opinions, and to prepare clear and concise reports. Ability to exercise good judgment in appraising situations and making decisions, to direct the work of others and to deal tactfully with associates.

"Minimum Qualifications: Graduation from an accredited high school or its equivalent, as determined by the State Department of Education, and at least nine years of full-time experience in duties related to the above, including the preparation of news reports, bulletins, magazine articles, and other reports based upon research and statistical data; or comparable experience in the Armed Services; or substituting 30 semester or 45 quarter hours of college credit, including courses in statistics, higher mathematics, economic analysis or related subjects, for one year of the required experience with a maximum substitution of four years."

The *actual* knowledge, ability and skill required for the position, as evidenced by the quoted minimum qualifications for the position, reasonably would appear to negative that the position is a "professional and scientific" one. If such qualifications for the position had required one to be a public accountant or to hold a doctorate in some branch of science, for example, our answer would necessarily be different. However, the quoted language "positions in professional and scientific services" does not appear to us to apply to persons who by reason of their practical experience, including college training, can fill said position. Especially is this true when the statistical position is measured in terms of the minimum standards prescribed for the position to be filled. The mentioned quoted language in §295.08 F. S. ought not be extended by construction to preclude veterans' preferences to persons on the theory that statistical positions are always necessarily scientific and professional. In ordinary walks of life such positions are not in all cases so considered, and by applying the tests of your minimum qualifications the position in question does not appear to be so either.

In view of the foregoing, in my opinion the position of chief of statistics of the workmen's compensation division is not one falling within the category of a position in the field of "professional and scientific services" as such words are used in §295.08, F. S. Hence, the question is answered in the negative.

055-42—February 24, 1955

PROFESSIONS AND VOCATIONS

MASSEURS AND MASSEUSES—CYCLE OF TERMS OF MEMBERS OF BOARD OF MASSAGE—§480.04 F. S.

To: *LeRoy Collins, Governor of Florida, Tallahassee*

QUESTION:

What is the beginning and ending of the present

terms of the members of the Florida board of massage?

The Florida board of massage was organized and established by Ch. 22034, Acts of 1943, §5 of which, now appearing as §480.04, F. S., provided in part that "the members of the first board appointed under this chapter shall be appointed for terms of 1, 2, and 3 years respectively, and shall hold office until their successors are appointed and qualified. Successors of said members shall be appointed for terms of 3 years."

"The law and not the commission issued to an officer controls as to the term of office. State ex rel v. Amos, 101 Fla. 114, 133 So. 623." (State v. Taylor, 108 Fla. 541, 146 So. 549, text 550). "Cycle of terms of office begin with the first appointments unless otherwise provided by law. The law and not the commission determines the term of the office. State ex rel v. Collins, 101 Fla. 371, 134 So. 595." (State v. Byrd, 120 Fla. 780, 163 So. 248, text 254) Generally, when an office is created, the term of office begins when the office is first filled, and the constitutional provision for holding over until successor is duly appointed or elected and qualified does not affect cycle of term (State v. Amos, 101 Fla. 114, 133 So. 623).

Section 480.04, F. S., established a state board or agency composed of three office holders whose offices are separate and distinct and whose terms of office are not concurrent. *One of such offices* was filled by appointment for a primary term of 1 year and thereafter for terms of 3 years; *the second of such offices* was filled by appointment for a primary term of 2 years and thereafter for terms of 3 years; and *the third of such offices* was filled by appointment for a primary term of 3 years and thereafter for terms of 3 years. The said primary term of 1 year was filled by an appointment for a term beginning on September 2, 1943; the said primary term of 2 years and the one for 3 years were filled by appointments for terms beginning on August 21, 1943. This being true the regular terms for 3 years each began on September 2, 1944, August 21, 1945 and August 21, 1946. One Agnes P. Snedeker was appointed for the 1 year term and succeeded herself by an appointment for the regular term beginning on September 2, 1944; Eric L. Wickman was appointed for the 1 year term and succeeded himself by an appointment for the regular term beginning on August 21, 1945; Paul Steel was appointed for the 3 year term. The cycle of the regular 3 year terms, following the said primary terms, is as follows:

Office beginning with a 1 year primary term: Primary term beginning on September 2, 1943, and regular terms beginning on September 2 in the years 1944, 1947, 1950, 1953, 1956, etc.

Office beginning with a 2 year primary term: Primary term beginning on August 21, 1943, and regular terms beginning on August 21, 1945, 1948, 1951, 1954, 1957, etc.

Office beginning with a 3 year primary term: Primary term beginning on August 21, 1943, and regular

terms beginning on August 21, 1946, 1949, 1952, 1955, 1958, etc.

We find nothing in the statutes and know of no general statute or law prohibiting the appointment of the person holding one of said 3 offices to another of said offices, provided, however, that he must resign the office held by him before he may accept the appointment to the other office. This would seem to be true although the effect would be to retain the same person on the board, there being no limitation in the statute in this connection.

The above observations seem to answer the above stated question.

055-43—February 23, 1955

INSURANCE

INSURANCE CONTRACT—NATIONAL AUTOMOBILE WARRANTY

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*

QUESTION:

Is the "National Automobile Warranty" of National Bonded Cars, Inc., of 1965 Morris Ave., Union, N. Y., as described below, a contract of insurance?

The following items accompanied the request for opinion: copy of forms "Dealer's Franchise" and copy of "National Automobile Warranty" used by National Bonded Cars, Inc.; copy of agreement between National Bonded Cars, Inc., and The Employers Liability Assurance Corporation, Ltd.; and copy of "Inspection and Adjustment Procedure", of National Bonded Cars, Inc.

The mentioned "Dealer's Franchise" constitutes form of an agreement to be entered into between National Bonded Cars, Inc., (hereinafter referred to as "National") and an automobile dealer, which for instant purposes is sufficiently described as follows: National agrees that it will, for the purposes of issuing its warranty of any car approved by it, inspect automobiles owned by the dealer, and will issue its warranty of the mechanical condition of each such car approved by it. The dealer agrees to submit cars owned and offered for sale by the dealer, considered by the dealer to meet inspection requirements of National, for the latter's inspection and warranty. The dealer shall pay to National \$15 per car inspected and upon issuance of such warranty. Should a car not meet inspection requirements, the dealer shall pay National \$7.50. Upon each bona fide sale of an approved car the dealer is authorized to deliver the warranty to the purchaser thereof, and thereupon shall remit to National an additional \$20.

The form of warranty, designated "National Automobile Warranty", constitutes an agreement between the purchaser from the dealer of such an approved car and National. A pertinent part of the instrument is quoted:

"NATIONAL BONDED CARS, INC., certifies that it has inspected the vehicle above described and certifies

that in its opinion the parts hereinafter specified are in good working order and condition and will with normal usage require no repairs or replacements for one (1) year from the date of purchase. National Bonded Cars, Inc., agrees that if its said certification is in error, it will protect the retail purchaser of this vehicle and holder of this Warranty from any costs of repairs which may arise for one year from date of purchase on the following specific parts subject to the terms and conditions hereinafter set forth to the extent of the total reasonable price for repairs, replacement and labor which become necessary in the normal use of the above motor car:"

followed by a detailed description of various parts of the following: "Motor"; "Standard Transmission"; "Automatic Transmission"; "Rear Axle"; "Clutch"; "Steering"; and "Brakes"; and by other written matter setting forth or limiting liability.

Aside from the form of contract (i.e., whether it is a primary contract or secondary to some other agreement), we feel that the contract is one of insurance for the reasons set forth in former opinion 050-250 (1949-1950 Biennial Report, 525) copy of which is attached. Attention is directed to the authorities, reasoning and conclusion appearing in said former opinion. A representative of National discussed this contract with the undersigned assistant attorney general and sought to distinguish it from the contract dealt with in opinion 050-250 for the reason that National did not approve a car and issue its warranty with respect thereto except upon an inspection demonstrating to National's satisfaction that the materials appeared to be in good condition. The form of warranty speaks of "normal usage" in relation to inspection of materials. It is a known fact that "normal usage" by one purchaser of a car for a year will not exceed a few thousand miles, while such usage by another purchaser will result in 25,000 to 50,000 miles in a year. Obviously, because of such variance in the use of automobiles by different purchasers, despite such an inspection, there is the element of chance or the contingent factor in any estimate of the durability and life of materials under conditions of "ordinary usage". Further, the contract makes no distinction between failure of materials because of wear or inherent defects.

In view of the foregoing, in my opinion the use in this state of the form mentioned above, designated "National Automobile Warranty", by National would constitute the issuance in this state of a contract of insurance. Hence, the question is answered in the affirmative.

055-44—February 28, 1955

STATE OFFICERS

REMOVAL AND SUSPENSION OF OFFICERS—REINSTATEMENT—PAYMENT OF SALARIES—RACING COMMISSIONERS—§15, ART. IV FLA. CONST.

To: *J. Saxton Lloyd, Chairman, Florida State Racing Commission, Miami*

QUESTIONS:

1. Are racing commissioners who have been sus-

pended from office and subsequently reinstated to office by the governor entitled to their salaries during the suspension period?

2. If such officers are entitled to their salaries from what fund or funds may such salaries be paid?

Section 15, Art. IV of our constitution, which authorizes the suspension or removal of officers, provides among other things:

"No officer suspended who shall under this section resume the duties of his office, shall suffer any loss of salary or loss of compensation in consequence of such suspension."

The supreme court of Florida in the case of *State ex rel Williams v. Lee*, 121 Fla. 815, 164 So. 536, passed upon almost the identical question here involved. In that case Mr. Williams had been appointed an assistant auditor for a term of 4 years by the governor in December, 1932, and commissioned as such he performed the duties of such office until May 31, 1935, except during two periods of time when he was suspended from office by the governor on March 29, 1933, and reinstated on May 15, 1933. He was again suspended by the governor on August 16, 1934, and was reinstated by the action of the senate in refusing to sustain the suspension on May 31, 1935, and immediately after being reinstated he resigned from said office. The court said:

"It is contended by the respondent that because the relator alleges that immediately after he had been reinstated by the action of the State Senate on May 31, 1935, he resigned as assistant state auditor, he is not entitled to the benefits of the provision of §15, of Art. IV, above quoted, because it is not shown that he resumed the duties of his office.

"We think this position is entirely untenable. In law he resumed the duties of his office as soon as he was reinstated, but instead of insisting upon performing the duties of that office and disrupting the organization which had probably been effectuated during this suspension, he tendered his resignation. It appears to us that under the conditions which the alternative writ shows to have existed, the relator pursued the proper course. He had been vindicated by the action of the Senate and thereby continued in office. His right to the salary during the time of suspension is not based upon the performance of work after reinstatement, but the right to that salary accrues as soon as the officer is reinstated, either by the act of the Governor or by the act of the Senate, and it is not contemplated that an inferior officer should force his association and services upon his superiors in office and the Chief Executive when it is apparent that such services are not wanted by those higher in authority and he may at any time resign without forfeiting the right to compensation as provided by law for the period between the date of his suspension and that of his resignation."

Therefore, it appears that all officers who have been reinstated under the foregoing provisions of the constitution are entitled to receive their salaries.

Although the above §15, Art. IV, State Const., declares the right of the reinstated officer to his compensation, neither it nor the statutes expressly specify the fund from which the said compensation is to be paid. In many instances the amount of the said compensation presents questions of fact which must be determined. In the past the legislature has in substantially all, if not all, instances provided by separate acts an appropriation for the payment of each separate claim, in which acts the legislature has found and fixed the amount to be paid. We understand that claims for compensation in like cases, where there has been no specific appropriation therefor, have been rejected by the state comptroller. Claimants should, therefore, look to the legislature for appropriations for the payment of their claims or proceed in courts of competent jurisdiction by mandamus or other appropriate remedy to require the issuance of warrants for such claims.

055-45—February 28, 1955

HIGHWAYS, BRIDGES AND FERRIES

TURNPIKE AUTHORITY—PUBLIC PRINTING—PUBLICATION FOR BIDS—§§283.10, 340.06(13) F. S.

To: *Florida State Turnpike Authority, Dania*

QUESTIONS:

1. Do the provisions of §340.06(13), F. S., apply to contracts for printing which may be entered into by the authority?
2. In advertising for printing, is the turnpike authority required to advertise for 2 weeks or 4 weeks?
3. Is there any standard as to the amount of deposit required by §283.10, F. S., where a deposit is required?

You point out that §340.06(13), F. S., turnpike act, provides that contracts of the turnpike in excess of \$1500 shall be given to the lowest and best bidder after not less than 2 consecutive weeks of advertising in a newspaper of general circulation published in Dade county, and published elsewhere as determined by the authority, and that a bid bond shall be supplied with each bid, etc.

There seems to be no question but that the legislature intended that all contracts, other than compensation for personal services, of the turnpike authority in excess of \$1500 be covered by said §340.06(13) F. S. and, therefore, your 1st question is answered accordingly. That is to say, that all printing contracts of the turnpike authority in excess of \$1500 shall be advertised and awarded in the manner prescribed in §340.06(13) F. S.

Your 2nd question relates to the provisions of Ch. 283, F. S., which provides for all public printing and divides it into classes

A and B. Section 283.05, which relates exclusively to class A, requires 30 days publication by the board of commissioners of state institutions. Your printing would be class B. Section 283.10 relates exclusively to contracts for class B printing, and these contracts are let by the agency which requires the printing. That section requires a call for bids from 2 or more printing houses in the state but contains no reference to publication of the call. I have carefully examined the development of Ch. 283 of the statutes from its original in 1887 through its revisions in 1911, 1931 and 1937, and I have concluded that publication is not required for class B printing. On the other hand, §283.10 contains nothing inconsistent with the provisions in §340.06(13) prescribing publication for bids on contracts in excess of \$1500. Therefore, on all printing contracts in excess of \$1500 you should advertise for 2 weeks as prescribed by §340.06(13) F. S. On printing contracts for less than \$1500 you should be governed by §283.10 F. S. relating to class B printing.

Answering your 3rd question, there is no standard for the amount of bid deposit on printing proposals. Requests for bids from some state agencies require a deposit amounting to 5% of the bid. Again, in the case of printing contracts in excess of \$1500 your bid deposit should be in accordance with §340.06(13) F. S., which requires that each bid shall be accompanied by a sufficient bond or certified check on a solvent bank so that if the bid is accepted a contract will be entered into and the performance of its proposal secured. On bids for printing less than \$1500, the bid deposit shall comply with §283.10, F. S., and shall not be in excess of \$2,000 as provided therein.

655-47—March 3, 1955

TAXATION

TANGIBLE PERSONAL PROPERTY—TAX LIENS—EXTENT— §§192.21, 200.02, F. S.

To: C. M. Gay, State Comptroller, Tallahassee

QUESTIONS:

1. What is the nature and extent of tax liens against or in connection with tangible personal property assessed for ad valorem taxes in this state?
2. Where a taxpayer sells tangible personal property upon which taxes remain unpaid, are the unpaid taxes a personal liability of such taxpayer?
3. Where tangible personal property has been sold by its owner subsequent to the assessment of ad valorem taxes against the same, is the purchaser liable for the payment of such unpaid taxes?

"All tangible personal property taxes shall be a lien on all of the personal property of the taxpayer in the county in which they are assessed from the 1st day of January for which year the property is liable to assessment" (§200.02, F. S.) which

lien is made superior to all other liens, except liens for other taxes, state, county and municipal. Prior to the amendment of this section by §1, Ch. 22758, 1945, such taxes were a lien only "from the time they became due." §192.21, F. S., provides that "all taxes imposed pursuant to the constitution and the laws of this state shall be a first lien superior to all other liens *on any property against which such taxes have been assessed* which shall continue in full force and effect until discharged by payment . . ." (Emphasis supplied.) It seems possible that there may be two liens (§192.21, F. S.) (1) a specific lien against *the tangible personal property assessed*, and (2) a lien against *all the personal property of the taxpayer in the county where assessed* (§200.02, F. S.) which language may include personal property not assessed and the language seems broad enough to include intangible personal property, although the tax warrants to be issued and enforced under §200.27, F. S., merely mention tangible personal property. Each of these liens appears to attach as of January 1 of the tax year. A tax lien is a creature of statute, and, unless expressly made so by statute, a tax is not a lien on property (84 C. J. S. 1180, §585). In this state tax liens are creatures of statute, and are not recognized by the state constitution (State v. Culbreath, 140 Fla. 634, 192 So. 814, text 818; Prince Hall Masonic Building Assn. v. Jacksonville, 149 Fla. 109, 6 So. 2d 250, text 253), and exist only in accordance with the terms of the statute (St. Petersburg v. Fiore, 160 Fla. 106, 33 So. 2d 852, text 854). We find nothing in the statutes making an owner personally liable for the payment of taxes levied and assessed against his tangible personal property, neither do we find any statute making his real property liable for taxes levied and assessed against tangible personal property. "At common law there is no personal liability on the part of an owner for taxes levied against his property" (84 C. J. S. 1318, §643). See also Florida Industrial Company v. State, 114 Fla. 1, 152 So. 717, holding no personal liability for real estate taxes.

"In the absence of a statute to the contrary, a tax lien which has become attached to personal property follows it into the hands of a purchaser, even though he is a purchaser for value without notice" (84 C. J. S. 1196, §593). This rule is doubtless subject to the property in question being followed into the hands of such purchaser and being identified for the purpose of seizure and sale. The lien appears to be against the property subject to it and we find nothing in the Florida statutes extending the tax liability to any other property, although it may have been exchanged or purchased with the property against which the lien attached. "The purchaser, however, incurs no personal liability for taxes assessed against his seller, even though he takes subject to lien for their payment. The lien is the only charge against him and extends only to the property bought; it does not attach to any other goods he may possess or acquire. Moreover, the lien is only against the specific property in the hands of the purchaser, where there has been no intermingling with other property." Where there has been an intermingling by the purchaser with other like or similar property

it may be seized, unless the purchaser will point out the portion of the intermingled property subject to the tax lien. (51 Am. Jur. 885, §1013).

Answering the 1st above question, it appears that the lien provided by §200.02, F. S., is against the tangible personal property of the taxpayer within the county, including but not limited to the property assessed, which lien attaches as of Jan. 1 of the tax year and continues until the taxes are paid. The lien may be enforced against such property, so long as it may be identified, even in the hands of a purchaser. However, the officer should collect the tax out of other tangible property in the hands of the taxpayer so long as he possesses sufficient property, and only resort to property subject to the tax lien in the hands of third persons when the taxpayer is possessed of no property subject to seizure and sale.

The lien being against the property itself and not a personal liability of the taxpayer, the 2nd and 3rd questions are answered in the negative.

055-48—March 3, 1955

WELFARE

UNIFORM SUPPORT OF DEPENDENTS LAW—§409.182, F. S.

To: *C. C. Codrington, Director, State Department of Public Welfare, Jacksonville*

QUESTIONS:

In administering §409.182 F. S. can legal action to obtain support be taken under the uniform support of dependents law in the following situations:

Situation 1: If the divorce was granted in this state, can action be taken to enforce the provisions for support included in the original divorce decree even though the absent parent is now residing in another state?

Situation 2: If the divorce was granted in this state but the original divorce decree did not include any provision for support of the children, would it be necessary to reopen the divorce case and have it amended to include provision for support, or could action be taken to obtain support from the parent now living in another state without reopening the divorce case in this state?

Situation 3: If the divorce was granted in another state, can action be taken by a woman now living in this state to enforce the provisions of the divorce decree for support of the children against the father who is still living in the state where the divorce was granted?

Situation 4: If the divorce was granted in another state but included no provision for the support of the children, can action be taken to reopen the divorce case in the other state and amend the original decree to provide for support? Under these circumstances, can action be taken for support without opening the divorce case?

AS TO SITUATION 1:

The uniform support of dependents law of Florida is not applicable to enforce the provisions for support included in a decree of divorce. The action, therefore, to support the terms of the decree would necessarily have to be instituted on the basis of the decree itself. The Florida decree of support, however, would probably not be enforced in a state other than Florida as it is a decree subject to modification and as such not entitled to full faith and credit within the meaning of this provision in the federal constitution. See U. S. Const., Art. IV, §1; *Lechner v. Lechner*, 154 Fla. 114, 16 So. 2d 816.

AS TO SITUATION 2:

Assuming that the husband in this instance procured the divorce, it appears that he would still be liable for the support of his children notwithstanding the fact that he has obtained such a decree which does not provide for the support of such children. See §88.04(7), F. S. Because of the terms of sub §(7), making a respondent husband liable for the support of any dependent child notwithstanding the fact that he has obtained in any state or country a final decree of divorce or separation from his wife, it appears not to be necessary to reopen the divorce case and have it amended to include provision for support of the children. The proceeding where the husband has obtained the divorce from the wife would be under §88.07(3), F. S.

Any proceeding in another state pursuant to the provisions of our Florida uniform support of dependents law (Ch. 88, F. S.) would, of course, depend upon whether or not the respondent state has substantially similar or reciprocal laws regarding the support of dependents.

It would appear from the wording of §88.04(7), F. S., that where the wife has procured the decree of divorce, then she must proceed according to the terms of the decree rather than under the provisions of the uniform support of dependents law.

AS TO SITUATION 3:

The Florida court could not acquire jurisdiction over the person of the husband in this situation as long as he remained outside of Florida. See *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565. Thus, no personal action of this nature could be brought in Florida against a husband who is residing in another state because of his immunity from service of process as long as he remains outside Florida.

AS TO SITUATION 4:

Whether or not an action may be maintained to reopen a divorce case in another state and amend the original decree to provide for the support would depend upon the law of the state in which such action was to be brought. Generally, a court has the authority after a final decree of divorce which is silent as to maintenance of children to make another order providing for such maintenance but there is authority in some states that no such order as to maintenance can be made if the original decree is silent thereon. See 27 C. J. S. 1165, Divorce, §306.

055-49—March 4, 1955

LEGISLATURE

LEGISLATION—COUNTY SALES AND USE TAX— CONSTRUCTION AND MAINTENANCE OF PUBLIC SCHOOLS

To: Thomas D. Bailey, Superintendent Public Instruction, Tallahassee

QUESTION:

May the legislature, by either a general statute with a referendum or a special or local act, provide local additional sales and use taxes for individual counties, the proceeds of which would be used only for public school construction and maintenance, to become effective only in such of the counties as may by referendum vote the statute effective in such counties?

Section 20, Art. III, State Const., provides in part that "the legislature shall not pass special or local laws . . . for the assessment and collection of taxes for state and county purposes;" however, this constitutional inhibition "goes only to the manner or method of assessing taxes, and does not forbid the legislature to authorize *by special or local law* a county to levy a tax for a local or county purpose" pursuant to the provisions of §5, Art. IX, State Const., which section provides in part that "the Legislature shall authorize the several counties and incorporated cities or towns in the state to assess and impose taxes for county and municipal purposes and for no other purposes . . . The Legislature may also provide for levying a special capitation and a tax on licenses . . .," (*Kroegel v. Whyte*, 62 Fla. 527, 56 So. 498; *McMullen v. Pinellas County*, 90 Fla. 398, 106 So. 73, text 74; *Whitney v. Hillsborough County*, 99 Fla. 628, 127 So. 486, text 491; *State v. Cone*, 130 Fla. 158, 177 So. 854, text 858). The above quoted language in §5, Art. IX, State Const., "precludes any other theory than that counties may *by special or local law* be empowered severally to assess and collect taxes for county purposes," so long as the assessment and collection of such taxes are directed and controlled by general statutes (*McMullen v. Pinellas County*, *supra*; see also *Kroegel v. Whyte*, *supra*); however, the taxes in issue in these cases appear to have been ad valorem and not excise or license taxes. (Emphasis supplied.)

The court in *State v. Lee*, 122 Fla. 639, 166 So. 249, text 254, which considered the chain store tax of 1935, stated that "under the Florida decisions a privilege tax is an excise tax and is authorized by §5, Art. IX, of the Constitution, as a license tax." Gasoline taxes (which are in the nature of sales taxes) imposed by Ch. 208, F. S., are excise taxes imposed upon the privilege of selling gasoline (*United States v. Lee*, 153 Fla. 94, 13 So. 2d 919, text 921; *Orange State Oil Company v. Amos*, 100 Fla. 884, 130 So. 707, text 709). The sales and use taxes imposed by Ch. 212, F. S., were considered by the court, in *Gaulden v. Kirk*, Fla., 47 So. 2d 567, *Spencer v. Mero*, Fla., 52 So. 2d 679; *Thompson v. Inter-County Telephone and Telegraph Co.*, Fla., 62 So. 2d 16, and *Gasson v. Gay*,

Fla., 49 So. 2d 525, as being in the nature of privilege or license taxes, authorized under §5, Art. IX, State Const.

Section 167.431, F. S., authorizes "the several cities and towns in this state" to levy an excise tax against the purchase of the public utilities therein named; however, there is nothing in said statute requiring that all cities and towns levy such a tax or that the tax imposed be the same in all cities levying the said tax. This act has been upheld by the court as a license tax under §5, Art. IX, State Const. (*Tamiami Trail Tours v. City of Tampa*, 159 Fla. 287, 31 So. 2d 468; *Peninsular Telephone Co. v. Clearwater*, Fla., 39 So. 2d 473; *State v. City of Pensacola*, Fla., 40 So. 2d 569; *State v. Lakeland*, Fla., 42 So. 2d 580; *State v. Daytona Beach*, Fla., 42 So. 2d 764; *State v. Bartow*, Fla., 48 So. 2d 747; and *Orlando v. Natural Gas and Appliance Co.*, Fla., 57 So. 2d 853). Although the following cases struck down excise or license taxes attempted to be imposed by municipalities, they were struck down because the power attempted to be exercised had not been delegated to the municipality and not on the want of power in the legislature to authorize such a tax (*DeLand v. Florida Public Service Company*, 119 Fla. 804, 161 So. 735, municipal utility tax; *Miami v. Kayfetz*, 158 Fla. 735, 30 So. 2d 521, municipal tax on admissions; and *Asbell v. Green*, 159 Fla. 702, 32 So. 2d 593, text 600, municipal sales and use tax). In the last above case the court remarked "we do not mean to hold that the city of Panama City has not the power to levy an excise tax in the form of a sales tax on businesses, occupations and privileges, but if such imposition of taxes is to be held valid it must apply to cases where the payer of the tax is engaged in a series of transactions and cannot be made to apply to casual, isolated or infrequent transactions . . ." (So. text 600). In *Bentley-Gray Dry Goods Co. v. Tampa*, 137 Fla. 641, 188 So. 758, text 760 and 763, the municipality had levied a tax of 60 cents upon each \$1,000 of gross sales made by wholesalers in said municipality during each fiscal year, concerning which the court remarked that "we find that by the great weight of authority in both state and federal courts the tax here imposed is valid . . ." The power of a municipality to levy a sales tax must be granted by the legislature or by fundamental law (64 C. J. S. 721, §220). We are, therefore, of the opinion that under legislative authority a municipality may levy a sales tax, although no other municipality in the state may levy a like tax. We feel that a single municipality may by local or special act be granted authority to levy a sales tax. However, a municipality is not a county.

The 2nd and 3rd gasoline taxes imposed by Ch. 14575, 1929, were held, in *Amos v. Mathews*, 99 Fla. 1, 126 So. 308, text 319, to have been county, and not state, excise taxes imposed pursuant to §5, Art. IX, State Const.; however, these taxes were imposed in all counties, and not in only a portion of them. Doubtless municipal excise or license taxes are imposed pursuant to the following authority in §5, Art. IX, State Const., to wit, "The Legislature may also provide for levying . . . a tax on licenses." County and municipal license taxes are imposed pursuant to this provision of the constitution by §205.02, F. S., in all of the counties. It, there-

fore, seems that a county sales tax (license tax in the nature of an excise tax) might be imposed in all of the counties of the state as are license taxes under said §205.02, F. S. There is but little applicable general case law on the question of county license taxes imposed by local acts applicable to a single or a small group of counties (American Digest System Key No. 5¼; 53 C. J. S. 473, §9). The legislature of Florida may enact local or special laws in all cases not expressly enumerated in §20, Art. III, State Const. (State v. Pearson, 153 Fla. 314, 14 So. 2d 565, text 567; State v. Jacksonville, 157 Fla. 276, 25 So. 2d 569, text 570). An examination of said section of the constitution reveals no prohibition against the levy of a license tax or excise tax by local or special law; only local or special laws "for the assessment and collection of taxes for state and county purposes" are mentioned in this section and this provision has been construed to relate to the assessment and collection of taxes and not to the taxes themselves; legislative authorization to a county to levy a tax for local county purposes is not prohibited (McMullen v. Pinellas County, 90 Fla. 398, 106 So. 73, text 74). The levy of a county sales tax in a particular county does not appear to be prohibited by express provision in the state constitution.

The above observations and authorities seem to indicate an affirmative answer to the above question, unless the levy and collection of a sales or use tax in a single or in a small group of counties would be violative of the equal protection provisions of the state and federal constitutions. In this connection it should be remembered that the constitutional provision found in §1, Art. IX, Fla. Const., relates to ad valorem taxation (Miami Beach College Corp. v. Tomlinson, 143 Fla. 57, 196 So. 608) and not to excise or license taxes (Jacksonville Gas Co. v. Lee, 110 Fla. 61, 148 So. 188, text 191; State v. Coleman, 122 Fla. 434, 165 So. 569, text 571; Florida Sugar Distributors v. Wood, 135 Fla. 126, 184 So. 641, text 643). The provision in §1, Art. IX, State Const. for equality and uniformity of taxation relates to the taxing units of the state. "The rates of state taxation must be equal and uniform throughout the entire state, though the rates of tax levies for county purposes may differ in the several counties, each county being a separate taxing unit." (State v. O'Quinn, 114 Fla. 222, 154 So. 166, text 168; see also W. J. Howey Company v. Williams, 142 Fla. 415, 195 So. 181, text 182). The tax rates to be assessed by the several counties for the several county funds provided in §193.32, F. S., may and actually do differ from county to county. For the county general fund, the county fine and forfeiture fund, the county school fund and the other funds provided in said section the rate in each of the several counties is not required by the equal and uniformity provision or the equal protection provision of the state constitution to be the same in each of the several counties. Although the taxes imposed pursuant to §193.32 F. S. are ad valorem taxes imposed upon real estate according to its assessed value, we see little distinction between the levy of a sales tax upon sales made in the county according to the amount of the sales made. A gasoline tax has been upheld against the contention that it is violative of the equal protection clause of the federal constitution where it applies "alike to all domestic

sales within the state or *taxing district*" (16 C. J. S. 1074, §529). The equal protection clauses of the state and federal constitutions were "not intended to secure to all persons in the U. S. the benefit of the same laws and the same remedies, whether as between states or between different sections of the same state" (Sawyer v. State, 94 Fla. 60, 113 So. 736, text 740; see also 16 C. J. S. 1003, §506).

Although the courts have held that the legislature may enact a general law and make it effective only in such counties as may by affirmative vote at a referendum election adopt it (Whitaker v. Parsons, 80 Fla. 352, 86 So. 247, text 252) many of such general laws have not presented questions of equal protection as would a statute such as the one here under consideration. The Whitaker v. Parsons case involved an enactment designed to control or eradicate tick infestation in Florida, which control and eradication by the very nature of things could not be accomplished statewide in one operation. As a matter of fact eradication required many years of operation progressing from one group of counties to another until the entire state was covered. No such question of necessary progression is here required.

Here we are asked to consider the constitutionality of two types of enactment: *first*, a general statute potentially applicable to all counties, but not to become effective in any county unless and until approved by a majority vote of the electors in said county, and *second*, a local or special statute made specifically applicable to a specified county or counties. Under either type of enactment some of the counties would impose a county sales tax while others would not. As a general state sales tax now exists, under which there is levied in all counties a state sales tax of 3% of the amount of the sale, the levy of a county sales tax in one or more, but less than all, of the counties of the state (say a 1% sales tax), when the general 3% tax is taken into consideration, would result in a sales tax of 3% in most of the counties and a 4% (or maybe more depending upon the special or local act) in other counties. The division between a 3% and a 4% sales tax would be a county line; a line which in many cases only a surveyor could locate with any degree of certainty. A 4% tax being charged on one side of this line and a 3% tax on the other side; which, where the places of business are located only a short distance apart, might and probably would result in the loss of business to one of the said businesses. (See discussion in 12 Am. Jur., pp. 236, 240 and 241; also 33 Am. Jur. p. 357.)

Although municipalities and counties appear to be treated substantially alike by §5, Art. IX, State Const., as to licenses and license taxes, a study of the entire constitution reveals a material difference between municipalities and counties. No powers are authorized for the counties similar to those that may be granted municipalities under §8, Art. VIII, State Const. Strictly speaking, a county is distinguishable from, and is not a municipality (20 C. J. S. 758, §3). Municipal boundaries are largely dependent upon the concentration of urban population; county boundaries are not. Business establishments in a county are usually located in or around the municipalities, with but few of them in the rural

areas. Territorial discrimination, in the case of the imposition of a local sales tax, would be far more evident when imposed county-wide than when imposed in a single municipality.

There the application of a statute, such as a statute imposing a local sales tax, is dependent upon a referendum to the electors of the locality its application of necessity is dependent upon the will of the electors voting, although they may be only a small portion of the persons residing in the community. In such a case the application of the statute may be determined by a minority group of the buying public. In its last analysis the making of a statute dependent upon a referendum delegates to the electors of the county the power to impose or not impose a sales tax. There is little if any distinction between the buying public in one county or in another county; or for that part in the entire state. It would be hard, if not impossible, to divide the buying public of this state into districts and distinguish one group of them from another. The main distinction between the buying public in a large county and in a small county is the total volume of the purchases; the items purchased and the nature of the purchases would largely be the same.

Accordingly we entertain doubt that §5, Art. IX, State Const., when read and considered in connection with the provisions in the state and federal constitutions for equal protection, and the question of the delegation of legislative powers, authorizes or permits the imposition of a county sales tax applicable to only a few counties. It seems hard to justify a sales tax in one county and not in other counties, and especially the adjoining counties. Certainly it would present problems of tax inequality based on county residence and divided merely by county boundaries.

As the subject is one not yet passed upon by our supreme court, and in which we entertain doubt as to the proper answer, we cannot at this time express an opinion upon the above mentioned question; however, we know of no reasonable reason why such an enactment might not go to the legislature which, if enacted into law, would lay the foundation for a court decision upon the question.

055-50—March 7, 1955

EDUCATION

TEXTBOOKS—INSTRUCTIONAL AIDS AND MATERIALS— STATE PURCHASING COUNCIL—§287.01(2) AND CH. 233, F. S.

To: *Ralph R. Siller, Executive Secretary, State Purchasing Council, Tallahassee*

QUESTION:

Do textbooks and all other instructional aids and materials covered by Ch. 233, F. S., come within the exception provided in §287.01 (2), F. S.?

Section 287.01 (2), F. S., provides:

“The word ‘commodities’ shall mean and include the

various commodities, goods, merchandise, equipment and other personal property purchased by the agencies of the state, but not including the materials covered by chapter 233, F. S."

Chapter 233, F. S., relates to courses of study and instructional aids. It deals largely with textbooks to be purchased by the state school system and furnished free to students. It also provides for other instructional aids which may be purchased by county school boards after consideration and approval by special committees appointed by the state superintendent and approved by the state board of education.

The instructional aids contemplated by this section (§233.12, F. S.) are not specifically defined but left to the discretion of the committees created for this purpose and the state superintendent of public instruction.

Since this subject matter is an integral part of the provisions of Ch. 233, F. S., it would appear to be included in the exception provided in §287.01 (2), F. S.

Your question is therefore answered in the affirmative.

055-51—March 7, 1955

REGULATION OF TRADE, COMMERCE AND INVESTMENTS

MILK COMMISSION—PRICE FIXING—CH. 501, F. S.

To: *L. K. Nicholas, Jr., Administrator, Florida Milk Commission, Jacksonville*

QUESTION:

Are the following motions adopted by the Florida milk commission within the purview of Ch. 501, F. S.?

(a) "All present prices as established by orders of the milk commission, in all markets, be declared as the MAXIMUM PRICE and that the minimum price shall be set at 15% LESS than the maximum. If, in the retail price should a fraction of a cent occur in the computation of the 15%, between the maximum and the minimum, then the fraction shall be eliminated.

(b) "The producer prices as now established by commission orders shall remain as such unless and until they are changed by commission order established after public hearings have been held."

Section 501.04 (9), F. S., relating to the powers of the Florida milk commission, provides, among other things, that "The commission *after public hearing* and investigation may fix the prices to be paid producers by distributors, milk dealers or producer-distributors in any market or markets; *may fix the minimum and maximum wholesale and retail prices to be charged for milk in any market. . .*" (Emphasis supplied.)

Section 501.13 (1), F. S., relating to orders of the Florida milk

commission fixing the price of milk provides that "The commission shall ascertain by such investigations and proofs as the emergency permits and requires what prices for milk in the several localities and markets of the state and under varying conditions, *will best protect the milk industry in the state and insure a sufficient quantity of pure and wholesome milk to adults and minors in the state, having special regard to the health and welfare of children, and be most to the public interest. The commission shall take into consideration all conditions affecting the milk industry including the amount necessary to yield a reasonable return to the producer and to the milk dealer.*" Said §501.13 in sub §(2) provides in substance that after making the foregoing investigation and determination, the commission "shall fix by official order the minimum wholesale and retail prices and *may fix by official order the maximum wholesale and retail prices to be charged for milk handled within the state for fluid consumption. . .*" Sub §(7) of said section provides in part as follows: "After making such investigation and *before making, revising or amending any order fixing the price to be charged for milk, the commission shall give a hearing thereon to all parties interested upon reasonable notice to such interested parties and to the public of such hearing . . .*" (Emphasis supplied.)

Such powers of the milk commission to fix maximum and minimum prices for milk appears constitutional in view of the supreme court's decision in the case of *Miami Home Milk Producers Assn. v. Milk Control Board*, 169 So. 541.

In view of the foregoing, it is my opinion that the action of the commission is lawful and within the scope of its authority, provided the procedure set forth in the statute providing for public hearing, etc. was followed.

055-52—March 8, 1955

TAXATION

DELINQUENT TAXES—SUBDIVISION PLATS—DUTIES OF CLERK OF CIRCUIT COURT—§192.56 AND CH. 177, F. S.

To: *W. C. Baggett, Clerk Circuit Court, St. Lucie County, Fort Pierce*

QUESTION:

What is the duty of the clerk of circuit court regarding the filing of a subdivision plat, approved by the board of county commissioners, upon which there are delinquent taxes?

Section 192.56, F. S., provides as follows:

"No land shall be divided or subdivided and no drawing or plat of the division or subdivision of any such land shall be filed or recorded in the public records of any county in this state until *all taxes shall have been paid on said land.*" (Emphasis supplied.)

The above quoted statute makes it mandatory that "all taxes shall have been paid" on the divided or subdivided lands before the plat of such lands may be filed for record.

Included among the taxes which shall have been paid on such divided or subdivided lands before a drawing or plat of such lands may be filed or recorded are delinquent county and municipal taxes and all county and municipal taxes which are due and payable at the time such drawing or plat is presented for filing or recording.

Therefore, it is my opinion that it is the duty of the clerk of circuit court, as the public recording official, regarding the filing of a plat, approved by the board of county commissioners, to require all delinquent county and municipal taxes and all county and municipal taxes due and payable be paid on divided or subdivided lands before receiving for record any drawing or plat of such divided or subdivided lands. See also Clerk's Manual, p. 66, to the same effect.

Also, your attention is directed to Ch. 177, F. S., for other duties of a public recording official in connection with receiving plats for record.

055-54—March 10, 1955

CITIES AND TOWNS

TAXATION—UTILITY EXCISE—CHURCHES—EXEMPTION—
§167.431, F. S.

To: *Norman R. Lyons, City Attorney, Miami*

QUESTION:

Are churches entitled to exemption from a utility excise tax imposed upon utilities pursuant to §167.431, F. S.?

Said §167.431, F. S., provides in part that a municipal ordinance imposing a utility tax pursuant to said section "may provide that federal, state, county and municipal governments and their commissions and agencies and other tax supported bodies, public corporations, authorities, boards and commissions, shall be exempt from the payment of the taxes imposed and levied thereby" We find no other provision in the statutes of Florida exempting religious institutions from the payment of such excise taxes. The tax exemption provisions in §1, Art. IX, and §16, Art. XVI, State Const., appear to apply to property taxes and not excise or license taxes. (*City of Lakeland v. Amos*, 106 Fla. 873, 143 So. 744, text 747).

The above question is answered in the negative; unless the municipality by valid ordinance has expressly granted such an exemption. We do not pass upon the power and jurisdiction of any particular municipality to expressly grant such an exemption; the municipal charter of each municipality should be examined to determine its power and jurisdiction to grant such an exemption.

055-55—March 8, 1955

ELECTORS AND ELECTIONS

BOND ELECTION—ELECTORS' QUALIFICATIONS—PINELLAS COUNTY—LONG KEY SEWER DISTRICT— CH. 29425, LAWS OF FLORIDA, 1953

To: *Arthur T. Ratcliffe, St. Petersburg Beach*

QUESTIONS:

1. Is a qualified elector, residing in Long Key sewer district (in Pinellas county and created by Ch. 29425, 1953) who owns no realty within the district but who owns realty within Pinellas county, entitled to vote in the coming district's bond election?

2. Can the board of commissioners of the Long Key sewer district lawfully delete or excise from the certified list of freeholders furnished by the supervisor of registration the names of those persons who do not own realty within the limits of the district, and bar such persons from voting as freeholders in the district bond election?

Your questions are answered as follows:

1. The wording of §6, Art. IX, Fla. Const., here relevant is that this district may issue general obligation bonds "only after the same shall have been approved by a majority of the votes cast in an election in which a majority of the freeholders who are qualified electors residing" in such district "shall participate."

To be qualified to vote in such election, a person must be a duly registered elector in a precinct located in such district and must be possessed of "an immediate beneficial ownership, interest, legal or equitable, in the title to a fee simple estate in land" located in such district. On the point, see attached opinion 053-259. Hence, the question is answered in the negative.

2. Mention here is made of a "certified list furnished by the supervisor of registration." As we construe the question, we are not called upon to deal with the regularity of the use of such a list; and the answer to this question is limited to the specific inquiry.

It is recognized that registrants are required at the time of registration to evidence if they are freeholders; and for general registration purposes, if the elector owns real property at any place in the county, he is registered as a freeholder. It is further recognized that, as Justice Terrell expressed it in *Holmer v. State, Fla.*, 28 So. 2d 586, "in a fluid population, such as exists in a new country like ours, electors are constantly moving from place to place"; and the same is true of their freeholder status. Because of this and the requirement that the freeholder status of an otherwise qualified elector in a bond election is fixed on election day (*Holmer v. State, supra*), it is quite reasonable that the legislature should have provided for reregistration for bond elections, as provided by §97.081, F. S.

However, we assume that this was not done. We must resort to the provisions of §100.241, F. S., in an attempt to find an answer to the question, certain features of which are mentioned: Sub §(2)(a) provides that at such a freeholder election "the regular registration books of the county shall be used". The effect of sub §(2)(b) is that the number entitled to vote in such election shall at least be *prima facie* established from the registration books. Sub §(2)(c) provides that "Those persons shown on the registration books in a freeholders' election to be freeholders shall be permitted to vote in the election." Sub §(2)(d) provides the proof to be made by a freeholder elector whose registration record does not evidence freeholder status.

Whether the use of the supervisor's certified list or use of the "registration books" applicable to the district is proper, depending upon controlling law, and despite the provisions of §100.241, F. S., the duty devolves upon the supervisor, from information available, to correct such list up to election day or, if the registration records are used, to indicate on such records those not qualified to participate in said bond election and to correct said records up to election day. The importance of this is demonstrated in the opinion of the court in *Holmer v. State*, *supra*. No doubt the governing body of the district can be of considerable assistance to the supervisor in the discharge of the duties mentioned.

The importance of attempting to meet the full requirements of freeholder status is further evidenced in *Bowers v. Alachua County, Fla.*, 8 So. 2d 395. To quickly understand the effect of that case, reference is made to §100.271, F. S. (as to canvass of vote) and §100.281 F. S. (as to determinations to be made). The single headnote in said case is quoted:

"Board of county commissioners, in making its findings as to number of freeholders in county qualified to vote at special bond election, was not bound by lists of supervisor of registration and sent out with ballot boxes if lists were found to be erroneous or untrue, but board had power at a time subsequent to holding of the election to inquire and find proof as to number of freeholders in county qualified to vote."

And a reading of the case will evidence that the board's consideration of the number of eligible freeholders was 20 days after the bond election.

Hence, it would appear that the duty rests upon the supervisor to make changes in said list (if such may be used) or to have the registration records evidence voting and freeholder status for the election (if such records are used) up to the day of the election. It will be noted from the *Holmer* case that while persons must register during the period provided by law for the books to be open, freeholder status is subject to change up to the time a registered elector applies to vote. The above observations furnish an answer to this question.

055-56—March 10, 1955

TAXATION

TAX SALES—COUNTY OWNED LANDS—SALE FOR NON-PAYMENT OF TAXES—§§194.47, 194.55 AND 194.60, F. S.

To: James E. Wood, Jr., County Attorney, Sarasota

QUESTION:

In what manner may a county dispose of lands acquired pursuant to §194.47, F. S., for non-payment of taxes where the county has had title to said lands for a period of 2 years or longer?

We have carefully studied §194.55, F. S., as amended by Ch. 24206, 1947, and we find that that section provides, among other things, that the board of county commissioners shall, within 90 days after the entry of the decree, as provided for in §194.47, F. S., determine the price of each parcel of such lands "which price shall not be less than 50 per cent of the amount of the last assessed valuation appearing upon the tax roll" (sub §1); that the board of county commissioners shall sell and convey such lands at public sale; that the amount to be deposited by any person desiring to purchase any parcel of said lands shall be a sum "not less than the price as determined by the board of county commissioners and recorded in the book marked 'county lands acquired for delinquent taxes' plus the estimated cost of advertising", etc.; that the amount deposited with the clerk by the person desiring to purchase the lands shall be taken and considered as the first bid and if no other bids are made, the land shall be sold to him and the amount deposited by him shall be applied on his bid; and that if other bids are made, the land shall be sold to the highest bidder (sub §2). It is further provided in §194.55 (2), F. S., that "after any of the foregoing lands so acquired by the county have been available for sale for at least 2 years and no application to purchase same has been made, the board of county commissioners may sell and dispose of the same in *any method provided by law . . .*" (Emphasis supplied.) It is significant, we think, that in §194.55, F. S., it is stated that the minimum price for which lands may be sold under that section shall be not less than 50% of the last assessed valuation appearing upon the county tax roll.

Section 194.60, F. S., enacted as Ch. 23830, 1947, provides that when the title to any lands has become vested in any one of the counties of the state in pursuance of Ch. 20722, 1941, as amended by Ch. 22079, 1943, and other amendatory acts thereof, and has remained vested in the county for a period of 2 years, etc., the board of county commissioners of the county having title to said lands *may* at its option order the sale of said lands or any part, or parts thereof, at public outcry to the highest bidder (sub §1). In §194.60 (6) it is provided that the board of county commissioners shall have the power and authority in ordering such sales to be held, *to fix minimum bids for which said lands (as to individual parcels) shall be sold.* Nowhere in §194.60, F. S., is it stated that the minimum bid or value for which the lands must be sold must be fixed at any specific ratio or percentage of the last assessed

value as in the case when sales are made pursuant to §194.55, F. S. Section 194.60, F. S., does not prevent county commissioners from selling such lands for as little as 5, 10 or 15% of the last assessed valuation. The county commissioners are given the power and authority, without limitation, to fix minimum bids for which such lands may be sold. It is to be noted that the authority and duty of the county commissioners to sell the lands under the provisions of §194.55 appear to be mandatory whereas §194.60, F. S., seems to leave the matter of whether sales are to be made under the terms of the latter section within the sound discretion of the boards of county commissioners.

The foregoing observations lead us to the conclusion that §194.55, F. S., and §194.60 F. S. are not in conflict. Section 194.55 appears to us to apply exclusively to lands which the county has had title to for a period not exceeding 2 years and §194.60 appears to us to state the procedure by which the county *may* sell such lands when title to said lands has been vested in the county for a period of 2 years or longer. In other words, when title to such lands has been vested in the county for a period of more than 2 years, §194.60, F. S., appears to allow the county to sell and dispose of such lands at a minimum price to be determined by the board of county commissioners even though such minimum price may be less than 50% of the last assessed valuation.

However, the county commissioners apparently are not required to sell any lands under §194.60, F. S., but may, in their discretion, sell the lands under the terms of §194.55, F. S., and in such event, the county commissioners would be bound by the terms of that section and could not accept a minimum price of less than 50% of the last assessed valuation even though the county had had title to the lands for more than 2 years.

These observations seem to answer the above question.

055-58—March 11, 1955

FLORIDA CITRUS CODE

CITRUS COMMISSION—ADVERTISING DISPLAY—SALE AND DISTRIBUTION TO OUT-OF-STATE SCHOOLS—§601.15, F. S.

To: *W. F. Robinson, Attorney, Florida Citrus Commission, Leesburg*

QUESTION:

Does the Florida citrus commission have authority to print advertising display material beneficial to the Florida citrus industry and to furnish this material at cost to out-of-state schools who desire to purchase said material from the commission?

Section 601.15 (2), F. S., provides, in part:

"The commission shall plan and conduct a campaign for commodity advertising, publicity, and sales promotion to increase the consumption of citrus fruits and may contract for any such advertising, publicity,

and sales promotion service. To accomplish such purpose, the commission shall have power, and it shall be its duty to disseminate information:"

Section 601.15 (7), F. S., provides, in part:

" . . . After the payment of all necessary administrative expenses of the commission and other expenditures provided for in this chapter, the money levied and collected under the provisions of sub §(3) of this section shall be used exclusively for the advertisement of citrus fruits, either in fresh or processed form produced in the state in such equitable manner and proration as the commission may determine taking into consideration the pro rata payments made on the various varieties and any other relevant and pertinent factors, but provided that funds expended for advertising thereunder shall be expended through an established advertising agency within this state."

If, in the discretion of the commission, the Florida citrus industry would benefit from the distribution of display material to public schools in other states, I know of no reason why it could not use this method of advertising.

I know of no statutory prohibition against the sale of printed advertising material by the commission.

In view of the requirement above quoted "that funds expended for advertising thereunder shall be expended through an established advertising agency within this state," I believe it would be necessary for the sale and distribution of the material in question to be performed by an advertising agency as defined by law on a contract basis.

Although you have not raised the question in your request for an opinion, I think it proper to point out that there is no existing legal method (such as a revolving trust fund created by law) which could be used by the citrus commission to receive and expend funds received by the commission from the sale of the materials in question. In other words, it would appear that in the absence of enabling legislation, the commission might have to deposit all money received from the sale of the advertising display material in the state general revenue fund. This of course could result in no direct benefit to the citrus commission. This difficulty could be remedied, however, by appropriate legislation at the forthcoming legislative session and it is suggested that the commission consider such action.

Your question, subject to the above observations, is therefore answered in the affirmative.

055-59—March 11, 1955

TAXATION AND FINANCE

CONSTRUCTION CONTRACTS—DETERMINATION OF WAGE SCALE—SECRETARY OF STATE—§215.19 (2), F. S.

To: *Thos. D. Bailey, Superintendent, State Department of Education, Tallahassee*

QUESTION:

When the secretary of state has made determination as to the prevailing wage rate as provided by §215.19, F. S., does such determination obtain throughout the life of the contract for the particular construction concerned?

Section 215.19 (2), F. S., provides, in part:

"In case of dispute which the contracting officer is unable to settle as to the prevailing rate of wages or the proper classification of skills of employees, the matter shall be referred to the secretary of state for determination. The secretary of state may call on the Florida industrial commission for technical assistance in determining the prevailing rate of wages and proper classification of skills. The decision of the secretary of state shall be conclusive on all parties. . . ."

The language used in this act apparently indicates an intention on the part of the legislature to provide only one determination of the prevailing wage under ordinary circumstances in any one construction contract.

"The decision of the secretary of state shall be conclusive on all parties . . ." would appear to end the matter in any ordinary dispute. The secretary of state is not placed under a duty by §215.19, F. S., in my opinion, to reopen cases of this kind once he has made a proper determination simply on the whim of one of the parties. I think it is possible, however, that in an unusual situation wherein a construction contract, for example, may extend over an unusually long period of time and during this time drastic economic changes take place, it would be entirely proper for the secretary of state upon request of the parties to reopen the matter and make a new determination of wage rates. The decision to take such action, however, must be based on the discretion of the secretary of state and I know of no mandatory legal requirement which would compel the secretary of state to reconsider a determination of this kind which he had previously made, if in his discretion a redetermination was unnecessary.

Your question is therefore answered in the affirmative, subject to the above observations.

055-60—March 17, 1955

CRIMES

GAMBLING—LOTTERY LAW VIOLATIONS—SHOOTING GALLERY—MINORS—REMEDY—§§849.01, 849.14, 823.05 AND 64.11, F. S.

To: David Neal, Mayor, City of Niceville

QUESTIONS:

1. A shooting gallery operator offers 3 shots for 25¢ at small red triangles on a card. As an inducement to get people to buy 3 shots for 25¢ the operator offers to pay \$5 to the shooter if he shoots inside of each of 3 red triangles running horizontally across the card and if each of the 3 bullets is clear and does not touch the red triangle. Does this type of operation violate the gambling laws of Florida?

2. What remedy, if any, is there against the shooting gallery operator when he permits minor boys to shoot and also permits them to hold matches, playing cards and other small objects in their hands while he shoots at such objects?

AS TO QUESTION 1:

It is my opinion that the above described operation violates §849.14, F. S., which reads as follows:

*"849.14 Unlawful to bet on result of trial or contest of skill, etc.—Whoever stakes, bets or wagers any money or other thing of value upon the result of any trial or contest of skill, speed or power or endurance of man or beast * * * shall be guilty of gambling, and shall be punished by imprisonment not exceeding 6 months or by fine not exceeding \$500."*

A trial of skill is involved when the shooter shoots at the 3 triangles in an effort to hit the places which will cause him to become entitled to the \$5 offered by the operator of the shooting gallery. When the shooter buys the 3 shots for 25¢ he bets or wagers his 25¢ against the \$5 offered by the operator. The words "bet" and "wager" are defined in 38 C.J.S. 43-44, Gaming, §1-c, as follows:

"The definitions of 'bet' and 'wager' ordinarily given imply that there must be 2 or more contracting parties having mutual or reciprocal rights with respect to the money or other things that are wagered, and usually called the stakes of the bet or wager, and that each of the parties shall jeopardize something, and have the chance to make something or to recover the stakes or thing bet or wagered on the determination of the contingent or uncertain event in his favor; but according to some decisions it is not essential that both parties should stand to lose, it being sufficient if one party stands to lose or win."

The transaction between the operator and the shooter meets this definition. There are 2 contracting parties, viz., the operator and the shooter. They have mutual rights with respect to the money that is wagered, that is to say, the shooter receives the operator's \$5 if the shooter hits the triangles in the right places and the operator gets the shooter's 25¢, with no return to the shooter, if the shooter fails to hit the right places. Each of them jeopardizes something; the shooter jeopardizes 25¢ and the operator jeopardizes \$5. Each has the chance to make something on the determination of the contingent or uncertain event of whether the shooter will hit the triangles in the right places, that is to say, the shooter has the chance to get the \$5 if he does hit the right places and the operator has the chance to get the 25¢ without any return to the shooter except the chance to shoot if the shooter doesn't hit the right places.

The very purpose of the operator's offer of the \$5 is to induce people to pay 25¢ for 3 shots who otherwise would not be interested in doing so. Most people would not think it worth 25¢ to fire 3 shots at a target if nothing more was involved, because it isn't worth that to most people to fire 3 shots at red triangles on a card. In determining whether a given operation constitutes gambling, the courts look to substance rather than form, and when we look at the substance of the shooting gallery operation, it is apparent that the shooter actually pays his 25¢ as a bet or wager against the operator's \$5, and the operator throws in the means of ascertaining the result for good measure, that is to say, he furnishes the place to shoot, the firearm, the 3 cartridges and the target.

A merchant conducts a gambling operation when he sells goods at their market value and by way of inducement gives each purchaser a chance to win a prize. The money which the purchaser pays for the goods also furnishes the consideration for the chance to win the prize. (See 54 C.J.S. 850-851, Lotteries, §4; 34 Am. Jur. 654, Lotteries, §10). And a person is conducting a gambling operation if he sells bonds issued for the purpose of obtaining a loan when the bonds undertake to pay the principal with interest and also any additional sum which the holder may win at a drawing. The money paid for the bonds also furnishes the consideration for the chance to win something for nothing. (See 54 C.J.S. 857, Lotteries, §10-b; 34 Am. Jur. 658, Lotteries, §15). By the same token, the 25¢ paid to the shooting gallery operator not only pays for the 3 shots but also furnishes the consideration for the chance to get the operator's \$5 for nothing, with the result that the 25¢ is wagered against the \$5.

For the purpose of illustration, let us assume that the operator raises his charges for the 3 shots and the chance to win something for nothing to \$10 and agrees to pay the shooter \$200 if the shooter hits the right places. Could it be doubted in such a case that the \$10 paid by the shooter actually constituted a wager or bet against the operator's \$200? I don't see how it could. And the fact that in the situation before us the shooter put up only 25¢ against the operator's \$5 in no way minimizes the fact that the 25¢ is a bet or wager.

Consequently I think that the transaction falls under the condemnation of said §849.14, F. S.

Further, I am of the opinion that the shooting gallery operator violates §849.01, F. S., which provides that:

"849.01 *Keeping gambling houses, etc.*—Whoever * * * in any place of which he may directly or indirectly have charge, control or management, either exclusively or with others, procures, suffers or permits any person to play for money or other valuable thing at any game whatever, whether heretofore prohibited or not, shall be punished by imprisonment in the state prison not exceeding 3 years, or by fine not exceeding \$5000."

The purpose and intent of said §849.01, F. S., was dealt with by the supreme court of Florida in *McBride v. State*, 22 So. 711, in words as follows:

"The purpose and intent of the section of the statute under discussion was to prohibit, not the gaming or gambling itself, but the keeping of a house or other place for any manner of gaming or gambling. If money or other thing of value is staked or wagered therein upon any result or event whatsoever, such house falls within the inhibition of this statute, whether the means adopted for the decision of the question as to who is the winner or loser of the amount wagered be a game prohibited by law or not."

and in the same case the supreme court of Florida said that:

"The consensus of the better opinions is that the wagering, betting, or laying of money or other thing of value upon the transpiring of any event whatsoever, whether it be upon the result of a game of chance or upon a contest of skill, strength, speed, or endurance, whereby one party gains and the other loses something for nothing, whether the parties betting be the actors in the event upon which their wager is laid or not, is gaming or gambling, within the meaning of these acts."

I think that when the shooting gallery operator permits a person to put up 25¢ for which he receives two things, (1) 3 shots at a target and (2) a chance to win \$5, the operator is permitting the shooter to play at a game for money within the contemplation of said §849.01, F. S.

AS TO QUESTION 2:

It may be that the parents of the boys could procure an injunction against the shooting gallery operator to restrain him from carrying on the practices set forth in the statement of this question, *supra*. However, it is not necessary for me to inquire into that possibility because there are other remedies which I believe will bring the entire matter to a head. As above indicated, the operator can be prosecuted for violating §849.01, F. S. and/or §849.14, F. S. In addition, his place of business is a nuisance

under §823.05, F. S., because the said gambling laws are violated there, and such nuisance can be enjoined under §64.11 et seq., F. S., upon a bill for injunction brought by the state attorney, the county prosecutor, or any citizen of the county. A prosecution and/or injunction suit would probably result in the closing down of the shooting gallery because without the gambling element it could hardly be conducted at a profit; hardly anyone would pay 25¢ for 3 shots at red triangles on a card when he stood to win nothing if he hit them all.

055-61—March 18, 1955

MOTOR VEHICLES

FINANCIAL RESPONSIBILITY LAW—PROPRIETY OF COVENANT NOT TO SUE IN LIEU OF RELEASE REQUIRED BY §324.04(2) (f), F. S.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTION:

Where the operator of a motor vehicle has no insurance coverage and is involved in an accident which invokes against him the provisions of Ch. 324, F.S. (financial responsibility law), does his securing of a "covenant not to sue" from a party or parties injured as result of such accident meet the requirements of §324.04(2) (f), F.S., that such operator shall obtain, from such party or parties, "release of liability"?

Pertinent parts of §324.04(1), (2) (b), (d), (f) and (g) are in substance as follows: Thirty days after receipt of notice of an accident involving a motor vehicle, resulting in bodily injury or death to any person or total property damage of \$50 or more, "the commissioner shall suspend the licenses of the operators of the motor vehicles involved in such accidents and in case of a non-resident operator, shall suspend such non-resident's operating privilege in this state", unless such operator shall, prior to expiration of such 30 days be found by the commissioner to be exempt from the operation of Ch. 324, F. S., based upon evidence satisfactory to him that: such operator did not cause or contribute to the accident; or had in effect at the time of the accident proof of financial responsibility as required by §§324.01(7) and 324.02; or had secured "*a duly acknowledged written agreement providing for release from liability by all parties injured as the result of said accident and had complied with one of the provisions of §324.02, F. S.*"; or had deposited with the state treasurer security to conform with §324.041, F. S. and had complied with one of the provisions of §324.02, F. S. The italicized wording above is the part of the law specifically referred to in the question. However, if a "covenant not to sue" constitutes a "release from liability" as contemplated by such italicized quoted matter, securing of such a covenant would also relieve such a person from complying in the alternative with the provisions of §324.041, F. S.

Chapter 324 is a "security-type" financial responsibility law, i.e., that in event of an accident invoking the provisions of the law, the motor vehicle operator found to be subject to its penalty provisions must evidence financial responsibility, to the extent required by the law, both with respect to damages resulting from such accident and future operation of a motor vehicle. Quite a number of our states have this more modern type of law; and while these laws in other states have in instances been judicially challenged for various constitutional reasons, uniformly they have withstood such tests. *Rosenblum v. Griffin*, N.H., 197 A. 701; *Surtman v. Dignan*, Mich., 15 N. W. 2d 471; *Heart v. Fletcher*, 53 N.Y.S. 2d 369; *Ballou v. Reeves*, Ky., 238 S.W. 2d 141; *Escobedo v. State Department of Motor Vehicles*, Cal., 222 P. 2d 1; *Doyle v. Kahl*, Iowa, 46 N.W. 2d 52; *Baker v. Fletcher*, 79 N.Y.S. 2d 580; *Larr v. Dignan*, Mich., 26 N. W. 2d 872; *Ohlson v. Mealey*, 37 N.Y.S. 2d 123; *State v. Stehlek*, Wis., 56 N.W. 2d 514; *Gillaspie v. Department of Public Safety*, Tex., 259 S.W. 2d 177.

These financial responsibility laws are not collection statutes nor is it their purpose to settle common law liability in relation to an accident. *Ballou v. Reeves*, supra; *Ohlson v. Mealey*, supra; *State v. Stehlek*, supra. These laws are police regulations relating to traffic, having for their purpose the assuring of financial responsibility of those operating motor vehicles upon public highways, and they are concerned with the privilege of such operation of motor vehicles. That the provisions of Ch. 324, F. S. have served such purpose is evidenced by the following: Prior to enactment of our first financial responsibility law in 1947 (Ch. 23626, which was concerned only with future operation after an accident), a comparatively small percentage of motor vehicle owners in Florida carried public liability and property damage insurance. During the 2-year period that law was in effect the percentage of motor vehicle owners in Florida purchasing such insurance rose to approximately 50%. With adoption of the present law (Ch. 25050, 1949) the percentage of motor vehicle owners in this state carrying such coverage has risen to approximately 81.5%.

The right to operate a motor vehicle upon the highways of Florida is a privilege as distinguished from a property right. *Thornhill v. Kirkman*, Fla., 62 So. 2d 740; *State v. Stehlek*, supra; *Rosenblum v. Griffin*, supra; *Ballou v. Reeves*, supra. The gist of the reasoning in these cases is that said privilege may be granted or withheld by the state under reasonable terms and conditions and measured in the light of public welfare.

As we have indicated, the requirements of §324.04(2)(f) and (g) are not unique to Florida but are found in similar form or effect in the modern "security-type" law. A casual survey of the opinions cited above relating to this type of law will evidence that such provisions have been sustained. Conceding the reasonableness of such provisions, the purpose of the statute, and the principle that the privilege of operating a motor vehicle upon our public highways may be controlled by the state, it must follow that unless a "covenant not to sue" is the same in

law as a "release of liability", then the question must be answered in the negative.

A distinction exists between a "release of liability" and a "covenant not to sue".

The term "release" has been defined as the "relinquishment, concession or giving up of a right, claim or privilege, by the person in whom it exists or to whom it accrues, to the person against whom it might have been demanded or enforced", 76 C.J.S. 629, §1. While a distinction may be drawn between a "release" and a "satisfaction" (Cleveland etc., R. Co. v. Hilligoss, Ind. 82 N. E. 485), in law a release may be considered as conclusive acknowledgment of satisfaction (State v. Tyler County State Bank, Tex., 277 S. W. 625, reheard, 282 S. W. 211). Where there are joint tort-feasors, release of one will release all. L. & N. R. Co. v. Allen, Fla., 65 So. 8; Roper v. Florida Public Utilities Co., Fla., 179 So. 904; Sauls v. Wilson, Fla., 191 So. 21.

A covenant not to sue has been defined as "a covenant by one who had a right of action at the time of making it against another person, by which he agrees not to sue to enforce such cause of action"; and "a covenant not to sue is not a release but is to be distinguished from a release, and the distinction, though technical or artificial, is clear." 76 C.J.S. 630, §3; and also see L. & N. R. Co. v. Allen, supra; Roper v. Florida Public Utilities Co., supra; Davidow v. Seyforth, Fla., 58 So. 2d 865. A covenant not to sue does not constitute a relinquishment of a right or claim but is agreement not to enforce an existing cause of action; its execution will not release a claim against a joint tort-feasor; and it does not constitute a satisfaction. 76 C.J.S. 630, §3.

In view of the foregoing, in my opinion the question is answered as follows:

A covenant not to sue is not "a duly acknowledged written instrument providing for release of liability by all parties injured" as result of a motor vehicle accident, as such quoted words are used in §324.04(2) (f). Hence the question is answered in the negative.

055-62—March 21, 1955

TAXATION

FOREIGN INSURANCE COMPANIES—TANGIBLE PERSONAL PROPERTY TAX—CREDITS PERMITTED AGAINST PREMIUM RECEIPTS TAXES—§205.432, F. S.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTION:

May the amount of ad valorem taxes paid by a foreign insurance company on tangible personal property used in connection with the operation and maintenance of such insurer's regional home office in Florida be taken into consideration in determining the credits and deductions to which such company is entitled against its

premium receipts tax, as contemplated by Ch. 27989, 1953 (§205.432, F. S.)?

Said §205.432, F. S., is here sufficiently described as providing that if any foreign insurance company which is subject to the premium receipts tax imposed by §205.43, F.S., establishes by August 1 of any calendar year a building in Florida as its regional home office, as defined in §205.432, F.S., it shall be entitled to certain credits and deductions as follows: "(a) An amount equal to 50% of the amount of the tax (premium receipts tax) as determined under sub §(2) of said §205.43, F.S.; and (b) an amount equal to the full amount of all ad valorem taxes paid by such a foreign insurance company during the year next preceding the filing of the return required by §205.43(3); 1. upon any building and the land on which it stands in the state owned and substantially occupied by such foreign insurance company in the said tax year as a regional home office, together with any adjacent land as may be required for the convenient use and occupation thereof; and 2. *upon any property used in connection with the operation and maintenance of such regional home office*"; (Emphasis supplied). There is the proviso that in no event shall such credits and deductions reduce the amount of such premium receipts tax payable to less than 20% of the amount of the tax as determined under §205.43(2), F.S.

Both real property and tangible personal property, unless exempt, are subject to ad valorem taxes levied on "a uniform and equal rate", provided by the legislature, as contemplated by §1, Art. IX, Fla. Const., and relevant statutes.

It is apparent that paragraph 1. of §205.432(1) (b) relates to ad valorem taxes on real property. Above italicized paragraph 2. of said subsection refers without qualification to ad valorem taxes on "property used in connection with the operation and maintenance of such regional home office".

Where the words employed in a statute have a well-defined meaning, and where the legislative intent is clearly manifest from the language used when considered in its ordinary and grammatical sense, no ambiguity exists to invoke rules of construction, hence rules of construction are unnecessary and inapplicable. *Van Pelt v. Hilliard*, Fla., 78 So. 693; *State v. Burr*, Fla., 84 So. 61; *State ex rel Southern Roller Derbies v. Wood*, Fla., 199 So. 262; *Smith v. Ryan*, Fla., 39 So. 2d 281.

In view of the foregoing, in my opinion the question is answered as follows:

The question is answered in the affirmative; that is to say, that paragraph 2. of §205.432(b), as quoted and italicized above, includes ad valorem taxes on tangible personal property in such a regional home office building, and used in said building "in connection with the operation and maintenance of such regional home office." With this quoted limitation of the personal property identified in said law, no detailed description of such property would seem required.

055-63—March 21, 1955

PENSIONS AND WAR VETERANS

CHIEF OF REHABILITATION—JOB SPECIFICATIONS—
MERIT SYSTEM—§295.08, F. S.

To: *Burnis T. Coleman, General Counsel, Florida Industrial Commission, Tallahassee*

QUESTION:

Is the classified position of chief of rehabilitation as contemplated and described in the attached copy of "Job Specifications" for such positions a professional or scientific position within the meaning and purpose of the proviso appearing as a part of §295.08, F. S., 1953, which reads as follows:

"Provided, however, that, except for positions in professional and scientific services for which the entrance salary is over \$3,000 per annum, the names of all qualified 10-point preference eligibles whose service-connected disability has been rated by the veterans' administration to be 30% or more shall be placed at the top of the appropriate register or employment list, in accordance with their respective augmented ratings."

As indicated in the above question, attached to the request for opinion is copy of "Job Specifications" relating to said position, relevant parts of which are mentioned.

Examples of work to be performed by a person holding this position are: "Conducts research and studies in the field of rehabilitation and plans and supervises the work of employees assigned to the rehabilitation department, including professional specialists and field visitors, including counselors, consultants, psychiatrists, psychologists, nurses, and visitors. Prepares forms and manuals for the guidance of employees in the rehabilitation department. Responsible for making arrangements to insure that injured employees shall be afforded opportunity in accordance with their abilities, both physical and mental, to receive training necessary to bring about readjustment based upon rehabilitation training available for them. Plans and directs a rehabilitation training program. Works with professional staff of the rehabilitation department of the commission, of the state department of education, and any other public agency maintaining professional classes of employees engaged in rehabilitation work in Florida. Works with representatives of insurance carriers and employers who cooperate with rehabilitation programs in which injured workers under the jurisdiction of the commission are eligible to receive rehabilitation training or treatment, or both. Responsible for the making of recommendations in specific cases and the follow-up and reports on the progress of such cases."

Knowledge, abilities, skills and personal qualities required of one holding this position are: "Thorough knowledge of the Florida workmen's compensation law; general knowledge of other

state laws pertaining to labor and employment; thorough knowledge of modern office methods; some knowledge of personnel methods; thorough knowledge of the purposes and objectives of rehabilitation in industry and general knowledge of methods and techniques accepted in professional fields in dealing with the employment and handling of physically handicapped persons; ability to exercise good judgment in appraising situations, to get along with people, to plan, direct, and coordinate the work of a group of people doing professional and semi-professional types of work related to counseling, vocational guidance, and psychoanalysis".

Minimum qualifications to be satisfied by a person seeking the position are: "Graduation from an accredited 4-year high school or its equivalent as determined by the state department of education; and at least 9 years of successful full-time paid employment in work relating to the above duties, of which 3 years must have been in at least one of the following fields, vocational guidance or counselling, vocational guidance in industry, or responsible comparable experience in the armed forces; or substituting 30 semester hours or 45 quarter hours of college credit for 1 year of the required general experience, with a maximum substitution of 4 years."

Heretofore this office has dealt with the question of "positions in professional and scientific services" in relation to the positions of director of the workmen's compensation law and executive director for coordination of employment service and unemployment compensation (opinion 050-245), and chief of statistics of workmen's compensation division (opinion 055-41). Copies of said opinions are attached. The discussions and conclusions set forth in such opinions concerning the positions therein named are applicable to this question in relation to the position here dealt with. The reasoning set forth in opinion 055-41 is particularly applicable here.

Hence it is that in my opinion this position of chief of rehabilitation is not a "professional or scientific position" within the meaning of such words as they are used in §295.08, F.S.

055-64—March 21, 1955

CRIMINAL PROCEDURE

APPEAL FROM MUNICIPAL COURT TO CIRCUIT COURT— SUPERSEDEAS—CONVICTION UNDER CH. 322, F. S.—§932.52(16), F. S.

To: *William H. Gleason, Rossetter and Gleason, Melbourne*

QUESTION:

Does an appeal from a municipal court to a circuit court from a conviction of driving while intoxicated operate as a supersedeas on the provisions of Ch. 322, F.S., which provides for mandatory revocation of drivers' licenses?

Section 932.52 (16), F. S., relating to appeals from municipal

courts, provides, in part: "When the bond is entered into and filed with the clerk of the circuit court, it shall operate as a supersedeas."

The Florida supreme court in the case of Joyner v. State (1947), 30 So. 2d 304, stated: "... if an appeal has been taken from a judgment of guilty in the trial court that conviction does not become final until judgment of lower court has been affirmed by the appellate court."

Your question is answered in the affirmative.

055-65*—March 21, 1955

COURTS

CIRCUIT COURT—JUVENILE AND DOMESTIC COURT OF
DADE COUNTY—JURISDICTION—COMMITMENT OF
CHILDREN FOR ADOPTION—CHS. 19597, 1939;
21094, 1941; 27000, 1951; 26880, 1951, LAWS
OF FLORIDA; §50, ART. V, STATE CONST.

To: *A. W. Graessle, Jr., Attorney for the State Department of
Public Welfare, Jacksonville*

QUESTION:

Does Ch. 19597, 1939, creating a juvenile and domestic relations court of Dade county confer exclusive jurisdiction on that court in the matter of permanent commitment of children to licensed child-placing agencies for the purpose of adoption, or could the Dade county circuit court permanently commit children for adoption to a licensed child-placing agency?

Ch. 19597, 1939, was amended by Ch. 21094, 1941. It was declared unconstitutional, in part, in *State v. Beckham*, 36 So. 2d 769. After that case the constitution was amended to provide for juvenile courts; see §50, Art. V. Thereafter, Ch. 19597 was reenacted, with certain changes, as Ch. 27000, 1951, and construed in *In re Rouse*, 66 So. 2d 42. In the meantime, Ch. 26880, 1951, was enacted for the purpose of establishing juvenile courts generally under the provisions of §50, Art. V, of the constitution.

Your question actually inquires whether the circuit court of Dade county may permanently commit children for adoption. I find nothing in any of the above statutes which removes from the circuit court the power to provide for the custody permanent or otherwise, of children of whom it has taken jurisdiction.

Chapter 27000, 1951, authorizes the circuit court to transfer such causes to the juvenile and domestic relations court of Dade county, but does not require it. Accordingly, when the circuit court of Dade county has taken jurisdiction of a child and has not transferred jurisdiction to the juvenile and domestic relations court of Dade county, it retains jurisdiction to make such orders as the welfare of the child may require.

* See supplementary opinion 055-278.

055-66—March 22, 1955

CLERK OF CIRCUIT COURT

SIGNATURE ON INSTRUMENTS FILED FOR PUBLIC RECORD—§28.17 AND 28.19, F. S.

To: *Jess Mathas, Clerk of the Circuit Court, DeLand*

QUESTION:

Is it necessary that instruments filed for public record be manually signed by the clerk of the circuit court, or may a facsimile signature be substituted?

Section 28.17, F. S., requires the clerk of the circuit court and all other officers charged with the duty of recording deeds and other instruments of writing to carefully compare the originals with the record of same made by them; and after such comparison "... the said officer shall endorse upon such original document the words 'record verified', and sign his name thereto."

Section 28.19, F. S., provides that the "fees for recording any instrument of writing entitled to record under the laws of this state shall not be payable to any officer who may have recorded the same until he has verified the record and endorsed the original instrument as aforesaid."

There are numerous decisions holding that "signature" includes any name, mark or sign written with intent to authenticate any instrument of writing, which language would include a facsimile signature. See the South Carolina case of *Smith v. Greenville County*, 199 S.E. 416. Such "signature" is binding on the person who affixes it as his own or authorizes another to do so. See the Georgia case of *Hansen v. Owens*, 64 S.E. 800.

However, the burden of proof of a signature not in the handwriting of the party whose signature it purports to be, is on the party relying on the genuineness or authenticity of such signature. See 58 Corpus Juris, p. 730, Signatures, §18.

Where the name required has been placed by rubber stamp by one having authority to do it and with intent to endorse the instrument, the authorities hold that this is a valid endorsement. The endorsement, however, does not prove itself but must be established, as in other cases, by proper testimony. See the North Carolina case of *Mayers v. McRimmon*, 53 S.E. 447.

In *State v. Reichle*, (Ohio) 81 N.E. 2d 735, the record of judgments was involved, and the court held that, notwithstanding the general rule that one may adopt as his signature any printed or stamped facsimile copy of his signature and be bound thereby, the circumstances there required the manual signature of the judge.

I am cognizant of the provisions of §§695.13-695.14, F.S., which specifically apply to the record instead of the endorsement on the instrument.

Nevertheless, it is my opinion that the better and safer prac-

tice, if the stamped form of certificate you sent with your letter or any similar form bearing your facsimile signature is used, would be to authenticate the facsimile signature with the manual signature of the duly authorized deputy who actually does the verification.

055-67—March 24, 1955

TAXATION

HOMESTEAD EXEMPTION—MEMBERS OF ARMED SERVICES

To: *Frances Botts, County Tax Assessor, Pensacola*

QUESTION:

Where a person is drafted, or involuntarily called into the armed services as a member of the organized reserve, but upon the expiration of his tour of duty elects to extend his service for an indefinite period rather than be separated, is he continuing his said service in the armed forces voluntarily or involuntarily?

We gather from your letter, from which the above question was posed, that the person in question had the election of leaving or being separated from the armed services or of remaining for a further tour of duty and that he elected to remain in the armed forces for a further tour of duty. Under these circumstances we feel that he was voluntarily in the armed services, after the expiration of his tour of duty under the draft or as a reserve, and that such further duty was not involuntary. In this connection see our opinion of Dec. 21, 1950 (050-574) a copy of which is handed you herewith.

055-70—March 25, 1955

CRIMINAL PROCEDURE

INTERSTATE EXTRADITION—MISDEMEANORS—FUGITIVE WARRANT—JUSTICE OF THE PEACE—§941.13, F. S.

To: *Clyde M. Kissinger, Judge, Justice of the Peace Court, Small Claims Court, St. Petersburg*

QUESTION:

Does the justice of the peace have discretion when presented with an out-of-state warrant alleging a crime, constituting a misdemeanor in this state, to deny such a fugitive warrant?

The supreme court of Florida in *Gatewood v. Culbreath*, 47 So. 2d 725, settled the question as to whether a misdemeanor is an extraditable offense. The court adopted the language of the U. S. supreme court which decreed:

“... The word “crime” of itself includes every offense, from the highest to the lowest in the grade of offenses, and includes what are called “misdemeanors”, as well as treason and felony.” (Emphasis supplied.)

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“... The word “crime” of itself includes every offense, from the highest to the lowest in the grade of offenses, and includes what are called “misdemeanors”, as well as treason and felony.” (Emphasis supplied.)

Section 941.13, F.S., 1953, (§13, Uniform Criminal Extradition Act) provides:

"Whenever any person within this state shall be charged on the oath of any credible person before any judge or magistrate of this state with the commission of any crime in any other state, and except in cases arising under §941.06 with having fled from justice, or with having been convicted of a crime in that state and having escaped from confinement, or having broken the terms of his bail, probation or parole, or whenever complaint shall have been made before any judge or magistrate in this state setting forth on the affidavit of any credible person in another state that a crime has been committed in such other state and the accused has been charged in such state with the commission of the crime, and, except in cases arising under §941.06, F.S., has fled from justice, or with having been convicted of a crime in that state and having escaped from confinement, or having broken the terms of his bail, probation or parole, and is believed to be in this state, *the judge or magistrate shall issue a warrant* directed to any peace officer commanding him to apprehend the person named therein, wherever he may be found in this state, and to bring him before the same or any other judge, magistrate or court who or which may be available in or convenient of access to the place where the arrest may be made, to answer the charge or complaint and affidavit, and a certified copy of the sworn charge or complaint and affidavit upon which the warrant is issued shall be attached to the warrant." (Emphasis supplied.)

The statute provides that the magistrate shall issue the warrant when the necessary showing has been made.

There is no difference in the issuance of a fugitive warrant and the issuance of a warrant on the basis of an affidavit charging a crime in this state.

The general rule is that the magistrate must issue the warrant upon the filing of a proper complaint. The magistrate does not have any arbitrary power (See: 22 C.J.S. Criminal Law, §3617).

Section 941.13, F.S., 1953, using the mandatory word "shall" rather than the discretionary word "may" clearly indicates that upon proper showing the fugitive warrant must issue.

Therefore, your question is answered in the negative.

055-72—March 28, 1955

COURTS

JUSTICE OF THE PEACE—PEACE BONDS, VIOLATION OF— PENALTY—§37.21, F. S.

To: *Ted P. Galatis, Justice of the Peace, 4th District, Broward County, Ft. Lauderdale*

QUESTIONS:

1. Does the justice of peace have the right to order

a person imprisoned for any period of time up to 90 days when that person has violated the conditions and terms of a peace bond posted with the justice of peace within 1 year preceding the alleged violation thereof?

2. If the justice of peace cannot commit a person to imprisonment for violation of a peace bond, can he then, as an alternative, estreat said bond and order the person to post a new peace bond, or in default thereof, be committed to jail for any period of time up to 90 days?

3. In the event your opinion is that the justice of peace has no power to either imprison a person or to forfeit his peace bond for the violation thereof, then what is your opinion as to the power of the justice of the peace in the enforcement of a peace bond?

One who breaches the conditions of a peace bond is not subject to imprisonment under §37.21, F.S., which provides for peace bonds. The individual would have to be tried for breach of the peace before he could be convicted as having committed a breach of the peace. See 11 C.J.S., Breach of the Peace, §17, p. 826. The appropriate procedure would be to estreat the bond. In the event that a new affidavit were to be filed in accordance with §37.21, F.S., then a new peace bond could be ordered posted by the justice of the peace and in the event that no bond was forthcoming, the defendant could be committed to jail for not more than 3 months.

055-73—March 28, 1955

CRIMINAL PROCEDURE

JUDGMENT AND SENTENCE—CONCURRENT—COSTS AND FINES—CREDITS—§§921.16 AND 951.16, F. S.

To: *Bryan Willis, State Auditor, Tallahassee*

QUESTIONS:

If a prisoner is convicted on 2 or more counts, or in 2 or more cases, and receives 2 or more sentences to pay a fine and costs, or in default of such payment to be imprisoned for certain lengths of time, and it is ORDERED BY THE COURT THAT THE SENTENCES BE SERVED CONCURRENTLY:

1. Does the "concurrent" provision run to payment of the fine and costs, and does payment of the amount fixed by one of the sentences discharge the defendant from payment of the fines and costs in the other sentences?

2. If the answer to the above question is in the affirmative, and the amounts fixed by the sentences are not equal, must the defendant pay the largest amount fixed by any of the sentences, or some other amount?

AS TO QUESTION 1:

The only sentences which can be served concurrently are

sentences to imprisonment in the county jail or in the state prison.

Section 921.16, F.S., is the only statute which Florida has on this subject and it reads as follows:

"921.16 When sentences to be concurrent and when consecutive.—When the defendant has been convicted of 2 or more offenses charged in the same indictment or information or in consolidated indictments or informations, the terms of imprisonment shall be served concurrently unless the court expressly directs that they or some of them be served consecutively. Sentences of imprisonment for offenses not charged in the same indictment or information shall be served consecutively unless the court expressly directs that they or some of them be served concurrently."

Fines and costs imposed under 2 or more counts or in 2 or more cases cannot be "served concurrently"; fines and costs cannot be served at all, either concurrently or consecutively; all that can be done with them is to pay them.

Therefore, when sentences are imposed as indicated in your question 1, the defendant must pay all of the fines and costs imposed or suffer imprisonment in accordance with the alternative provisions of the sentences.

In my opinion, therefore, your question 1 is properly answered in the negative.

However, the provisions of the sentences that they be served concurrently comes into play if the defendant does not pay the fines and costs and serves the alternative jail terms imposed or if he serves a portion of such terms and then pays out. Section 951.16, F.S., provides as follows:

"951.16 Prisoners entitled to receive credit on fine based on imprisonment.—Every person who may be imprisoned in the county jail for failure to pay a fine and costs, or either, under sentence imposed, upon conviction for crime shall be entitled to receive, together with subsistence, a credit on such fine and costs, or either, as the case may be, in proportion to the time such person may be imprisoned."

For example, let us assume that the 1st sentence is to pay a fine and costs totaling \$100 and in default of such payment to be imprisoned in the county jail for 2 months, and that the 2nd sentence requires the defendant to pay a fine and costs totaling \$200 and in default of such payment to be confined in the county jail for a term of 4 months, and that the defendant makes no payment but, instead, goes to jail and remains there 2 months and then wants to pay out. In such case, he would have completely served the alternative 2 months imposed under the 1st sentence and would not have to pay anything on account of that sentence. He would also be entitled to credit on his 4 months sentence for the 2 months served and could satisfy the 2nd sentence by paying $\frac{1}{2}$ of the \$200 fine and costs. If he serves 1 month and then wants to

pay out, he would have to pay $\frac{1}{2}$ of the \$100 fine and costs in the 1st case and would have to pay $\frac{3}{4}$ of the \$200 fine and costs in the 2nd case. In short, a defendant upon whom sentences are imposed as indicated in your question 2 is entitled to credit on each of said sentences for every day served.

AS TO QUESTION 2:

Your 2nd question is not answered because you did not request an answer unless the 1st question should be answered in the affirmative and it has been answered in the negative.

055-74—March 29, 1955

BEVERAGE LAW

BEVERAGE DIRECTOR—SUSPENSION OR REVOCATION OF
LICENSE—VIOLATION OF CITY ORDINANCE OR
COUNTY RESOLUTION—§§561.44(1),(2), 561.34
AND 562.14(3), (4), F. S.

To: *J. D. Williamson, Director, State Beverage Department, Tallahassee*

QUESTION:

May the beverage director suspend or revoke a license of a person, firm or corporation which has been issued under the provisions of §561.34, F.S., where the licensee has violated a city ordinance or county resolution adopted under the provisions of §562.14(3) and (4), F.S.?

Section 562.14, Sub §§(1) and (2), F.S., establishes a statewide closing law for licensees dispensing alcoholic and intoxicating beverages. Sub §§(3) and (4) of said section permit cities by ordinance and counties by resolutions of their respective governing bodies to independently regulate the hours of operation of beverage establishments.

Section 561.44(1),(2) F.S., grants to cities and counties the power by ordinance and resolution to establish zones restricting the location wherein a vendor licensed under §561.34 F.S., may be permitted to conduct his place of business and *prohibits* the granting of a license to conduct a place of business in a location where such place of business is prohibited from being operated by such municipal ordinance or county resolution. There are certain exceptions to this grant of power not material here.

The state, under the police power, may by statutory enactment prescribe rules under which intoxicating liquor may be sold to the public and, if application is made to the state for such license, the statutory conditions become binding obligations between the state and licensee upon acceptance of license and under which the licensee engages in sale of liquor. *State ex rel Hoffman v. Vocelle*, 159 Fla. 88, 31 So. 2d 52.

The legislature, in enacting the state beverage law, intended to inhibit all powers of a municipality over the subject of intoxicating liquors, except those powers specifically enumerated, namely (1) regulation of hours of business, (2) regulation of location,

and (3) prescribing sanitary regulations. *City of Miami v. Kichinko*, 156 Fla. 128, 22 So. 2d 627.

Our court has held invalid an ordinance authorizing the city to investigate the character of an applicant and decline a beer and wine license to those it (the city) finds unfit. *State ex rel Anthony Distributors v. Pickett*, 59 So. 2d 856.

The state, in the exercise of its police powers, may enact a valid law forbidding the sale of intoxicating liquors in a particular locality, and may confer on municipalities similar power. *State ex rel Dixie Inn v. City of Miami*, 156 Fla. 784, 24 So. 2d 705, 163, A.L.R. 577.

An inquisition into a charge of violating the conditions of one's license is in no sense criminal but equitable in nature and should be adjudicated on equitable principles. *Cohen v. Schott*, 48 So. 2d 154.

In the case of *Ellis v. City of Winter Haven*, 60 So. 2d 620, the city of Winter Haven adopted an ordinance prohibiting the sale for consumption on the premises of non-intoxicating beer in a small area within the city limits. In adopting this ordinance the city *did not follow* the procedure prescribed in Ch. 20202, Special Acts of 1939, which is a special zoning law applicable only to the city of Winter Haven, but rather it adopted the ordinance under §561.44, F.S., of the beverage act. The question in that case was whether the city was authorized to adopt such an ordinance without complying with the procedural requirements set forth in the special act.

The court pointed out that the special act was not a *new* grant of power to the city insofar as giving it authority to zone where alcoholic beverages are sold. It then referred to the state beverage act of 1935, to numerous sections of the beverage law, and pointed out that Ch. 3163, 1879, now appearing as §§168.07 and 562.45, F.S., reserves to the cities their power to regulate the hours of business and location of places of business and to prescribe sanitary regulations for liquor establishments. In other words, the court held that the city was perfectly within its rights to pass an ordinance under the grant of power given to it by the beverage law insofar as zoning was concerned rather than operating under the separate act.

In the case of *Dade County v. Overstreet*, 59 So. 2d 862, our court referred to certain sections of the beverage law, §§561.32, 561.18 and 561.19, F.S., relating to the securing and transfer of beverage licenses and said that when these sections are read in *para materia* with the provisions of §561.44, F.S.:

"It is quite clear that the legislature never intended to confer on the state beverage director the power or authority to examine into charter provisions of the several municipalities of Florida and determine therefrom whether or not zoning ordinances were enacted in accordance therewith, or the power to examine into the several acts applicable to counties of Florida and ascertain whether or not

zoning resolutions adopted by the several boards were enacted pursuant to law"

"The director is not a judicial officer authorized to determine these questions. He *may* and *should* perform the ministerial duty of making measurements or investigations of locations to ascertain whether or not the location would violate the *statutes* or *zoning ordinances* or *resolutions*." (Emphasis added.)

It follows that if the director is prohibited from issuing a license contrary to a city ordinance or county resolution, he not only has the right and authority but the duty where a city ordinance or county resolution relating to hours of sale, location of business or sanitary conditions, has been violated by a licensee, to cite said licensee to show cause why his license should not be suspended or revoked.

055-75—March 28, 1955

BEVERAGE LAW

ADMINISTRATION—AUTHORITY AND DUTIES OF SHERIFFS—SEIZURE AND DESTRUCTION OF ALCOHOLIC BEVERAGES AND EQUIPMENT USED IN PERPETRATION OF VIOLATIONS—§§562.27, 562.40-562.408, 562.42, F. S.

To: *John A. Madigan, Jr., Attorney, Florida Sheriffs Association, Tallahassee*

QUESTION:

Outline rights and duties of sheriffs in connection with the seizure and destruction of illicit beverages and equipment used to perpetrate violations of beverage law.

In dealing with this matter, we must keep in consideration that in the enforcement of the liquor traffic laws the officer is concerned with two types of property, (1) property which has some value, such as sugar, corn, bran, etc., and automobiles, trucks and other vehicles and even perhaps animals, used in the transportation or manufacture of moonshine whiskey; also intoxicating liquors that have been manufactured according to federal specifications, but which do not possess the necessary Florida tax stamps according to law; and (2) property which is purely contraband, such as moonshine whiskey, stills and stilling apparatus, mash, etc.

Section 562.27, F.S., makes it unlawful for a person to have in his possession, custody or control, any still or stilling apparatus designed or adapted for the manufacture of alcoholic and intoxicating beverages, and makes it unlawful to have in his possession any mash, wort or other fermented liquids capable of being distilled or manufactured into alcoholic beverages unless the person has a license to manufacture such alcoholic beverages.

This section also provides that the still and stilling apparatus,

mash, wort, etc., or receptacles, containers, and *all personal property* used to facilitate the manufacture or production of alcoholic beverages (moonshine whiskey) and used to facilitate the violation of the beverage law of this state may be seized by the beverage director or any supervisor or any sheriff or deputy sheriff and shall be forfeited to the state. This provision takes in all types of property heretofore named except liquor made under federal regulations which does not bear Florida stamps.

If a sheriff should seize what is commonly referred to as "red liquor," but not containing Florida revenue stamps, or otherwise illegal for the person from whom it was seized to possess it, then such liquor shall be disposed of by the sheriff as provided by §568.10, F.S. After securing an order of forfeiture from the trial court the sheriff may advertise it and sell it to any licensed liquor wholesaler in Florida. All other property seized under the beverage law is either forfeited to the state in accordance with §562.40, F.S., et seq., or if it is contraband the same may be destroyed by the seizing officer under the provisions of §562.42, F.S.

It will be noted that contraband such as stills and stilling apparatus, moonshine whiskey and other property having a value of less than \$1,000 where it is impracticable to remove the same to a safe storage place from the place where it is seized may be destroyed by the seizing officer. Such destruction shall be in the presence of at least one credible witness and the witness joins the seizing officer in making a report of same to the beverage director. In the case of moonshine whiskey, one pint of such intoxicating beverage shall be preserved by the seizing officer to be used as evidence against anyone accused of violating the provisions of the beverage law. Of course if the still and moonshine whiskey are located in an open field and no person is charged by the officers of violating the law, then I see no reason at all for the seizing officer to retain any moonshine whiskey, but his report should be evidence that the same was destroyed. It may be that for certain county purposes of bookkeeping and accounting the sheriff should seize at least one pint of moonshine whiskey.

There is no reason to bring contraband property into a storage place under this section, and even property that has some value, such as sugar, rye, cracked corn, water pumps and other property used to manufacture moonshine whiskey, may be destroyed when the value is less than \$1,000 and it is impracticable to remove it from the still site to a safe storage place.

Normally, property seized in accordance with violations of the beverage law having some value such as motor vehicles, animals, sugar, bran, corn, etc., is forfeited under the provisions set forth in §§562.40-562.408, F. S., inclusive.

055-76—March 31, 1955

COUNTY ORGANIZATION, OFFICERS AND REGULATIONS
COUNTY COMMISSIONERS—POWERS AND DUTIES—APPLI-
CATION OF §839.09, F. S.—CONTRACTS—§125.08, F. S.

To: Board of County Commissioners, Okeechobee

QUESTIONS:

1. Where a board of county commissioners, pursuant to §125.08, F.S., and notice published pursuant thereto, awards a contract, when does such contract become final and pass from the control of the said board?

2. Where a county commissioner of a county is employed by a person in the operation of one of his businesses, is such person disqualified, under §839.09, F.S., from offering a bid pursuant to §125.08, F.S., in behalf of another of his businesses in which the said county commissioner has no direct connection or duties?

Section 125.08, F.S., requires that certain contracts may be made by boards of county commissioners only pursuant to notice published in newspapers as required by said section, which contracts are to be let to "the lowest responsible bidder." The term, "the lowest responsible bidder," as used in said §125.08 F.S. does not necessarily mean the lowest bidder, financially only, but is generally accepted as being applicable to the bidder who by experience or otherwise is most capable of doing the work or providing the equipment or materials desired in a satisfactory manner. The lowest bidder is not always the lowest responsible bidder. (See opinion of October 23, 1951, 051-371, 1951-2 Biennial Report 228-230). "A board or public official charged with the letting of a public contract has general authority to rescind its action in awarding such contract to a particular bidder where no contractual right has vested in the bidder. Rescission has been allowed when made before the statutory bond has been furnished by the contractor or before the contract has been reduced to writing, as required by the statute. However, in the absence of any reservation in the contract of a right to rescind it, public authorities cannot, without incurring liability for breach of contract, after a bid has been accepted and the contract awarded, rescind such award and contract, except for some cause which in the eye of the law, renders it void or voidable, or upon the ground that the contractor has failed to prosecute the work with proper diligence . . . In other words, the public authorities, after having regularly awarded the contract to a bidder, have no right to cancel the award or refuse to go forward with the contract . . ." (43 Am. Jur. 790, §47). These observations seem to answer the 1st question. The request for opinion seems to indicate that the contract has been awarded and other information coming to us indicates that the contract has been reduced to writing and the performance bond filed and accepted.

Section 839.09, F.S., prohibits county commissioners and other named public officers from purchasing "supplies, goods or ma-

terials for public use from any firm or corporation in which any member of such board is either directly or indirectly interested" We note that the above prohibition is against the purchase of "supplies, goods or materials" from any "firm or corporation" of which a member of the public board is either directly or indirectly interested. Section 839.09, F.S., being a criminal statute, should be strictly construed. When this section is read in conjunction with §§839.07 and 839.08, F.S., doubt is entertained as to whether the purchase of "supplies, goods or materials" includes the letting of contracts for construction of buildings or repair to buildings; we also entertain doubt as to whether an individual is either a "firm or a corporation" within the purview of said §839.09, F.S. The opinion of this office of May 17, 1951, 051-122 (1951-2 Biennial Report 730) involved a purchase of supplies, goods or materials and not a contract to build or repair a building. We feel that §839.07, F. S., is the controlling statute with regard to the letting of contracts for the construction or repair of public buildings. The above opinion of May 17, 1951, involved §839.09, F.S., and not §839.07, F.S.

Said §839.07, F.S., makes it "unlawful for any commissioner or other officer of this state or . . . of any county . . . to bid or enter into, or be in any way interested in, a contract for . . . the erecting or building of any house, or for the performance of any other public work in which the said officer was a party to the letting" This section is likewise a criminal statute and must be strictly construed. The county commissioner involved is not the one making the bid in question, but is an employee of the person making the bid, not in the business of the bidder for which the bid is made but in another business not directly connected with the contracting business of the bidder. So far as we are advised the county commissioner in question would not in any way personally profit from the contract. In an opinion of February 21, 1952, 052-50 (1951-2 Biennial Report) this office held that a clerk of the circuit court might sell lime rock (upon competitive bidding under §125.08, F.S.) to his board of county commissioners.

The question of when a person is or is not *in any way interested in a contract* is not one of easy solution (43 Am. Jur. 103-109, §§294-302; 67 C. J. S. 406-407, §116). A public officer should not place himself in a position in which personal interests may come in conflict with his duty to the public (67 C. J. S. 406, §116; *Stubbs v. Florida State Finance Co.*, 118 Fla. 450, 159 So. 527, text 528). A public officer should not act as the agent of another in connection with the awarding of contracts by an agency of which he is a member (*Stubbs v. Florida State Finance Co.*, *supra*). A contract between a county board and one who is not a county officer, but who employs certain county officers to assist him in his business is not for that reason void (20 C. J. S. 1028, §192, note 13). Where a county commissioner is an employee of a person who bids upon a county contract, although the employment of such county commissioner is in no way connected with the subject matter bid upon, he at least places himself in a position where it may be calculated that he might be influenced by his employer. Even if not within the purview of §839.07, F.S., such officer would

appear to be disqualified to take any action in connection with or concerning any contract between his employer and the board. Only members competent to act on a matter before the board may be counted in determining whether a quorum is present, but the mere fact that one of the members present is personally interested in the proceeding at hand does not oust the board of jurisdiction. (20 C. J. S. 858, §88).

As to the 1st question, if the contract has been let, reduced to writing and signed by the parties, and the performance bond furnished and approved we think that the board of county commissioners, in the absence of fraud or other thing sufficient to avoid the contract, has lost jurisdiction and may not reconsider the bids offered although they may have been legally mistaken as to the qualification of one of the bidders.

As to the 2nd question, except in so far as one or more of the contracts relate to the purchase of supplies, goods and materials, §839.09, F.S., which does not relate to construction contracts, has no application, and §839.07, F.S., appears to be the applicable statute. (Our opinion of May 17, 1951, 051-122, 1951-2 Biennial Report 730, related to §839.09 and not to §839.07, F.S.). We think that the 2nd question should be answered in the affirmative. However, we doubt that the remaining members of the county board would be disqualified from considering the contract in question, so long as it is clear that the remaining members of the board have not been influenced by the disqualified member. The statute does not seem to declare a contract made under such circumstances null and void.

055-77—April 4, 1955

MOTOR VEHICLES

DRIVER'S LICENSE—REVOCATION BY COUNTY JUDGE—
DRUNKEN DRIVING CONVICTION—§§322.25 AND 322.26, F. S.

To: Max Brewer, County Prosecuting Attorney, Titusville

QUESTIONS:

1. On a conviction of driving while intoxicated, does the county judge have the authority to suspend the defendant's driver's license?

2. If the county judge advises the defendant in a driving-while-intoxicated case at the time of his conviction that it is mandatory that his driver's license be revoked, is his license revoked as of that day or is he able legally to drive an automobile until he receives a formal notice of revocation?

3. May a defendant be convicted of driving while license is revoked when, although his license has been revoked, he had never had his license picked up nor received a copy of the notice revoking his license?

AS TO QUESTION 1:

Section 322.25, F.S., 1953, provides:

"(1) Whenever any person is convicted of any offense for which this chapter makes mandatory the revocation of the operator's or chauffeur's license of such person by the department, the state or municipal court in which such conviction is had shall require the surrender to it of all operator's and chauffeur's licenses then held by the person so convicted, and the court shall thereupon forward the same, together with a record of such conviction, to the department.

"(2) Every state or municipal court having jurisdiction over offenses committed under this chapter, or any other chapter of this state regulating the operation of motor vehicles on highways, shall forward to the department a record of the conviction of any person in said court for a violation of any said laws, and *shall suspend or revoke* in accordance with the provisions of this chapter, the operator's or chauffeur's license of the person so convicted.

"(3) For the purpose of this chapter, a forfeiture of bail or collateral deposited to secure a defendant's appearance in court, which forfeiture has not been vacated, shall be equivalent to a conviction." (Emphasis supplied.)

Section 322.26, F.S., 1953, requires the mandatory revocation of the driver's license upon the conviction of certain offenses, one of which is driving while under the influence of intoxicating liquor or a narcotic drug. These two statutes clearly make the revocation of the driver's license a mandatory duty on the part of the court.

In *Bartels v. State, Fla.*, 24 So. 2d 40, the supreme court said:

"... the judgment in so far as it revokes appellant's driver's license for 12 months, may be rather harsh in this case, but *the court was compelled to so order* by the language of the second paragraph of §322.25 F.S. when construed in connection with §322.26, F.S. 1941, F.S.A."

Upon conviction of driving a motor vehicle while under the influence of intoxicating liquor the driver's license must be revoked—not suspended.

Therefore, your 1st question is answered in the negative.

AS TO QUESTION 2:

Section 322.25, F.S., 1953, above referred to, requires the court to take up the driver's license and to revoke the driver's license in this type of situation. The language of the statute indicates that the revocation will be a part of the sentence imposed. In the *Bartels* case, *supra*, the revocation of the driver's license was by the court.

Unless the conviction and sentence is superseded by an appeal, the effective time of the revocation would be the time

of the adjudication of guilt, i.e., "conviction". (See: §924.14, F.S., 1953.)

It is the conviction for one of the offenses requiring mandatory revocation that lays the groundwork for the revocation of the driver's license. The law requires and makes mandatory the revocation of the driver's license by the court, and requires the surrender of the driver's license.

If the trial court fails to revoke, then under §322.26, F.S., 1953, the department of public safety must revoke the driver's license upon receipt of a record of "... conviction".

Nothing in the law requires the department of public safety to send the holder of the driver's license any notice of revocation. The law only requires the department of public safety to send notice upon a cancellation or suspension. While as a matter of policy, notice is sent by the department in cases of revocation as well as cancellation and suspension, the effective time of the revocation is the date of the "conviction". Nowhere in the statutes do I find a provision which authorizes the driver to operate his automobile until he receives a formal notification of the revocation from the department of public safety.

When the defendant surrenders his license upon conviction, he is no longer authorized to drive a motor vehicle. (See: §322.15, F.S., 1953).

AS TO QUESTION 3:

Section 322.34, F. S., 1953, provides:

"Any person whose operator's or chauffeur's license, or driving privilege as a nonresident, has been cancelled, suspended or revoked as provided in this chapter, and who drives any motor vehicle upon the highways of this state while such license or privilege is cancelled, suspended, or revoked, is guilty of a misdemeanor and upon conviction shall be punished by imprisonment for not less than 1 day, or more than 6 months, and there may be imposed in addition thereto a fine of not more than \$500."

As we have indicated above, §§322.25 and 322.26, F.S., 1953, place a mandatory requirement on the court not only to revoke the license but, in addition, to forward the record of conviction and the driver's license to the department; and upon receipt of the conviction the department forthwith revokes the license.

As above indicated, the revocation being mandatory by the court and part of the sentence, effective when rendered, there is nothing in §322.34 F.S. to indicate that the failure to "pick-up" the driver's license or the failure of the defendant to receive "notice revoking his license" (from the department) would defeat prosecution under §322.34, F.S., 1953. In fact, under §322.32, F.S., 1953, it is unlawful to have in one's possession a revoked driver's license.

Therefore, your 3rd question is answered in the affirmative.

055-78—April 5, 1955

TAXATION

HOMESTEAD EXEMPTIONS—ASSESSMENT OF REAL PROPERTY HELD IN TRUST—§7, ART. X, STATE CONST.

To: *E. Glenn Hennig, City Tax Assessor, Orlando*

QUESTION:

Where the owner of a tax exempt homestead in this state dies testate and, after making certain specific bequests of personal property, vests title to the remainder of her estate, including the said tax exempt homestead, in trustees to exercise an active trust thereover, the proceeds from the said trust to be paid to one Anna B. Appleton during the term of her natural life, and after her death the corpus of the trust to be divided into 3 parts to vest in 3 named persons, and where the said beneficiary now resides in the said dwelling house and makes the same her permanent home, may the said house, or any interest therein, be granted homestead tax exemption?

We have before us a copy of the will setting up the said trust, although it appears that the trustees mentioned in the said will never qualified and that court appointed trustees apparently now administer the said trust estate, the said Anna B. Appleton being one of the said trustees. It is stated in the file before us that there are now 2 trustees, so that Anna B. Appleton, who makes her permanent home in a dwelling house held in trust by the said 2 trustees, bases her claim for homestead tax exemption on the title held by her as trustee. Under §7, Art. X, State Const., "every person who has the legal title or beneficial title in equity to real property in this state and resides thereon and in good faith makes the same his or her permanent home . . . shall be entitled to an exemption from taxation . . . Said title may be held by the entireties, jointly, or in common with others . . ."

The said will setting up the said trust provides that the trustees are to "hold and invest the same and the investments thereof, to change from time to time in their discretion, and the net income arising therefrom to pay over in convenient periodical payments to my said cousin Anna B. Appleton . . . during the term of her natural life." The interest of the beneficiary Anna B. Appleton, in the estate and its property is receiving the income from the trust during her natural life. The beneficiary was named one of the trustees of the estate, evidently upon the disqualification or failure of the trustee named in the will to act. It seems to be the usual rule that a beneficiary of a trust may be one of several trustees of such trust, but may not be a sole trustee (54 Am. Jur. 102 and 117, §§117 and 137). The income of the beneficiary from the trust is not "subject to the debts, contracts, or engagements of such beneficiary, nor to those of any other person nor capable of anticipation, alienation or pledge nor liable to attachment, execution or other legal process" (See item 6th of the will). This

provision in the will creates what may be said to be in effect a spendthrift trust (See 54 Am. Jur. 123, §148).

Nowhere in the provisions of the will setting up the said trust is there to be found any provision authorizing the occupancy of the dwelling house by the beneficiary; the powers over the trust property are for the trustees to manage it, making further investments and changing investments, and pay the income to the said Anna B. Appleton "during the term of her natural life" at which time the corpus of the estate is to be divided among certain named remaindermen. The beneficiary's right in the estate appears to be only a right to receive the income from the administration of the trust estate. The beneficiary appears to have a vested interest in the income of the trust estate but has no rights in or to the property of the estate; her right seems to be merely one to require the distribution to her of the income of the trust and to require that the trust be properly executed. She does not appear to have any right, title or interest in the trust property, either equitable or legal, that may be sold or conveyed by her. We, therefore, conclude that the title of the beneficiary under the trust is neither a legal title nor a beneficial title in equity to real property in this state, and that such interest as the said beneficiary may have is not such as will support a claim for homestead tax exemption.

This brings us down to the question of whether her title as trustee will support a claim for homestead tax exemption under the constitution. "Under some authorities a homestead exemption (from execution) may be claimed in any estate or interest (of the owner) which would be liable to seizure and sale under an execution" against the claimant (40 C. J. S. 519, §79). "A trust estate is not subject to sale under an execution issued against a trustee (personally) where he has no beneficial interest in such estate" (40 C. J. S. 174, §41). We do not think that the trust property could be seized and sold under an execution against Anna B. Appleton, notwithstanding that she is vested with a legal title to the property in question in trust for the uses and purposes of the said trust. (See 54 Am. Jur. 490, §634). The trustees of the property in question hold no title as would enable them to claim homestead rights against an execution against the trust (40 C. J. S. 518, §78).

We, therefore, are of the opinion that the above question should be answered in the negative.

055-79—April 6, 1955

CITIES AND TOWNS

POLICE OFFICERS—ARREST FOR MISDEMEANORS—USE OF FIREARMS

To: *Mack N. Cleveland, Jr., Representative, Seminole County, Sanford*

QUESTION:

Does a police officer, in pursuit of a traffic violator,

have the RIGHT TO SHOOT FIREARMS AT SAID VIOLATOR who speeds up his vehicle after the officer has made his presence known by siren and any other facility on the police car?

If a police officer, acting pursuant to the authority conferred by §901.15, F.S., is attempting to arrest for traffic violation against the state law, which would be a misdemeanor, and if the person sought to be arrested is fleeing to escape arrest, then the applicable law is laid down in 4 American Jurisprudence 54-55, Arrest, §78, as follows:

"As a general rule, in the case of a misdemeanor an officer has no right, except in self-defense, to shoot or kill the offender in attempting to arrest him; he is not justified in shooting or killing him merely to stop his flight. In this regard a distinction is drawn between misdemeanors and felonies. The killing of a fleeing person under such circumstances amounts to murder, or at least manslaughter. The possible excuse of self-defense is generally absent if the person whose arrest is sought is running away, and not offering resistance, at the time he is shot. The same rule applies where the person, after arrest, attempts to escape. Even though an officer has a suspicion that a felony has been committed, he cannot kill to stop flight where only a misdemeanor has been committed. If the officer kills, having good grounds for thinking his life in peril from the fleeing prisoner, he will be justified."

To the same effect is 6 Corpus Juris Secundum 614, Arrest, §13-c.

Since the police officer has no right to *shoot* the traffic violator under such circumstances, it follows that he has no right to *shoot at* him.

If the police officer is attempting to arrest for a violation of a municipal traffic ordinance, I think that the same rule would apply. The basic reason given by the courts for holding that in the case of a misdemeanor an officer has no right, except in self-defense, to shoot or kill the offender in attempting to arrest him and is not justified in shooting or killing him merely to stop his flight, is that the security of person and property is ordinarily not unduly endangered by a misdemeanor at large. In other words, the law has too much regard for human life and individual worth to sanction killing or even shooting a man who has done no more than commit a misdemeanor. A violation of a city traffic ordinance is certainly of no more, if as much, importance in the eyes of the law than a misdemeanor against the state law and therefore it is my opinion that an officer has no more right to shoot, or shoot at, a person whom he is attempting to arrest for violating a municipal traffic ordinance than he would have to shoot at him in attempting to arrest him for a misdemeanor traffic violation against the state law; in short, he has no right at all to do so.

Therefore, I think that your question is properly answered in the negative.

055-80—April 6, 1955

WELFARE

PUBLIC WELFARE DEPARTMENT—DEPENDENT CHILDREN —SUIT TO REQUIRE SUPPORT—LIMITATION OF ACTION—§§409.182, 95.07, 95.10, F. S.

To: *State Department of Public Welfare, Jacksonville*

QUESTIONS:

1. Is it the duty of the department of public welfare to require the mother of an illegitimate child seeking aid for the dependent child to bring action against the reputed father for support of the infant even though the statute of limitations has run against the action?

2. Does the absence of the reputed father from this state stop the running of the statute of limitations in such cases?

You refer to the recent case of *Wall v. Johnson*, 78 So. 2d 371 (Advance Sheet), holding that the 3-year statute of limitations was applicable to suits under the new bastardy law, Ch. 742, F.S. You also call attention to the statute, §409.182, F.S., which prohibits your department from approving any application for aid to dependent children unless the applicant shall have first instituted in the proper court an action to require support from persons liable for support of the dependent child, etc.

In the case of *Wall v. Johnson* the court, referring to the 3-year statute of limitations and its application to bastardy proceedings, said:

"... there is no reason for interpreting our statute of limitations as inapplicable to such a proceeding, and there is every reason for holding that it is so applicable." The 2nd question is answered by §95.07, F.S., as follows:

"If, when the cause of action shall accrue against a person, he is out of the state, the action may be commenced within the term herein limited after his return to the state; and if after the cause of action shall have accrued he depart from the state, the time of his absence shall not be part of the time limited for the commencement of the action."

But another section of the statutes should not be overlooked and that is §95.10, F.S., which reads as follows:

"When the cause of action has arisen in another state or territory of the U. S., or in a foreign country, and by the laws thereof an action thereon cannot be maintained against a person by reason of the lapse of time, no action thereon shall be maintained against him in this state."

Now, coming back to your 1st question, if the facts in the particular case show that the statute of limitations has run it would be a futile thing to require the applicant to file suit under §409.182, F.S., and it would not be the duty of your agency to require the bringing of such action.

055-81—April 7, 1955

TAXATION

AD VALOREM TAXES—EXEMPTIONS—LITTLE THEATRE ORGANIZATIONS—§1, ART. IX, §16, ART. XVI, STATE CONST., §192.06, F. S.

To: C. M. Gay, State Comptroller, Tallahassee

QUESTION:

Is the property of the Daytona Beach Little Theatre and of other like organizations, organized and existing under and by virtue of the non-profit corporate statutes of this state entitled to exemption from ad valorem taxation in this state?

All real and personal property, "excepting such property as may be exempted by law for municipal, educational, literary, scientific, religious or charitable purposes" having a situs in this state is subject to ad valorem taxation (§1, Art. IX, State Const.). "The property of all corporations . . . whether heretofore or hereafter incorporated, shall be subject to taxation unless such property be held and used exclusively for religious, scientific, municipal, educational or charitable purposes" (§16, Art. XVI, State Const.). Section 192.06, F. S., was enacted to make effective the exemptions from ad valorem taxation authorized by §1, Art. IX, State Const. Under these constitutional and statutory provisions *ownership and utilization* of the property are the criterion for determining its exemption from taxation (*Riverside Academy v. Watkins*, 155 Fla. 283, 19 So. 2d 870; *State v. Doss*, 146 Fla. 752, 2 So. 2d 303; *State v. St. Johns*, 143 Fla. 544, 197 So. 131; *Lummus v. Florida Adirondack School*, 123 Fla. 810, 168 So. 232; *University Club v. Lanier*, 119 Fla. 146, 161 So. 78). Ownership is not sufficient, there must also be utilization for one or more of the purposes mentioned in the state constitution. This being true the question becomes primarily one of fact and not of law.

The fact that a corporation may have been organized as a non-profit corporation, pursuant to the corporate statutes of this state, even though its charter may declare that it has been organized for religious, scientific, educational or charitable purposes, will not for that reason alone entitle it to exemption from ad valorem taxation under §1, Art. IX, or §16, Art. XVI, State Const., or §192.06, F. S. To entitle such a corporation to the tax exemption it must show that its property is used exclusively for one or more of such purposes. Should the corporation rent a portion of its property, as authorized by §192.06(3), F. S., the rents received must likewise be used exclusively for one or more of the said purposes. Where a nonprofit corporation was renting a portion of its property and using a large portion thereof to pay off a mortgage encumbering the said property, thereby

creating a capital estate, it was held in *Simpson v. Bohon*, 159 Fla. 280, 31 So. 2d 406, text 407-8, that the money used in paying off the said mortgage was not being used for one or more of the purposes mentioned in the said constitutional provisions, and the exemption claimed was denied.

What constitutes a religious, scientific, educational or charitable use is a matter of general knowledge. The tax assessor should, from the tax return and all other available evidence, ascertain whether or not the property in question is being used exclusively for some religious, scientific, educational, municipal or charitable use, and if so the property will be entitled to exemption. However, it is the obligation of the corporation claiming the exemption to satisfy the tax assessor that the property is actually being used exclusively for such purposes. The property must be used directly, not indirectly, for one or more of such purposes (see *University Club v. Lanier*, 119 Fla. 146, 161 So. 78). Incidental use for one or more of such purposes is not sufficient, the primary use controls.

The question of the right of Little Theatre organizations to exemption from ad valorem taxation being primarily one of the ascertainment of facts we are unable to give a specific answer to the above question but feel that the question is one to be determined by the tax assessors by the application of the above observations and constitutional and statutory provisions to the facts in each case.

055-82—April 14, 1955

LIMITATIONS

RELIEF BILLS—CLAIMS AGAINST STATE—LIMITATION OF ACTIONS—§15, ART. IV, STATE CONST., §95.37, F. S.

To: *Paul Kickliter, Chairman, Committee on Pensions and Claims, Florida State Senate, Tallahassee*

QUESTIONS:

1. Is there a limitation upon the time within which claims for relief may be presented to the Florida legislature?

2. If the 1st question is answered in the affirmative, would an act authorizing the payment of a claim barred by statute be valid so that payment may be made thereunder?

These questions appear to have been raised by reason of the introduction of Senate Bill No. 40, which is in effect a claim bill for the payment of compensation or salary claimed by one W. R. Faircloth by reason of his suspension from the office of tax collector for Holmes county, by the governor of Florida, on October 1, 1937, and the refusal of the state senate, on May 26, 1939, to concur with the suspension and remove the said W. R. Faircloth from office. We have verified the above dates with the records in the office of the secretary of state and the journals of the senate and find them to be correct. We are unable to check on the correctness of the amount claimed as salary

or compensation by Mr. Faircloth during the said period of suspension; it is probable that the records of the state auditing department may reflect the compensation paid the acting tax collector during said period of suspension. We are, therefore, presuming that the amount stated in the bill is correct.

The governor was authorized, by §15, Art. IV, State Const., to make the suspension and communicate it to the next session of the state senate, which appears to have been the regular session in 1939, and "if the senate shall refuse to remove . . . the officer suspended shall resume the duties of the office." Upon the refusal of the senate to concur in the suspension this section had the effect of reinstating the suspended officer. The said section of the state constitution further provides that "no officer suspended who shall under this section resume the duties of his office shall suffer any loss of salary or compensation in consequence of such suspension." We are of the opinion that the suspended officer was upon his reinstatement entitled to his salary or compensation (*State v. Lee*, 121 Fla. 815, 164 So. 536) so that his claim therefor accrued on May 26, 1939, or more than 15 years prior to the filing of the claim therefor with the 1955 state legislature.

This raises the question of the application of §95.37, F. S. (derived from Ch. 26953, 1951), which provides as follows:

"95.37 Claims against state; limitation.—

(1) No claims against the state shall be presented to the legislature more than 4 years after the cause for relief accrued. *Any claim presented after this time of limitation shall be void and unenforceable.*

(2) All relief acts of the legislature shall be for payment in full. No further claim for relief shall be submitted to the legislature in the future." (Emphasis supplied.)

This statute appears to be specific and in point and by its terms to bar the above mentioned claim. The last sentence of sub §(1) of said section seems to be in the nature of a statute of nonclaim, if not a pure statute of nonclaim. It seems to declare a claim not filed within the time allowed to be "void and unenforceable." This answers the 1st question.

The 2nd question above stated raises the question of how far is the legislature of 1955 bound by the limitation imposed by said §95.37, F. S. It has long been the rule in this state that the act of one legislature is not binding upon a future legislature (*Trustees Internal Improvement Fund v. St. Johns Railway Company*, 16 Fla. 531; *Gonzales v. Sullivan*, 16 Fla. 791; *Kirklands v. Town of Bradley*, 104 Fla. 390, 139 So. 144; *Tamiami Trail Tours v. Lee*, 142 Fla. 68, 194 So. 305; *Ware v. Seminole County*, Fla., 38 So. 2d 432). These authorities seem to establish a rule that the present legislature is not absolutely bound by said §95.37, F. S., and might amend or otherwise alter it by current legislation, and may alter the same by implication through the enactment of statutes and laws conflicting therewith. We are inclined to view the said statute of limitations or nonclaim as being in

the nature of a joint rule for the house and senate. It is in the nature of a rule of the legislature to consider only claims within the purview of said §95.37, F. S.

Said §95.37, F. S., may be likened to a rule of court, concerning which the supreme court of this state has held binding upon the court, its attorneys and the clerk (*Bryan v. State*, 94 Fla. 909, 114 So. 773; *Morgan v. Eaton*, 59 Fla. 557, 51 So. 814; *Merchants National Bank v. Grunthal*, 39 Fla. 388, 22 So. 685). Rules of court being usually in the nature of procedure and not jurisdictional it seems reasonable that a judgment made and entered pursuant to a procedure violative of such rules would not render the judgment absolutely void, although it might be subject to review and possible reversal in an appellate court. Should the legislature, like a court, ignoring its rules or statutes in the nature of rules duly and regularly enact a claim bill, there being no review of the action of the legislature except upon constitutional grounds, we are inclined to the view that such an enactment would be valid and being valid its payment would seem to be authorized where there has been no violation of constitutional requirements. These observations seem to answer the 2nd question.

055-83—April 20, 1955

TAXATION

TANGIBLE PERSONAL PROPERTY TAXES—COLLECTION— ASSESSMENT OF LEASEHOLD INTERESTS

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where a building, located upon leased property not subject to taxation, has been assessed as tangible personal property upon the tangible personal property tax rolls how may such tax assessment be enforced in case of delinquency?

For the purpose of the above question we shall assume the correctness of the assessment and the validity of the tax assessed. Tangible personal property taxes are a lien "on all of the personal property of the taxpayer in the county in which they are assessed from the 1st day of January for which year the property is liable to assessment (§200.02, F. S.). If not paid tangible personal property taxes are deemed delinquent on and after April 1 of the year following the assessment, after which delinquency the tax collector is required to publish a list of "delinquent tangible personal property taxpayers and the amount of tax due by each," notifying such taxpayers of their delinquency. After the publication of the said notice warrants for the collection of such delinquent taxes issue as provided by §200.27, F. S., under which warrants tangible personal property of the taxpayer may be seized and sold for the payment of such taxes (see §§200.07 and 200.08, F. S.). It, therefore, appears that delinquent tangible personal property taxes assessed against a taxpayer may be collected by seizure, under a tax warrant as provided in §200.27, F. S., and sale pursuant to §200.28, F. S., of any of the tangible personal property of the taxpayer within the county. We find nothing in the statutes requiring that taxes

assessed against an item of tangible personal property be collected by seizure and sale of the property assessed; collection may be made through the seizure and sale of any of the taxpayer's tangible personal property located in the county.

We gather from the file handed us with the said request for opinion that the tangible personal property taxes in question were in part assessed against a building placed by a lessee upon leased lands; this raises the question of whether the building in question was tangible personal property or real estate. The buildings, permanent in nature, placed upon leased property by a lessee become a part of the realty, unless it be otherwise provided in the lease contract or otherwise by the parties to the lease (see 73 C.J.S. 164, §7). It appears from the file before us that the lease contract provides that at the expiration of the lease the buildings will revert to the lessor; this seems to indicate an intent on the part of the parties that the building is a part of the realty and not tangible personal property. If a part of the realty the buildings could not be assessed for taxes as tangible personal property. We, therefore, doubt the validity of the assessment in question; however, only by an inspection of the lease agreement may it be finally determined whether or not the building became a part of the realty upon which it was constructed.

The leasehold interest in question appears to have been for a term of 10 years; if this is true then the leasehold interest (not the building) itself is a chattel real and personal property. This office in an opinion issued on July 25, 1950 (050-363) held leasehold interests in tax exempt property for a term of years was personal property, and not real property, and subject to taxation on the tangible personal property tax roll (one of the circuit judges in the 9th judicial circuit recently held the same thing). Under this opinion the leasehold interest for a period of 10 years was subject to taxation on the tangible personal property taxing roll. We doubt that the value of the building constructed upon the leased real property was the correct value of the leasehold interest; and we feel quite sure that the value of buildings upon leased property may not usually be used to fix the value of the leasehold interest.

Where a tangible personal property assessment has been placed upon several items of tangible personal property, some of which is subject to taxation and others not so subject to taxation against the person named in the assessment as taxpayer, we see no reason why the tax assessor may not correct that tax assessment by deleting the property not subject to taxation and correct the assessment so as to leave only the taxable property in the assessment and recalculate the taxes upon the corrected assessment (see §192.21, F. S.).

Although the above question is answered hereinabove, it appears that such answer may be subject to certain limitations and possible adjustments in the amount of the taxes due.

055-84—April 22, 1955

TAXATION

HOMESTEAD TAX EXEMPTION—MOTOR COURT OWNERS
RESIDING ON COURT*To: Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where a motor court is divided into 2 parcels of land, "A" owning one of the parcels and "B" the other, although the court, excluding the residences of the 2 owners, is operated by the parties as a single unit, are the said 2 owners entitled to homestead tax exemption?

For one to be entitled to homestead tax exemption in this state he must be possessed of the title to real property and must reside on the same and make the same his permanent home. As we understand the facts the motor court is located upon a lot located in Daytona Beach, about 100 ft. in width and extending east and west from Atlantic avenue to the ocean, "A" holding the legal title to the north $\frac{1}{2}$ of the said lot and "B" holding title to the south $\frac{1}{2}$. "A" occupies a building upon his half of the lot and makes the same his permanent home, and "B" a building upon his half of the lot and makes the same his permanent home. We find nothing in the record which would seem to justify a disregarding of the instruments vesting title in "A" and "B" or either of them or that would constitute grounds for the cancellation thereof. The said ownerships and occupancies, and the making of their permanent homes, upon their portions of the lot seems, prima facie, to require the granting of homestead tax exemption to the said parties. The fact that the owners jointly operate a motor court upon the portion of the lands not occupied by them would not seem to be sufficient grounds for denying a claim for homestead tax exemption for the portion occupied by the owners as their permanent homes. Presuming the title and possession of the owners to be as above mentioned, we find nothing in the file furnished us with the opinion which would justify a rejection of the claim for homestead tax exemption.

The above question is therefore answered in the affirmative.

055-85—April 25, 1955

TAXATION

HOMESTEAD TAX EXEMPTION—UNDIVIDED INTERESTS—
REMAINDERS—§§1, 7, ART. X, STATE CONST.*To: Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. Where 2 tenants in common (each possessed of an undivided interest in the property) own a particular parcel of real property, and occupy separate buildings thereon and make the same their permanent homes, are they each entitled to homestead tax exemption?

2. Where the owner of a parcel of real property

conveys it to another, retaining a life estate in an undivided $\frac{1}{2}$ interest therein, and each of such parties make their permanent homes in separate dwelling houses located upon the said property, are they each entitled to homestead tax exemption?

"Every person who has the legal or beneficial title in equity to real property in this state and who resides thereon and in good faith makes the same his or her permanent home . . . shall be entitled to an exemption from taxation . . . up to the assessed value of \$5000 Said title may be held by the entireties, jointly or in common with others, and said exemption may be apportioned among such of the owners as shall reside thereon, as their respective interests shall appear, but no such exemption of more than \$5000 shall be allowed to any one person or any one dwelling house, nor shall the amount of the exemption allowed any person exceed the proportionate assessed value based on the interest owned by any such person." (§7, Art. X, State Const.) The area of homestead tax exemptions is determined by the limitations upon homestead exemptions from process under §1, Art. X, State Const., and bears a close relation thereto, so that decisions of the court relative thereto are persuasive in construing the homestead tax exemption section of the constitution.

"Two separate homesteads cannot exist in the land at one and the same time" (40 C. J. S. 442, §14; 29 C. J. 790 and cases cited in note 23). As a general rule homestead exemption may not be granted to a lessee where the same property is homesteaded by the lessor (40 C. J. S. 524, §85). Where 2 or more tenants in common occupy separate houses upon the same parcel of land held by them in such tenancy, it is unlikely that there is a common or joint occupancy of each of the 2 houses. In such a case each occupant is not possessed of the entire title to the lands occupied by him, but only to an undivided interest therein. Under the example mentioned in the 1st question, although each tenant in common occupies a separate dwelling house upon the lands held in common, such occupant only holds an undivided interest in the lands occupied. Only the interest of the occupant in the land may be exempted; the interest of the other tenant in common, who does not occupy the land, is not entitled to homestead tax exemption. Homestead tax exemption may be granted only to the part occupied as a permanent home; and then only to the extent of the interest of the occupant therein. Let us take for example a 1-acre tract of land upon which there is located 2 dwelling houses, 1 on each half acre of the land, owned by 2 tenants in common, 1 of the tenants occupying 1 of the houses, and the other tenant the other house, and making the same their permanent homes. Each tenant would be entitled to homestead tax exemption to the half acre occupied by him as his permanent home, but only to the extent of his $\frac{1}{2}$ undivided interest; the interest of the other tenant in the land occupied by him would be subject to taxation, and vice versa. These observations seem to answer the 1st question.

For example, "A" and "B" own a 1 acre tract of land as tenants in common upon which are located 2 dwelling houses, 1

upon the east half of said acre and the other upon the west half. "A" occupies and makes the dwelling on the east half of the tract his permanent home; and "B" occupies and makes the dwelling on the west half his permanent home. Although "A" occupies and makes the dwelling on the east half of the tract his permanent home, he owns only an undivided $\frac{1}{2}$ interest in the lands so occupied by him, the other undivided $\frac{1}{2}$ interest being owned by "B" who does not occupy said half acre. Under these circumstances "A" would be entitled to homestead tax exemption upon the half interest owned by him, but "B's" half interest, he not making the same his permanent home, would be subject to taxation. For the same reason "B" would be entitled to homestead tax exemption upon the half interest of the half acre occupied by him, but "A's" undivided interest in the lands occupied by "B" would be subject to taxation.

In the 2nd question there is an absolute title to an undivided $\frac{1}{2}$ interest in a parcel of real property, a right to a remainder in the other undivided $\frac{1}{2}$ interest after the termination of a life estate therein, and the said life estate. Homestead tax exemption may be granted to the person owning the undivided $\frac{1}{2}$ interest in the lands to the extent of his separate occupancy of said undivided $\frac{1}{2}$ interest; but the life tenant being entitled to the possession of the other undivided $\frac{1}{2}$ interest during his lifetime the remainderman would not be entitled to the possession of such undivided $\frac{1}{2}$ interest and his interest therein would seem to be subject to taxation. A life estate in real property being title to real property (although an estate in real property for a term of years is personal property) may be the basis for a claim of homestead tax exemption, where the life tenant makes his permanent home upon the premises based upon the life estate; however, the exemption may not exceed the taxable value of the life estate held by the occupant. The remainder after the life estate would seem to have a present value and subject to taxation. Only the portion of the lands occupied by the tenants may be granted the exemption; the portion not occupied may not be granted exemption. There cannot be 2 occupancies of the same lands by 2 or more persons where there are separate dwelling houses occupied by each. Two or more persons may jointly occupy 1 dwelling house and be entitled to an exemption in the same building, to the extent of their interests so long as not more than \$5000 total exemption is allowed on 1 house; but there may not be such a joint occupancy, for purposes of homestead tax exemption, in 2 or more dwelling houses. These observations seem to answer the 2nd question.

For example, "A" is seized and possessed of full title to a 1 acre tract of land, upon which are located 2 dwellings, 1 on the east half of said tract and the other on the west half of said tract. "A" conveys the said 1 acre tract to "B" reserving unto himself a life estate in an undivided $\frac{1}{2}$ interest in the said lands. "A" continues to occupy the dwelling on the east half of the said tract of land, and "B" moves into the dwelling on the west half and makes the same his permanent home. As "B" owns the title to the entire tract subject only to "A's" life estate in the entire tract, he will be entitled to homestead tax exemption upon

the west half acre occupied by him, but not on the east half acre occupied by "A". As "A" occupies the east half of the tract under his life estate, his life estate in the said east half would be subject to the homestead tax exemption, but not his interest in the west half occupied by "B".

055-86—April 25, 1955

ELECTORS AND ELECTIONS

BOND ELECTIONS—REGISTRATION OF FREEHOLDER ELECTORS—ELIGIBLE FREEHOLDER VOTERS— §§97.081, 100.241, 100.281, F. S., §6, ART. IX, STATE CONST.

To: *Jessie Carswell, Supervisor of Registration, Putnam County, Palatka*

QUESTION:

Where the board of county commissioners has in anticipation of a bond election, called for a reregistration of freeholder electors, under §97.081, F.S., may a person duly registered as an elector on the regular registration records, who did not reregister for such bond election as contemplated by said section, vote at such election upon making proof of freeholder status, as provided by §100.241, F.S.?

The request for opinion states that the "Board of County Commissioners has called for a reregistration of freeholder electors of Putnam County in preparation for the freeholders' Election which is to be held sometime in May this year." From this it is assumed that such board has duly called for a reregistration in relation to a freeholder election; that such election is a bond election; and this opinion is conditioned on such assumptions.

Counties, districts or municipalities of Florida may issue bonds "only after the same shall have been approved by a majority of the votes cast in an election in which a majority of the freeholders who are qualified electors residing in such Counties, Districts or Municipalities shall participate." (§6, Art. IX, Fla. Const.) Hence it is that the proper canvassing board in relation to such an election must determine: (1) Whether a majority of freeholder electors participating in the election approved issuance of bonds; and (2) Whether a majority of the freeholder electors in the taxing unit (i.e., county, district, municipality) participated in the election (§100.281, F.S.).

Relevant features of §100.241, F. S., are mentioned: In any election where only freeholders are qualified to vote, the "regular registration books" of the county shall be used; the supervisor of registration shall determine from the records of his office "the number of freeholders appearing on said registration books and shall execute his certificate as to the number, which shall be accepted as the determination prima facie of those entitled to vote in the election"; those persons shown on the registration books "in a freeholders' election to be free-

holders shall be permitted to vote in the election"; and §100.241 (2) (d) "Any registered elector who is not shown as a freeholder, but who presents to the inspectors a tax receipt showing a payment of taxes on property in his name or a deed or certified copy thereof of property in his name, or makes a sworn affidavit of ownership giving either a legal description, address or location of the property in his name shall be entitled to vote in the election and shall be considered a freeholder."

Relevant features of §97.081, F.S., are mentioned: At the time of registration of any person, the supervisor of registration shall require the applicant to state under oath or affirmation whether he is a freeholder; that the "county commissioners of any county may at any time call for a reregistration of freeholder electors for the purpose of securing a new and up-to-date list of freeholders to be used for qualifying freeholder electors to participate in any election called for the purpose of approving the issuance of bonds of such county The latest list of reregistered qualified freeholders shall supersede prior lists and in any bond election held after a reregistration of freeholders the power to issue bonds shall be based upon the approval by a majority of the votes cast in an election in which a majority of the reregistered freeholders who reregister and are qualified shall participate"; such reregistration is called and notice given in pursuance of §97.081(4) F. S.; and that the registration books "shall be kept open for at least 30 days and closed at least 5 days prior to the holding of any bond election at which time a certified number of reregistered freeholders shall be available, as provided by law."

There is no conflict between the mentioned provisions of §§97.081 and 100.241, F.S. Where no reregistration as contemplated by §97.081, F. S., has been had, the regular registration records are used in a bond election; if such a reregistration is required for a particular bond election, such new registration of freeholders is used. However, even in the latter instance, there is a field of operation for the provisions of §100.241, F.S., including sub §(2) (d) thereof, providing for proof of freeholder status not shown on the registration records, as shall be demonstrated.

Subject to specifically named exceptions, when as here a reregistration has been called in relation to a bond election, only those persons who reregister as freeholders are qualified to vote in such an election. However, freeholder status is fixed as of election day. (*Holmer v. State*, 28 So. 2d 586.) Hence, it is apparent that a duly registered elector not a freeholder when the books closed for the freeholder reregistration (and hence not entitled to register in such new registration) may become a freeholder during the 5 days between date of the closing of the books and holding the election. Further, a person who was a freeholder and duly registered as such in the reregistration may cease to be a freeholder by election day. Further, §97.121, F. S., preserves the right to vote of a person, duly registered as an elector, "inducted into the military service of the United States and remaining in service when the registration books of any

county are open for reregistration of electors", to the extent set forth in said section.

The following conclusions reasonably derive from the foregoing:

Where in relation to a specific bond election a reregistration of freeholder electors is called for by the board of county commissioners in the county where the bond election is to be held, only those freeholders who reregistered as such for said bond election and who are freeholders on the day of such bond election are qualified to vote in such election, subject to the following exceptions:

(1) Where a person who is a duly registered elector on the regular registration books of the county, and who at the time the books closed for such reregistration 5 days before the bond election was not a freeholder, but who becomes a freeholder after the closing of such books and by election day, such person is qualified to vote in said bond election by evidencing to the inspectors at such election his status as a duly registered elector, and by evidencing his freeholder status in the manner provided by §100.241(2)(d).

(2) A person who, at the time of his induction into military service was a duly registered elector and who, because of his induction into and remaining in the service, as contemplated by §97.121, F.S., had no opportunity to reregister as required, would be qualified to vote in such election by his evidencing to the inspectors of election his registration, that it was impossible to reregister as required by reason of his induction and retention in military service, that his name has not validly been removed from such registration records, and by his evidencing his freeholder status in the manner prescribed by said §100.241(2)(d).

Hence, subject to the specific exceptions set forth above, your question is answered in the negative.

055-87—April 26, 1955

TAXATION

EXEMPTIONS FOR DISABLED PERSONS—ELIGIBILITY— §9, ART. IX, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Section 9, Art. IX, State Const., provides in part that "there shall be exempt from taxation property to the value of \$500 . . . to every person who is a bona fide resident of the State and has lost a limb OR BEEN DISABLED in war or BY MISFORTUNE." (Emphasis supplied). What disabilities are included in the above reference to disabilities by misfortune?

Tax exemptions, whether in the state constitution or a statute, are construed against the tax exemption claimant and in favor of the taxing power. (*Steuart v. State*, 119 Fla. 117, 161 So. 378; *State v. Doss*, 146 Fla. 752, 2 So. 2d 303.) In construing

a statute, general and specific words are associated with and take color from each other (Ex Parte Amos, 95 Fla. 5, 112 So. 289). Specific words followed by more general words, in a statute, limit the general words. (Ex Parte Amos, supra; Children's Bootery v. Sutker, 91 Fla. 60, 107 So. 345; Goldsmith v. Orange Belt Securities Company, 115 Fla. 683, 156 So. 3; Dunham v. State, 140 Fla. 754, 192 So. 324.) The language of the constitutional and statutory provisions in question provides exemptions to every person who "has lost a limb or been disabled in war or by misfortune." (Emphasis supplied.) We have 3 classes of disabilities, loss of limb, disability because of war and disability because of misfortune. When we apply the above rules of statutory construction, it would seem that the disability by reason of misfortune should be of the same type as that caused by the loss of a limb or that usually incurred in war.

Misfortune has been defined as any instance of adverse fortune, an unlucky accident, a calamity, a mishap, or a mischance (Ennis v. Fourth Street Building Assn., 102 Iowa 520, 71 N. W. 426); as analogous to misadventure (Mead v. State, Okla. Crim. App. 83 P. 2d 404); as ill luck, ill fortune, calamity, evil or cross accident (Anthony v. Kerbach, 64 Neb. 509, 90 N. W. 243); as some adverse event not immediately dependent on action or will of him who suffers from it, and so improbable that no prudent man will take it into his calculations (Re Montouri's Will, 40 N. Y. S. 2d 414); as a miscarriage of fortune (Swetland v. Swetland, N. J. 134 A. 822). One may be fortunate or unfortunate; if the latter, he suffers a misfortune (Swetland v. Swetland, supra).

Disabilities growing out of wartime service usually consist of disabilities caused by or growing out of injuries received or those brought on by exposure to the elements above and beyond that usually incurred in civil life. When we refer to disabilities incurred in war we have reference to those disabilities peculiar to war and not to the hazards of every day life in peace time. Wars bring on extra hazards to life and limb, not only to members of the armed services, but to all persons within its theatre of operations. These extra hazards of war bring on disabilities that do not occur under peace time conditions. The disabilities from misfortune mentioned in said §9, Art. IX, State Const., are of a similar nature. Disabilities by misfortune, mentioned in said §9, Art. IX, State Const., are those arising from accident, calamity, mishap, mischance or misadventure, which arise over and above the ordinary hazards of life and disease. Although any illness or disease may be a misfortune in the broad meaning of the word "misfortune", such is not the meaning of the term as used in the constitution. Ordinary and usual diseases of the human race are not *misfortunes* within the purview of above constitutional provision. There was no intention or purpose in adopting said constitutional provision to grant tax exemption to disabilities brought on by usual and ordinary hazards of life.

Although there is attached to the request for opinion a copy of several applications for exemption based upon disabilities due to diabetic conditions, paralysis, aortic aneurysm, ptosis

bilateral, muscular dystrophy, cerebral hemorrhage, and hardening of the arteries, there is no history of the cases from which we can or could determine the cause from which such diseases arose. We are not able from the file before us to determine whether or not they arose from natural causes or usual hazards of life, or from some misfortune as above defined. About the best way of determining a particular case is to secure a certificate from a reputable physician certifying whether the disability is a non-allowable one that might arise from disease or degeneration in the ordinary hazards of life or one for which the exemption is granted arising from accident, calamity, mishap, mischance or misadventure, not ordinarily having its origin in disease or the degenerative process of life.

055-88—April 28, 1955

TAXATION

LICENSE TAXES—PHARMACIST EMPLOYED BY NON-PROFIT HOSPITAL CORPORATION—EXEMPTION— §5, ART. IX, STATE CONST., §192.06, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Is an occupational license required of a non-profit hospital corporation for the operation by it of a drug room, where prescriptions issued by doctors to patients in the hospital are filled from said drug room, by a duly registered pharmacist employed by the said hospital, for which a charge is made by the hospital?

Tax exemptions provided for in §1, Art. IX, and §16, Art. XVI, State Const., and §192.06, F. S., have reference to ad valorem taxation and not to license or excise taxes. License taxes are imposed pursuant to §5, Art. IX, State Const. As the pharmacist in question was employed by the hospital to prepare and dispense drugs from its drug room, and was not operating a business of his own, we do not think that he is liable for the payment of a license tax as being engaged in a profession (*Lee v. Gaddy*, 133 Fla. 749, 183 So. 4).

We gather from the request for opinion that drugs were not prepared and dispensed from the drug room upon prescriptions generally, but only in connection with persons who are or have been patients of the hospital, although where a patient is being discharged from the hospital any prescription issued at that time may be filled from the drug room, although the patient when using the prescription will no longer be in the hospital. It is our further understanding that although express charges are made for the drugs dispensed from the drug room, the primary purpose of the drug room is to supply drugs for use by patients in the hospital. It may well be said to be an adjunct to the hospital and not a separate business establishment.

Although hospitals for profit were formerly required to obtain occupational licenses from the tax collector (§27, Ch. 6421, 1931; §905, R. G. S., 1920; §1176, C. G. L., 1927) such requirement was repealed by §38, Ch. 18011, 1937. We find no provi-

sion in prior statutes and laws, or in present Ch. 205, F. S., requiring that *hospitals not for profit* obtain occupational licenses, however, all hospitals operating in this state are required to obtain licenses from the state board of health pursuant to Ch. 395, F. S.

We are, therefore, of the opinion that no occupational license is required of a drug room in a hospital not for profit, although supervised by a duly registered pharmacist, where only prescriptions for patients in the said hospital are filled, and prescriptions to a patient being discharged or just discharged from the hospital, although to be taken home by the patient and there used, should be construed as a prescription to a patient. If prescriptions are being filled by the drug room for non-patients, then a license would seem to be required. These observations answer the above question in the negative.

055-89—April 28, 1955

LEGISLATURE

GENERAL LAWS—EFFECT OF EXCLUSION OF SINGLE COUNTY FROM OPERATION OF LAW—§21, ART. III, STATE CONST.

To: *Paul Kickliter, State Senate, Tallahassee*

QUESTION:

Will the amendment of a bill applicable to the entire state so as to exclude from its operation a single county by name convert it into a local bill, so as to render it invalid if passed as a general bill?

The legislature may not enact special or local legislation unless and until notice of intention to apply therefor shall have been published in the manner provided by law where the matter or thing to be affected may be situated, unless the same be submitted to a referendum held in the territory to be affected (§21, Art. III, State Const.). No such notice or referendum is required of bills or statutes of general application. Special and private statutes and laws are prohibited in many cases (§20, Art. III, State Const.), and may not be enacted even after the publication of a notice or the submission thereof to a referendum.

Legislation treated and enacted by the legislature as general may nevertheless be treated and held by the courts to be local or special (*Anderson v. Board of Public Instruction*, 102 Fla. 695, 136 So. 334; *Carter v. Norman*, Fla., 38 So. 2d 30). Except where required by the state constitution to be of statewide operation they may be classified as to operation so long as they are of uniform operation within a class (*Cates v. Heffernan*, Fla. 18 So. 2d 11; *Budget Commission v. Blocker*, Fla., 60 So. 2d 193). Population of counties may be a proper classification where reasonable (*Clein v. State*, Fla., 52 So. 2d 117; *State v. Daniel*, 87 Fla. 270, 99 So. 804; *Cates v. Heffernan*, Fla., 18 So. 2d 11). However, the exclusion of a single county by name would not appear to be within this rule of classification.

Chapter 14545, 1929, purported to amend an existing statute

prohibiting the use of diving suits in connection with sponge fishing within the territorial limits of Florida, by amending the same so as to exclude from its operation "any waters of Florida south of 26.50° north latitude; or, generally speaking, south of the mouth of the Caloosahatchee River in Lee County, Florida." The requirements of §21, Art. III, State Const., relative to the publication of notices of application for the passage of special and local laws were not complied with. This amendment had the effect of excluding from the operation of the statute all of 4 counties and small portions of 3 other counties, out of a total of 67 counties. The supreme court in *Lipscomb v. Gialourakis*, 101 Fla. 1130, 133 So. 104, text 106, remarked that said "Ch. 14545 attempts to convert by amendment the general law into a special law by limiting the territory in which it is applicable, and its passage by the Legislature did not comply or attempt to comply with the provision contained in §21, Art. III, of the Constitution . . ." Although this expression of the supreme court may have been dicta, because of it having held the same act invalid upon other grounds, it is indicative of the views of the court upon the question.

There would seem to be little difference between the express exclusion of the southern tip of the state from an act and the exclusion of a single county in principle. The case of *Webb v. Adams*, Ark., 23 S. W. 2d 617, text 619, is of interest in this connection. In this case the supreme court of Arkansas remarked:

"If 2 counties and a special school district can be excepted from the provisions of a law otherwise general and operative equally and uniformly throughout the whole state, there would be no reason to say that 25 or 50 counties or 74 of the 75 counties of the state could not be so excepted, leaving its application as a general law to but one county, abrogating by legislative determination and judicial construction the constitutional amendment prohibiting the Legislature from passing 'any local or special act.' The exclusion of a single county from the operation of the law makes it local, and it cannot be both a general and a local statute. *Davis v. Clark*, 106 Pa. 384; *State v. Township of Mullica*, 51 N. J. Law, 412, 17 A. 941; *Miller v. Kister*, 68 Cal. 142, 8 P. 813; *Township of Lodi v. State*, 51 N. J. Law, 402, 18 A. 749, 6 L. R. A. 56."

Although only a court of competent jurisdiction could finally determine the above stated question, we are of the opinion that the amendment in question would present a serious constitutional question and might render the amended bill unconstitutional if notice thereof not published in the counties to which applicable, or submitted to a referendum in such counties, in accordance with §21, Art. III, State Const.

055-90—May 3, 1955

SHERIFFS

DEPUTY SHERIFFS—SUMMONS IN TRAFFIC OFFENSES— FEES—§§901.09, 901.11, F. S.

To: R. L. Kendrick, Sheriff, Escambia County, Pensacola

QUESTIONS:

1. Is a written notice to appear, described below, given to a person charged by a deputy sheriff with violation of one or more statutes pertaining to operation of motor vehicles upon the public highways of the state contemplated by the Florida Statutes?

2. Where an accused is not arrested either without or with a warrant, should a summons issue under §901.09, F. S., and be served by the sheriff upon the accused traffic violator, in order to obtain jurisdiction of the accused?

3. Where a highway patrolman arrests for a traffic violation and obtains a recognizance pursuant to §321.05 (4) (a), F. S., and a summons thereafter issues, but the return thereon is made by the sheriff, is the sheriff entitled to a fee for serving such summons?

AS TO QUESTION 1:

It is assumed that no arrest is made. The written notice attached to your letter is designated, "Summons, County of Escambia, Sheriff's Dept." It contains the name and identifying information concerning the offender, nature of the violation, date and hour returnable, and before whom returnable. It appears to be signed by a deputy sheriff.

There is no provision in law for a deputy sheriff giving a written notice or ticket described above for the commission of an offense. My predecessor in office so held (AGO 1943-1944, p. 189) and I concur. While the accused might voluntarily appear and subject himself to the court's jurisdiction, he cannot be penalized should he fail to respond to the notice, as in the case where a summons issued. (See §901.11, F. S.) The 1st question is answered in the negative.

AS TO QUESTION 2:

It is, of course, assumed that the accused does not voluntarily appear before the committing magistrate to answer the charge placed against him by the deputy sheriff.

Where complaint is made, the magistrate, under §901.09, F. S., "... shall issue a summons instead of a warrant of arrest, if he has reasonable ground to believe that the person against whom the complaint was made will appear upon a summons". This, then, is authority by which the accused may be required to answer. The sheriff, for service of the summons, is entitled to the fee allowed for serving civil process. (Florida Sheriffs' Manual, p. 45).

Since the accused was not arrested, either without or with a warrant, and did not voluntarily appear, one process known under our law to require his appearance to answer the traffic charge is a summons issued under §901.09, F. S. Hence, the question, as qualified above, is answered in the affirmative.

AS TO QUESTION 3:

Where a highway patrolman, under §321.05 (4) (a), F. S., makes an arrest for traffic violation, he may (1) forthwith deliver the accused to the sheriff, or (2) obtain a recognizance, or (3) if thought necessary, require a cash bond. Your letter refers to a "citation" issued by the patrolman. I find no such method recognized by the statute. If we assume, as the question does, that a *recognizance* is taken by the officer, there can be no reason for a summons to issue. In opinion number 054-119 (AGO 1953-1954, page 409), a copy of which is enclosed, we held that after arrest by a highway patrolman the issuance of a warrant or *capias* causing the re-arrest of the accused is entirely unwarranted. We believe this applicable to your question so that a summons should not issue.

If the sheriff actually serves a summons, he is, of course, entitled to the fee allowed by law. On the other hand, if he merely makes the return after such summons has been issued by the magistrate, but without rendering the service, he is not entitled to any fee. This answers the 3rd question.

I gather from your request for opinion, you are under the impression that where the form of notice described in question 1 is delivered by a deputy, you are entitled to a fee. As stated above, this notice is not contemplated by our statutes; consequently, no fee is provided.

055-92—May 4, 1955

COURTS

SMALL CLAIMS COURTS—CLERICAL ASSISTANCE—EXPENDITURES—§§42.05, 145.01, 145.02, 145.05, F. S.

To: *Bryan Willis, State Auditor, Tallahassee*

QUESTION:

Are reasonable expenses for salaries of clerks and assistants in a small claims court, created by Ch. 42, F. S., properly deductible from fees collected before applying the maximum compensation of \$7,500 fixed by §42.05, F. S.?

The maximum compensation that a small claims judge may receive is \$7,500 per year "... after deducting costs." (§42.05, F. S.). There is no explanation in Ch. 42 as to what is intended by the quoted words. The costs by way of filing fees to which the judge is entitled are set forth in §42.11, F. S.

Therefore, unlike other county officers whose compensation is derived wholly or partly from fees, the maximum compensation of a judge of the small claims court is not fixed by §145.01, F. S. However, the maximum compensation is identical.

"Net income" as defined in §145.02, F. S., means the deduction of "... all reasonable expenditures for the salaries of clerks and assistants ..."

Subsection (1) of §42.05, F. S., provides:

"(1) All fees collected by the judge as authorized by §42.11, F. S., after deducting costs, shall be retained by him as his sole remuneration, but in no event shall the sum to be retained exceed \$7,500."

The language in §42.20, F. S., requiring the county commissioners to furnish "... such necessary equipment, maintenance and supplies ..." to enable the court to function "... and the amount so expended shall be a first charge upon the excess earnings of the court ..." indicates that the costs to be deducted are not those charged to the particular case. Excess fees of other county officers are so earmarked. (§145.05, F. S.).

It would not be logical to assume that the fee officers whose compensation is governed by the provisions of Ch. 145, F. S., are placed in a different category, insofar as the method for meeting office expenditures is concerned, from judges of the small claims courts. From a practical standpoint, should judges of small claims courts be required to pay the compensation of various assistants employed by them from the maximum of \$7,500 permitted by statute, their compensation would probably be reduced to such an extent that it might be difficult to interest qualified persons in the judgeship of that court.

Consequently, I do not believe the legislature intended to use the words "after deducting costs" in the restrictive sense. It is my opinion that, as in the case of other fee officers falling within the purview of Ch. 145, F. S., reasonable and necessary expenditures for clerks and assistants may properly be charged as expenses of the office, before computing the compensation to which such judge is entitled under §42.05, F. S.

Accordingly, the question is answered in the affirmative.

055-93—May 6, 1955

COUNTY OFFICERS AND EMPLOYEES

SCHOOL BOARD MEMBERS—COMPENSATION—FEDERAL CENSUS—PALM BEACH COUNTY—CH. 27037, ACTS OF 1951

To: *George W. Slaton, Chairman, Palm Beach County Board of
Public Instruction, West Palm Beach*

QUESTION:

Does the wording "Last Preceding Federal Census," as contained in the title of Ch. 27037, 1951, refer to the census preceding the date of the enactment of Ch. 27037, 1951, or may it refer progressively to a subsequent census such as the new one now under way?

Chapter 27037, 1951, provides in part:

"That from and after January 1, 1951 each member

of the several Boards of Public Instruction in all counties of the State of Florida having a population of not less than 114,000 and not more than 114,800, according to the last preceding Federal census, shall receive as compensation for his or her services, as such member of such Board of Public Instruction, the sum of \$200.00 per month, to be paid monthly from and out of the County Current School Fund of such county; . . ."

The language of Ch. 27037, 1951, does not limit its provisions to the last federal census taken prior to its enactment. It would apply with equal force to a regular federal census taken subsequent to January 1, 1951.

This, I believe, answers your specific question as presented. I think, however, that I should point out that there would be considerable doubt as to whether the special census in Palm Beach county which is involved would affect the compensation of school board members in counties falling within the population bracket provided by Ch. 27037, 1951.

This act is a general law and it must be assumed that the legislature intended its population application to be governed by the regular decennial statewide census. At the time of the enactment of this law the legislature could not have foreseen or contemplated the special census in question.

This line of reasoning was adopted by the Florida supreme court in the case of *Sproul v. State ex rel Smith*, 16 So. 2d 109 (1944). See Headnote 1:

"The Beverage Act of 1935 is a taxing as well as a regulatory statute intended to have uniform operation throughout state, so that words according to the latest 'state or federal census' in provision for license tax graduated according to population, refer to regular federal census and regular state-wide census. F.S.A. §561.34 (4,5)."

In view of this decision, I think that unless the special census in question is authorized for the express purpose of determining the salary of school board members in Palm Beach county, it would be unlikely that the courts would consider the special census to be within the purview of the act in question.

055-94—May 9, 1955

TAXATION

MURPHY ACT—TAX SALE CERTIFICATES—CANCELLATION—§§194.59, 192.38, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are those tax sale certificates which were sold and assigned under the Murphy Act subject to cancellation under §194.59, F. S.?

Section 194.59, F. S., provides for the cancellation, by the clerk of the circuit court, of tax sale certificates "issued prior

to the year 1940, whether issued for state taxes, state and county taxes, or municipal taxes, and held by any private holder . . . where the lands covered by such tax certificates heretofore reverted to the state for non-payment of delinquent taxes under the provisions of §192.38, et seq., F. S." (Emphasis supplied.) In other words this section provides for the cancellation of individually held tax sale certificates issued in 1939 or prior years, where the lands encumbered by the said certificates reverted to the state under the Murphy Act.

Doubtless this statute was activated by reason of the holding of the Florida supreme court in *Ivey v. State*, 147 Fla. 635, 3 So. 2d 345, where the holders of tax sale certificates issued in 1932 and 1933 made application, after June 9, 1939, for a tax deed sale and the issuance of a tax deed to the lands described in said tax sale certificates. The state filed a proceeding for an injunction upon the grounds that the title to the lands described in said tax sale certificates had become vested in the state, on June 9, 1939, under the Murphy Act, upon other outstanding tax sale certificates held by the state, which act, it was contended, had the effect of fixing a limitation upon the time for making application for tax deeds upon individually held tax sale certificates when there were also outstanding tax sale certificates held by the state within the purview of the Murphy Act. This contention of the state was upheld, the court having remarked in said case that "the effect of the Murphy Act of 1937 was to require the owners of all state and county tax sale certificates that were more than 2 years old when the Murphy Act became effective on June 9, 1937, to apply for tax deeds on such certificates before the lands covered by the certificates became absolutely vested in the state under the Murphy Act on June 9, 1939."

For said §194.59, F. S., to be applicable the lands covered by the tax sale certificates in question must have reverted to the state under the Murphy Act. Where outstanding tax sale certificates were sold under the Murphy Act only in rare cases, if ever, were there left remaining in the state outstanding tax sale certificates under which title to the lands might have become vested in the state under the Murphy Act. Therefore, the above question must be answered in the negative, in the absence of a positive showing that notwithstanding the said sale of tax certificates under the Murphy Act there was left outstanding one or more tax sale certificates sufficient to cause a reversion of the title to the state under the Murphy Act. For all practical purposes the above question is answered in the negative.

055-97—May 9, 1955

STATE OFFICERS

SUSPENSION—REINSTATEMENT—COMPENSATION— §15, ART. IV, STATE CONST.

To: Dewey M. Johnson, Chairman, Senate Committee on Judiciary
"A", Tallahassee

QUESTIONS:

1. Where an officer, suspended by the governor

pursuant to §15, Art. IV, State Const., is subsequently reinstated in his office, but simultaneously with such reinstatement resigns from such office and exercises none of the functions of such office after reinstatement, was there such a resumption of office to entitle such officer to compensation during the period of his suspension?

2. Does the provision in said §15, Art. IV, State Const., that "no officer suspended who shall under this section resume the duties of his office, shall suffer any loss of salary or other compensation in consequence of such suspension," when read in connection with §24, Art. IV, and §3, Art. XVI, of the said constitution, constitute a constitutional appropriation for the payment of such salary or compensation?

We feel that the 1st question is answered by the following extract taken from *State ex rel Williams v. Lee*, 121 Fla. 815, 164 So. 536, text 538, to wit:

"It is contended by the respondent that because the relator alleges that immediately after he had been reinstated by the action of the State Senate on May 31, 1935, he resigned as Assistant State Auditor, that he is not entitled to the benefits of the provision of §15 of Art. IV above quoted, because it is not shown that he resumed the duties of his office.

"We think this position is entirely untenable. In law he resumed the duties of his office as soon as he was reinstated, but instead of insisting upon performing the duties of that office and disrupting the organization which had probably been effectuated during his suspension, he tendered his resignation. It appears to us that under the conditions which the alternative writ shows to have existed, the relator pursued the proper course. He had been vindicated by the action of the Senate and thereby continued in office. His right to the salary during the time of suspension is not based upon the performance of work after reinstatement but the right to that salary accrues as soon as the officer is reinstated, either by the act of the Governor or by the Act of the Senate, and it is not contemplated that an inferior officer should force his association and services upon his superiors in office and the Chief Executive when it is apparent that such services are not wanted by those higher in authority and he may at any time resign without forfeiting his right to compensation as provided by law for the period between the date of his suspension and that of his resignation."

It, therefore, appears that the supreme court of this state has answered the 1st question in the affirmative.

Under §15, Art. IV, State Const., any officer suspended by the governor, pursuant to said section, may resume the duties of his office: (1) when reinstated by order of the governor,

(2) when the fact of suspension, and the cause therefor, is not communicated to the "next session of the senate," (3) when the senate refuses to concur in the suspension and refuses to remove the suspended officer from office, and (4) when the senate, to which the suspension is communicated by the governor, adjourns without taking any action thereon. Any officer resuming the duties of his office as aforesaid shall suffer no loss of "salary or other compensation in consequence of such suspension" (§15, Art. IV, State Const.). Although a suspended officer upon resuming the duties of his office is clearly entitled to his salary or compensation during suspension under the above constitutional provision, there remains the question of the amount of such compensation and an appropriation therefor.

In *State ex rel Williams v. Lee*, supra, John W. Williams, a commissioned assistant state auditor, was suspended by the governor on March 29, 1933, and reinstated by the same official on May 15, 1933, and again suspended on August 16, 1934, and reinstated May 31, 1935, by reason of the refusal of the senate to concur in such suspension. He claimed compensation, at the statutory rate for assistant state auditors, during the period of such suspensions and made requisition therefor to the state comptroller who refused to pay the same, whereupon mandamus was brought against the said state comptroller to enforce the payment of said claim. It does not appear from this opinion that there was any doubt or dispute as to the amount of the relator's claim. We find no relief act or other legislation expressly relating to Mr. Williams' claim or providing for its payment. The court appears to have been of the view that the compensation claimed by Mr. Williams (there being apparent no dispute as to the amount of the claim) might be paid from the appropriation to the state auditing department. This case seems to leave in doubt the right of the state comptroller to pay such a claim where there is not a sufficient legislative appropriation for the payment of the said claim, the payment of the claim out of a subsequent appropriation (at least where the payment of the claim was not contemplated by the legislature), the payment of the claim when the amount is in dispute, and the payment of a claim by a suspended and reinstated county official (whether from state or county funds, and from which fund). These questions are not answered in the above Williams case nor, so far as we have been able to ascertain, in any other opinion of the supreme court of this state. There remains unanswered also the question of whether the governor should report suspensions to an extraordinary session of the senate, if one intervenes before a general session of the senate, or only to general sessions of the senate.

Our examination of the laws of the legislature for many sessions last past reveals that the legislature, in substantially all, if not all, suspensions and reinstatements, has determined the right of the suspended officer to compensation, the amount of the compensation, and its payment, including an appropriation therefor. So far as we are able to ascertain the legislature has not by general law set up any tribunal for determining the amounts due such suspended and reinstated officers nor has the legislature provided an appropriation for the payment of

such claims. The legislature having taken it on itself, over a long period of time, the fixing of such compensation and providing for its payment, has in effect made a departmental construction of the constitutional provision.

These facts and circumstances lead to serious doubt, in the absence of general legislation setting up a tribunal to fix the amount of compensation due and providing funds for the payment of such claims, of the authority of any state official, agency or court to determine the amount of the claim and pay the same (there being uncertainty as to which fund it may be paid from) until the question is clarified by the courts, or by the legislature by legislation. The 2nd question must be answered in the negative, and it is so answered, pending such determination.

055-98—May 9, 1955

PUBLIC HEALTH

MOSQUITO CONTROL DISTRICTS—DISTRICT BOARD OF COMMISSIONERS—COMPENSATION—§27, ART. III, STATE CONST., §390.14, F. S.

To: *Albin C. Thompson, Jr., Attorney for Amelia Island Mosquito Control District of Nassau County, Fernandina Beach*

QUESTION:

Where a mosquito control district is created under Ch. 390, F. S., may the compensation of the commissioners of such district be established by a special or local act without offending the provisions of §20, Art. III, Florida Const., prohibiting the legislature from passing special or local laws regulating the fees of state or county officers?

In *State v. Ocean Shore Improvement Dist.*, 116 Fla. 284, 156 So. 433 the court held that a taxing district is not covered by the provisions of §27, Art. III, of the constitution requiring the election by the people or appointment by the governor of all state and county officers not otherwise provided for by the constitution. The decision pointed out the great latitude permitted the legislature in dealing with such districts. Later, in *Advisory Opinion to the Governor*, 156 Fla. 166, 23 So. 2d 158 the court approved the *Ocean Shore Improvement District* case, holding the officers thereof do not fall within §27, Art. III, Fla. Const.

These decisions, then, settle the principle that the officers of an improvement district, into which category a mosquito control district falls, are neither state nor county officers. The commissioners are district officers. Consequently, their compensation may be fixed by a local or special act passed pursuant to the requirements of §21, Art. III, State Const.

It follows, then, the question is answered in the affirmative.

055-100—May 11, 1955

COUNTY OFFICERS AND EMPLOYEES

BOARD OF PUBLIC INSTRUCTION—PAYMENT OF PUBLIC FUNDS INTO TRUST—HEALTH AND HOSPITALIZATION INSURANCE FOR EMPLOYEES—§§112.08, 112.10-112.12, 112.14, F. S.

To: Thomas D. Bailey, Superintendent of Public Instruction, Tallahassee

QUESTION:

Is the board of public instruction of Dade county, empowered to expend public funds into a trust fund, the purpose of which is to purchase health and hospitalization insurance for employees under a plan as provided in the trust agreement?

I have examined the copy of a form of trust agreement which you enclosed with your letter, which it is assumed would be the pattern for the proposed plan embracing the school authorities and their employees. The purpose of the trust agreement is set forth as follows: "Purpose. The purpose of the fund, herein created, is to provide and maintain, through policies issued by duly licensed commercial carriers authorized to do business in the state of Florida, or by other means, benefits for Employees of Employers who are eligible therefor, in accordance with the plan for such benefits and with rules and regulations to be established by the Trustees". The agreement sets up trustees and payments by employers to be made into a trust fund to be administered by the trustees to secure insurance benefits for employees.

I know of no legal authority for a county school board to arrange for group insurance for its employees other than that contained in Ch. 112, F. S.

Section 112.08, F. S., authorizes school boards to provide for "life, health, accident, hospitalization or annuity insurance . . . for the employees thereof, upon a group insurance plan, and to that end to enter into agreements with insurance companies to provide such insurance." (Emphasis supplied.)

Section 112.10, F. S., authorizes school boards "to deduct from the wages of such employee, periodically, the amount of the premium which such employee has agreed to pay for such insurance, and to pay or remit the same directly to the insurance company issuing such group insurance." (Emphasis supplied.)

Section 112.11, F. S., provides that participation in such group insurance by any employee shall be *entirely voluntary* at all times.

Section 112.14, F. S., sets forth specifically the purpose and intent of Ch. 112 F. S. as follows:

"It is hereby declared to be the purpose and intent of this law to make available upon a voluntary participation basis to the several employees aforesaid, the economics, protection and benefits of group insurance not available

to each employee as an individual." (Emphasis supplied.)

Since the above cited laws contemplate that group insurance for the benefit of employees of school boards shall be entirely on a voluntary basis on the part of each employee; that premiums shall be paid by the board directly to the insurance carrier and that employees shall participate at least to some extent in the payment of the premium through payroll deduction, (§112.12, F. S., specifically forbids the board from paying *any part* of such premiums for teachers from public funds), it is my opinion that there is no legal authority for a county school board to pay public funds into a trust fund such as has been proposed. New enabling legislation would be required to authorize the proposed plan.

Your question is therefore answered in the negative.

055-101—May 11, 1955

COUNTY OFFICERS AND EMPLOYEES

COUNTY COMMISSIONERS—COURTHOUSE—OFFICE
SPACE—OFFICIAL COURT REPORTER—
§§29.01-29.02, F. S.

To: *Harry A. Johnston, County Attorney, Palm Beach County,
West Palm Beach*

QUESTIONS:

1. Is the board of county commissioners, as custodian of the courthouse, authorized to furnish space in the county courthouse to private businesses?

2. Is the board of county commissioners authorized to assign office space in the county courthouse to an official court reporter, appointed pursuant to the provisions of Ch. 29, F. S., where such official court reporter, in addition to the duties required of him by law, receives fees for services otherwise rendered?

3. Where space is available in the county courthouse may the board of county commissioners properly furnish office space to a justice of the peace when the county courthouse lies within the district of such justice of the peace?

AS TO QUESTION 1:

Your letter states that abstract and title companies have for many years had desk space in the office of the clerk of the circuit court. These companies, of course, are engaged in business for profit. Apparently, they perform no service for the county but their business is essentially for private gain. As we pointed out in opinion 053-39, AGO 1953-1954, p. 149: "County buildings, of course, may not be used for the purpose of operating a private business enterprise but are dedicated solely for the use of public business." We did hold in that opinion that the board of county commissioners might, in its sound discretion, permit the installation of public toll telephones in the county courthouse, for the use and convenience of the public.

Unless the businesses contemplated by this question per-

form a necessary county function, which I fail to see, then I know of no authority by which the board of county commissioners may permit use of space in the county courthouse. Accordingly, the question is answered in the negative.

AS TO QUESTION 2:

Section 29.01, F. S., provides for the appointment of official court reporters "... of testimony and proceedings in trials at law in the circuits." Section 29.02, F. S., specifically sets out the duties of the official court reporter as reporting the testimony and proceedings upon the request of the presiding judge, the state attorney or defendant, as well as the testimony in preliminary hearings when so requested by said judge or state attorney. The reporter is also required to report the trial of "... any civil case in said court upon the demand or request of the attorney for either party." It will, therefore, be seen the statute contemplates the court reporter shall have official duties in both criminal and civil cases. The supreme court in *In Re Opinion of Justices*, 120 Fla. 729, 163 So. 76, advised the then governor that the official court reporters are not state officials "... but are officially employed court functionaries ..." Apparently, he is not a county officer. Ordinarily, it is the duty of the board of county commissioners to furnish quarters for county officers. However, just as in the case of the circuit judge, the official court reporter performs functions on behalf of the county as well as the state. As a practicable matter, it would be impossible to separate fees received by the court reporter for his services rendered in connection with matters not officially required of him by law from those he is required to perform. Without a reporter readily available, delay and inconvenience may well result. He should be located in the courthouse for the convenience of the court, the attorneys and the litigants. Accordingly, the question is answered in the affirmative.

AS TO QUESTION 3:

In opinion 051-130, AGO 1951-1952, p. 231, I concurred in and adopted the opinion of my predecessor in office, holding that there is no statutory authority in county commissioners for supplying *office space*, furniture, record books, or seals to a justice of the peace, since these expenses are to be paid from the fees of the justice of the peace. I intended this to mean the board might not lease space for the justice of the peace. If there is space in the county courthouse not otherwise required for carrying on county functions, I see no reason a justice of the peace as a county officer might not properly be permitted to occupy it until such time as the space is otherwise needed. As qualified, the question is answered in the affirmative.

055-104—May 18, 1955

EDUCATION

BOARD OF CONTROL—TEACHERS—EMPLOYMENT— SALARIES

To: Board of Control, Florida State University, Tallahassee

QUESTION:

Is it lawful for the board of control to contract with

the teaching personnel of the institutions of higher learning on academic year (10 months) basis, spreading the total salary over 12 months?

I know of no legal objection to the procedure described in your question. Some of the counties have been paying the teachers in public schools on that basis for several years.

055-105—May 24, 1955

TAXATION

LICENSE TAXES—INSURANCE—REGIONAL HOME OFFICE
—CREDITS AGAINST PREMIUM RECEIPTS TAX FOR
COMPUTING EXEMPTIONS—§§205.43, 205.432,
440.51(5), F. S.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTION:

Where there is involved the credit against the tax imposed by §205.43(2), F. S., as to the assessment paid by an insurance company on premiums received for workmen's compensation insurance under §440.51(5), F. S., what constitutes the "amount of the tax as determined under §205.43(2)," as such words are used in §205.432, F. S., in relation to the credits and deductions granted a foreign insurer who has established a regional home office, as contemplated by said latter section?

In opinion 053-197 (1953-1954 Biennial Report, 191), copy attached, the questions therein dealt with were concerned with computing the tax, credits and deductions provided by Ch. 27989, 1953 (§205.432, F. S.) in relation to casualty insurance companies, in view of the provisions of Ch. 28230, 1953 (Ch. 185, F. S.), providing a retirement system for police officers of incorporated municipalities. Reference is made to said opinion concerning the pertinent provisions of §205.432 F. S. in relation to this question; and to the reasoning and conclusions therein set forth in relation to the questions dealt with in such opinion.

Section 440.51, F. S. (part of our workmen's compensation law), provides that Florida industrial commission shall estimate annually in advance the amounts necessary for the administration of Ch. 440, F. S.; that total expenses of such administration "shall be prorated among insurers writing compensation insurance in this state, and self-insurers"; that such amount "may be assessed as a specific amount or as a percentage of gross premiums, payable as the commission may direct, provided, however, such amount so assessed shall not exceed 4% of such gross premiums." Sub §(5) of said section provides that, "Any amount so assessed against and paid by an insurance carrier shall be allowed as a deduction against the amount of any other tax levied by the state upon the premiums, assessments or deposits for workmen's compensation insurance on contracts or policies of said insurance carrier." It is recognized that were it not for the deduction mentioned, an insurer would be liable to the state under the provisions of §205.43(2) for the premium receipts tax imposed by said section in relation to premiums received for such compensation insurance. It is here relevant to remark that the mentioned deduction has been a part of our

workmen's compensation law since its adoption (sub §51(3)(e), Ch. 17481, 1935).

The effect of opinion 053-197 was to place premium receipts taxes imposed under Ch. 185, F. S., in the same position as premium receipts taxes imposed under Ch. 175, F. S., in relation to the tax, credits and deductions contemplated by §205.432, F. S. The reasoning and the law set forth in that opinion furnish the answer to this question; and only sufficient portions thereof are here repeated to assure clarity.

It will be noted that a foreign insurer who has qualified under the provisions of §205.432, F. S., by establishing a regional home office in this state, is permitted exemptions summarized as follows: (a) 50% of the amount of the tax determined under §205.43(2), F. S.; (b) the full amount of all ad valorem taxes paid on certain described properties; and (c) provided, that in no event shall such credits and deductions reduce the amount of the tax payable to less than 20% "of the amount of tax as determined under §205.43(2), F. S." It is to be noted that no mention is made in the section concerning the deductions permitted by §440.51(5), F. S.

The general rule of statutory construction is that legislative intent is to be found from a view of the whole law or laws in *pari materia*. *Curry v. Lehman*, Fla., 47 So. 18; *State v. Johnson*, Fla., 72 So. 477; *Singleton v. Larson*, Fla., 46 So. 2d 186. And in dealing with finance and taxation measures courts are required to look to the substance of the legislative scheme in its practical operation and effect. *State ex rel King v. Lee*, Fla., 163 So. 859.

It is to be noted that in computing the tax under §205.43(2) certain deductions from gross premiums collected are specified in said section. The deduction provided by §440.51(5) had long been provided at the time of the adoption of §205.432; and reading in *pari materia* §440.51(5) and §205.43(2) such deduction was and is as effective as though set forth as a deduction under §205.43(2) in computing the tax imposed thereby. Hence, it must follow that in applying the credits and deductions provided by §205.432 in relation to an insurer issuing workmen's compensation insurance in this state, prior to applying such credits and deductions there first must be credited against the tax otherwise payable under §205.43(2) the amount of assessment paid by such an insurer in pursuance of §440.51(5). It requires no particularization to demonstrate that the only other alternative would lead to disturbing results; and it is a recognized rule of statutory construction that no interpretation should be indulged in which leads to absurd consequences. *City of Miami v. Romfh*, Fla., 63 So. 440; *Haworth v. Chapman*, Fla., 152 So. 663.

In view of the foregoing, in my opinion the question is answered as follows:

In relation to a foreign insurer who has established a regional home office in this state as contemplated by §205.432, F. S., and which insurer has issued workmen's compensation insurance in this state, prior to applying the credits and deduc-

tions authorized by said section, there must first be credited against the tax otherwise payable by such an insurer under §205.43(2), the amount of assessment paid by such insurer in pursuance of §440.51(5). It follows that the provision requiring payment of not less than 20% of the premium receipts tax determined by §205.43(2) is to be computed on the premium receipts tax imposed by §205.43(2) remaining after crediting thereon such assessment as may have been paid by an insurer in pursuance of §440.51(5).

The matter in the preceding paragraph is not to be construed as disturbing the effect of opinion 053-197. Hence, should such an insurer be required to pay premium receipts taxes to municipalities in pursuance of ordinances as contemplated by Chs. 175 and 185, F. S., either or both, the preceding paragraph is to be read in connection with the reasoning and conclusions set forth in opinion 053-197.

055-106—May 25, 1955

BEVERAGE LAW

ADMINISTRATION—SPECIAL BEVERAGE LICENSE— MIAMI SPRINGS VILLA—\$561.20, F. S.

To: *John D. Marsh, County Solicitor, Criminal Court of Record,
Miami*

QUESTION:

May the Miami Springs Villa, which presently has issued to it a so-called special or exception license and which license may be issued to certain hotels without being counted in the quota under \$561.20, F. S., serve intoxicating liquors in another separate and apart building known as a banquet hall building, located in the same 10 acre tract but some 2000 ft. from the main hotel for which the exception license was issued under the authority of the exception license issued for the main building?

This office held in opinion number 053-38, dated February 17, 1953, that a hotel in the city of Miami which has been licensed to sell intoxicating liquor under the hotel exception provision of §561.20(2), F. S., would be legally entitled to dispense intoxicating liquors from an additional room, lounge or temporary bar of the same hotel without the necessity of securing an additional license. We pointed out in that opinion as follows:

"It has long been the departmental construction by the State Beverage Department that as long as the dispensation of intoxicating liquor by a hotel is incidental to the main operation of the hotel that one license for the sale of intoxicating liquors on the premises was sufficient and that if it became necessary to open another room for storage or for service to the hotel customers, it was within the spirit and intent of the law to allow such operation as long as it remained on the licensed

premises and the entire operation was subject to inspection and search by officers during all business hours."

In that case only one building was involved and it was the building for which the original liquor license had been issued and in which it was then located.

You stated in your letter that you were familiar with the above cited opinion and also with the opinion of the supreme court in *Long v. Capital Gardens, Inc.*, 142 Fla. 261, 194 So. 625, and you stated as follows:

"It appears to me that there are some features of the case pending before me now which distinguish it from the *Long* case in that here the sale of liquor is incidental to the main operation of the business which is that of a hotel providing accommodations and food for guests, and that the sale of liquor in the banquet hall is a part of the entire hotel operation."

The facts in the *Miami Springs Villa* case are almost identical to the facts in the *Capital Gardens* case except the plot of ground in the *Miami Villa* situation is twice as large as was the *Capital Gardens* premises. Then, too, insofar as the operation of the dance pavilion of *Capital Gardens* was concerned, the sale of liquor was incidental to the dance hall operation.

In the *Capital Gardens* case the court construed §562.05, F. S., to mean that the licensee is required to have a license for each separate house, booth, tent or other structure in which he engages in the sale of intoxicating liquors and that such house, booth, tent or other structure must be definitely described in the license. Said the court in that case:

"The fact that both buildings are on one 5-acre tract is of no importance and has no controlling significance. If both buildings were on a 160-acre tract that would be just as much one place of business as when they are located as they are and, located as they are, they are just as evident two separate places of business as they would be if each was located at the opposite end of a 160-acre tract of land."

What we have here is a factual situation representing a problem of degree. The separation of the banquet hall with its service bar from the main building of the hotel by some 2000 feet presents a situation too remote in point of proximity to the operation of the bar in the hotel to justify the sale of liquor there under the hotel license. The precedent established if approved would unduly extend the reasonable intendment of the regulation.

It is therefore my opinion that it will be necessary for the *Miami Springs Villa* if it wishes to sell intoxicating beverages in its banquet hall to secure a license for such sale and that the license heretofore issued to said *Villa* is for the purpose of serving the guests of the hotel wherein the license is located, and it must be limited to that purpose.

055-108—May 25, 1955

TAXATION

MUNICIPAL TAXES—ASSESSMENT—REAL PROPERTY—
CITY OF TREASURE ISLAND—§§13, 14, ART. VIII,
STATE CONST., CH. 26160, 1949

To: H. H. Sterling, County Tax Assessor, Clearwater

QUESTION:

May the taxable real property within the city of Treasure Island, Florida, recently incorporated and embracing the former cities of Sunshine Beach, Sunset Beach, Boca Ciega, and Treasure Island (SB 354, 1955, which became a law and effective on May 3, 1955) be assessed for municipal taxes on the 1955 tax roll of Pinellas County?

Under said SB 354 the said cities of Sunshine Beach, Sunset Beach, Boca Ciega and Treasure Island, Fla., were abolished, and a new city of Treasure Island, Fla., created, it being provided in and by said enactment that the said new city of Treasure Island "shall succeed to, own, possess and hold all rights in and title to all property, real, personal and mixed, and *all taxes, dues, claims . . . heretofore owned, possessed or held by*" the said 4 abolished cities. (Emphasis supplied.) Although the boundaries of the new city of Treasure Island are set out in Art. V of said SB 354, we are not advised whether or not the said description includes only the lands embraced within the said former 4 cities or additional lands or less lands. *For the purpose of this opinion we shall presume that all the lands included within the boundaries of the said former 4 cities are included within the new city; if not, then adjustments may have to be made by the county tax assessor in this connection. The above stated question is not directly answered by the said SB 354.*

Under §§13 and 14, Art. VIII, State Const., Ch. 26160, 1949, and the applicable section of the Florida Statutes, municipal taxes in Pinellas county, (beginning with the tax year of 1950) are assessed and collected by the county tax assessor and collector. Under these statutes and laws the municipality is treated as being in the nature of a taxing district for the purpose of assessing its taxes on the county tax roll. Under the applicable taxing statutes the existing municipalities within Pinellas county, on January 1, 1955, obtained a tax lien, along with the county and all other political subdivisions or agencies whose taxes are also assessed upon the county tax roll, continuing until discharged by payment (§§192.04 and 192.21, F. S.) although the taxes had not on said date been assessed. From and after January 1, 1955, the said cities of Sunshine Beach, Sunset Beach, Boca Ciega and Treasure Island (existing prior to consolidation and reincorporation) held an inchoate lien encumbering the lands assessed to secure the payment of 1955 taxes to be subsequently assessed (U. S. v. Alabama, 313 U. S. 274, 61 S. Ct. 1011, 85 L. ed. 1327). Although the 4 former municipalities were in terms abolished and a new municipality established, we gather

from the entire enactment that a consolidation of existing municipalities was the secondary purpose. Creditors of the abolished municipalities acquired a vested right to have the 1955 taxes, in so far as the same might have related to debt service, assessed and if the said municipalities had been abolished without any reincorporation into a single municipality they could have required assessment by the board of county commissioners or other authority (§8, Art. VIII, State Const.; §165.28, F. S.). Where the abolition and the creation of a new municipality were accomplished through a single act, with the new municipality succeeding to the rights and obligations of the old municipality or municipalities, it may well have been the intention of the legislature that the new municipality carry out the obligations of the abolished municipality or municipalities, including the assessment and collection of the necessary taxes for the payment of the outstanding indebtedness of the abolished municipality or municipalities.

We feel that the new municipality, under said SB 354 of the 1955 session, has the obligation of causing the lands formerly embraced within the abolished municipalities to be assessed for debt service purposes, in so far as such lands lie within the boundaries of the new municipality, at least until the new municipality has made adequate provision for the payment of creditors having vested rights in the assessment of such taxes. These observations seem to require an affirmative answer to the above stated question.

Because of vested rights in creditors of the abolished municipalities it is possible that different rates of levies may have to be made in different sections of the new municipality; however, we shall not in this opinion deal with that question, not being fully advised of the facts and circumstances that may be involved.

055-110—May 25, 1955

SHERIFFS

CRIMINAL OFFENSES—MISDEMEANORS—FINGERPRINTING—§30.31, F. S.

To: Nick Kelly, Deputy Sheriff, Lee County, Ft. Myers

QUESTION:

Can a person picked up on a misdemeanor charge be required to be fingerprinted?

My answer is in the affirmative. Section 30.31, F. S., provides in part as follows:

"(1) It is hereby made the duty of the sheriffs of the state, when in their opinion it is necessary for the protection of the public, to fingerprint all persons charged with or convicted of any criminal offense."

Since a criminal offense includes felonies and misdemeanors (Gatewood v. Culbreath, 47 So. 2d 725) it is clear that the

sheriff, in his discretion, may require the fingerprinting of one charged only with a misdemeanor.

Although the statute has not been construed in Florida, several courts have pointed out very clearly that police officers are entitled to compel persons accused of misdemeanors as well as felonies to have their fingerprints taken. For example, the federal court in the case of *United States v. Kelly*, 55 Fed. 2d 67, 83 A.L.R. 122 said:

"Fingerprinting seems to be no more than an extension of methods of identification long used in dealing with persons under arrest for real or supposed violations of the criminal laws. It is known to be a very certain means devised by modern science to reach the desired end, and has become especially important in a time when increased population and vast aggregations of people in urban centers have rendered the notoriety of the individual in the community no longer a ready means of identification."

In accord with this decision are several others including the well reasoned decision by the New York courts in the case of *People v. Sallow*, 100 Misc. 447, 165 NYS 915.

As the Wisconsin court pointed out in the case of *Bridges v. State*, 247 Wis. 350, 19 N.W. 2d 529, 862:

"... that it is commonly known that such photographing and fingerprinting are matters of daily practice and the usual method used in the police services in populous communities for identification of persons arrested but not yet convicted; and that the use of that practice and method is considered to be for the common good, and the right of police authorities to resort thereto has been recognized in most jurisdictions and such use thereof is not considered, in itself a badge of crime."

For a splendid discussion of all of the law pertaining to fingerprinting, I heartily recommend an annotation found in 28 A.L.R. 2d at p. 1115.

055-111—May 26, 1955

(Reconsideration of Op. 055-21)

INSURANCE

GROUP LIFE INSURANCE—FLORIDA CITRUS MUTUAL MEMBERS—\$635.24, F. S.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTION:

In the light of additional relevant information presented relating to the proposed group coverage dealt with in opinion 055-21, hereto attached, lawfully may such coverage and additional coverage, explained in detail below, be issued?

Attached to the request for reconsideration of opinion 055-21 are the following items: Printed copies of amended charter and amended by-laws of Florida Citrus Mutual, effective July 1, 1954; printed copies of "Uniform Marketing Contract" entered into between said mutual and its members; a copy of "Florida Citrus Mutual Group Insurance Plan" submitted by the Group Division of Metropolitan Life Insurance Co. The following relevant information set forth in these attached matters is summarized.

Florida Citrus Mutual is a non-profit cooperative marketing association without capital stock, organized and existing under Ch. 618, F. S. Among its purposes (Art. II of its charter) are the following: "To promote and provide a medium for the cooperative unity of effort by producers of citrus fruit in the handling and marketing of the same and any and all derivatives and products thereof . . ."; and ". . . to promote and secure a more adequate method of regulating and stabilizing the citrus fruit industry to meet the consumptive demands thereof." Members of the organization (Art. VII of the charter) "shall be only persons, natural or otherwise, engaged in the production of citrus fruit in the State of Florida, including the lessee, tenant, agent or trustee of groves and lessors and landlords who receive as rent part of the crop produced on their lands. In all cases members shall have signed the uniform marketing contract prescribed by the Association . . ." Property rights of members in the funds and assets of the organization are mentioned (Art. VIII of the charter).

The "uniform marketing contract" referred to in the charter has certain provisions here pertinent: "That all citrus fruits and products thereof produced, acquired or controlled by the Grower (member) will be marketed on an agency or sale basis only through handlers that have entered into contracts with the Association in the form prescribed by it . . . ; or, in the event that the Grower desires to personally market his citrus fruit, or any part thereof, then the Grower will enter into contract with the Association like that executed by the handlers; and Grower agrees to be bound by such rules, regulations, instructions, and orders with respect to the picking, handling, selling, grading and marketing of citrus fruit that may be issued from time to time by the Association, or the general manager thereof, under authority conferred . . ." * * * * "That Grower will submit . . . such reports and statistical data (to the Association) as may be requested by it from time to time . . ." * * * "That Grower will promptly notify the Association of the name and address of each handler that is to market or in any way acquire and handle any part of Grower's citrus fruit . . ." * * * "That it shall regulate the marketing of citrus fruit and products thereof of its members, among the various markets and over the marketing period . . ."

A part of paragraph 4 of said marketing contract provides: "(a) That if Grower should market any part of the citrus fruit or products thereof covered hereby, other than through a handler that has entered into a contract with the Association, Grower shall pay the Association, as liquidated damages, at the rate of

50¢ per box of 1 3/5 bushels, or its equivalent in volume, for all citrus fruits or products thereof so marketed or disposed of . . . together with all costs, premiums for bonds, expenses and fees arising out of, or caused by, litigation, and reasonable attorneys' fees expended or incurred, and all such costs and expenses shall be included in any judgment . . . (b) That this agreement shall not cover . . . fruit used for home consumption, or small quantities disposed of for local consumption, or fruit shipped by Express, or sold to Express shippers, or fruit disposed of in any other way approved . . . by the Board of Directors of Association." Sub-paragraph 4 (c) provides that the contract shall be in force for 10 years from its effective date, subject to the grower's right to cancel same in June of any year by giving notice as prescribed.

The group insurance plan of the mentioned insurer is not too clear. However, reading that plan in connection with recitations in the aforesaid letter from Keen, O'Kelley & Spitz, the proposed coverage is as follows: Group life coverage for employees of Florida Citrus Mutual and for members of said organization and their employees; and group disability insurance (daily hospital benefits; hospital special services; doctors' calls in hospital; surgical operation; maternity benefit) for employees of the organization, members and their employees, and dependents.

GROUP LIFE COVERAGE

The propriety of the proposed group life coverage is to be tested by the provisions of §635.24(1), paragraph (a) thereof being quoted:

"(a) The employees eligible for insurance under the policy shall be all the employees of the employer, or all of any class or classes thereof determined by conditions pertaining to their employment. The policy may provide that the term 'employees' shall include the employees of one or more subsidiary corporations, and the employees, individual proprietors, and partners of one or more affiliated corporations, proprietors or partnerships if the business of the employer and of such affiliated corporations, proprietors or partnerships is under common control (through stock ownership or contract). The policy may provide that the term 'employees' shall include the individual proprietors or partners if the employer is an individual proprietor or a partnership. The policy may provide that the term 'employees' shall include retired employees. No director of a corporate employer shall be eligible for insurance under the policy unless such person is otherwise eligible as a bona fide employee of the corporation by performing services other than the usual duties of a director. No individual proprietor or partner shall be eligible for insurance under the policy unless he is actively engaged in and devotes a substantial part of his time to the conduct of the business of the proprietor or partnership. *A policy issued to insure the employees of a public body*

may provide that the term 'employees' shall include elected or appointed officials."

A bill has been introduced at this session of the legislature seeking to amend above paragraph (a). The words in parentheses have been deleted in said proposed amendment, and the italicized words are sought to be added to the present law. The proposed amendment if adopted would not change the effect of the conclusions below premised on the present law.

Section 635.24(1)(c) requires at least 25 employees at date of issuance of the policy.

We are here dealing with corporations, partnerships and "proprietors" as employers, and only the quoted word requires brief comment. A "proprietor" has been defined as, "One who has the legal right or exclusive title to anything. In many instances it is synonymous with owner. *Turner v. Cross*, 83 Tex. 218, 18 S. W. 578, 15 L.R.A. 262." *Black's Law Dictionary*, 3rd Ed. p. 1450. The definition set forth in *Webster's New Collegiate Dictionary* is more comprehensive: "One who has the legal right or exclusive title to anything; an owner; also, in a wider sense, a person having an interest less than an absolute and exclusive right, as the usufruct, or present control and use of property; as, the proprietor of the village inn." From such definitions reasonably it appears that a "lessee, tenant, agent or trustee of groves and lessors and landlords", who may be members of the organization, may be "proprietors", along with owners, within the meaning of §635.24(1)(a), if otherwise they are "employers" as contemplated by the subsection.

It has been stated that under the U. S. constitution, freedom to contract is freedom from undue restraint on the right to contract. *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. Ed. 619. However, that right is subject to such statutory restraint as the reasonable interests of public welfare may demand; indeed, existing contracts are subject to the valid exercise of the police power. *Southern Utilities Co. v. City of Palatka, Fla.*, 99 So. 256; 264 U.S. 580, 68 L. Ed. 859; 268 U. S. 232, 69 L. Ed. 930. Furthermore, there are limitations on the part of corporations to claim the right. However, the wording of §635.24(1)(a) seems sufficiently clear that resort to the more involved rules of construction is not required. It is elementary that the intent of a statute is the law; and that when legislative intent is clearly manifest by the language used, considered in its ordinary and grammatical sense, rules of construction are unnecessary and inapplicable. *State v. Patterson, Fla.*, 65 So. 659; *State v. Burr, Fla.*, 84 So. 61. With these remarks, various aspects of §635.24(1) are considered.

In my opinion master policy to Florida Citrus Mutual affording this proposed group life coverage may be issued for the reasons and subject to the following limitations and conditions:

(1) *Common control:* By virtue of the mentioned contracts between the organization and its members and with handlers, the organization exerts control of the marketing of citrus fruit

of its members, within the meaning of "common control" as used in §635.24(1)(a), subject to the possible exception in the succeeding sentence. If in any instance less than substantially all of the citrus crop of a member is marketed by the organization or in pursuance of its agreements, by reason of local sales and sales by express or to express shippers by the member, it cannot be said that the organization exerts control of the marketing activities of such a member, and he would be excluded from any such coverage.

(2) *Employers:* As noted above and as indicated in the mentioned subsection, we are concerned with the controlling employer corporation and member corporations, partnerships and proprietors who are employers engaged in the production of citrus fruit. Hence, it follows that those members of the organization who are not such employers are not eligible for group life coverage; i.e., lessors, landlords, small producers who are not employers, agents or others who have not the exclusive control of the production of citrus fruit and of employees whose services are required in connection with such production.

(3) *Employees:* The following may be insured under such a group life policy:

(a) At the outset it is stated that the nature of group life insurance is such that it is applicable only to full-time employees. To permit such coverage for those who are not full-time employees for any annual period could reasonably result in confusion and misunderstanding and inequities to those insured.

(b) Full-time employees of Florida Citrus Mutual, and of officers of such corporation actively engaged in the operation of its affairs, including directors of the corporation actively engaged as bona fide employees thereof in performance of services other than their services as directors.

(c) Full-time employees of member corporations, partnerships and proprietors engaged exclusively in performance of services essential to the production of citrus fruit.

(d) Where all or a substantial part of corporate member's activities relate to the production of citrus fruit, officers thereof, including directors who are bona fide employees of the corporation as distinguished from their duties as directors, performing services for the corporation in relation to the production of citrus fruit.

(e) Partners and proprietors who are employer members of the organization, as above described, actively engaged in the production of citrus fruit and devoting a substantial part of their time to that activity.

(f) Retired employees of the organization and of corporation, partnership and proprietor members, and who at the time of retirement were full-time employees as above described.

(4) *Controlling Law:* It is understood that any such cov-

erage which might be issued will otherwise meet the requirements of other parts of §635.24(1) and §635.25, F. S. Mention has been made of proposed legislation pending at this session of the legislature which involves parts of §§635.24 and 635.25; and it is, of course, understood that if and when such coverage may be issued that the law then existing applicable to such coverage will control, regardless of the conclusions set forth herein.

PROPOSED GROUP DISABILITY COVERAGE

Former opinion 055-21 dealt exclusively with group life coverage. As we recall, it was such coverage that was the subject of discussion at the conference mentioned above. We have received no request for opinion from the insurance commissioner concerning the propriety of the proposed group disability coverage. Without trespassing upon the rule that only when such a request is received should an opinion of this office issue, it is generally stated that under Ch. 642, F. S., relating to accident and sickness insurance, particularly §642.04(2), F. S., apparently there is no statutory authority for the proposed disability coverage.

We are informed that presently there is pending before the legislature a bill which proposes an amendment of §642.04(2), F. S. Subparagraphs 2(b), (e) and (g) of the proposed amended section are quoted:

"(b) Under a policy issued to an employer, or to the trustees of a fund established by an employer, which employer or trustees shall be deemed the policyholder, insuring at least 15 employees of the employer for the benefit of persons other than the employer. The term 'employees' as used herein may include (1) retired employees, (2) the individual proprietor or partners if the employer is a proprietor or partnership, and (3) elected or appointed officials if the policy is issued to insure employees of a public body. The policy may provide for insuring the employees of one or more subsidiary or affiliated corporations, proprietors and partnerships if the business of the employer and such subsidiary or affiliated corporations, proprietors and partnerships are under common control."

* * * * *

"(e) No such policy of insurance as defined in sub §(2)(b) above may be issued to any employer, as enumerated therein, unless all employees of such employer, or all of any class or classes thereof, determined by conditions pertaining to their employment, but not determined so as to exclude those in the more hazardous employments solely because of their hazardous employment, are declared eligible and acceptable to the company at the time of issuance of the policy, and unless 60 per cent of the eligible employees are so insured."

* * * * *

"(g) Any such policy of insurance as defined in sub §§(2)(b) and (2)(c) above may insure spouse and/or dependent children with or without the employee or member being insured."

Should these amendments be adopted, a consideration of the question in relation to the provisions thereof is required by the insurance commissioner; and in such event should he request the advice of this office concerning the application of such provisions to this insurer's proposal, such will be furnished.

The above part of this opinion relating to group life coverage supersedes opinion 055-21.

055-112—May 31, 1955

LEGISLATURE

INTERIM HOUSE COMMITTEE—COSTS AND EXPENSES—
H. R. 1628—§§11.08-11.13, F. S.—§10, ART. III,
STATE CONST.

To: *John M. Hathaway, Chairman, Committee on Game & Fresh Water Fish, House of Representatives, Tallahassee*

QUESTIONS:

1. May the costs and expenses of the interim committee, appointed pursuant to house resolution 1628 of 1955, incurred during the interim between the 1955 and 1957 sessions be paid from the state treasury?

2. What compensation and expenses should the members of the said committee be entitled to in connection with any meeting or hearing held during the said interim?

3. May the committee, or any of its members, when exercising the powers and functions required of them under said resolution go into other states for the purpose of investigation and study?

4. May the said committee, during said interim, employ experts and clerical assistants and pay the same from said funds?

5. May the said committee issue subpoenas requiring appearance of witnesses before the said committee?

Said House Resolution 1628 of 1955 provides as follows:

"Section 1. That an interim committee of 9 members of the house of representatives be appointed by the speaker thereof to make a careful and comprehensive study of all matters relating to game and fresh water fish in Florida including but not limited to the management, restoration and regulation of the game and fresh water fish of the state, and the control and management of hatcheries, sanctuaries, refuges, reservations and all other property now or hereafter owned or used for

such purposes by the state and all laws relating thereto and their enforcement. The committee shall report to the 1957 legislature the result of its activities and make such recommendations to the house of representatives as shall be meet and expedient in the premises.

"Section 2. The committee appointed under the provisions of this resolution is authorized to assemble such data by whatever means is deemed necessary, such as holding public hearings, employing experts or other persons authorized to carry out its duties, and taking any other proper and necessary actions so as to properly and completely make its investigations hereunder and shall have all other authority and duties provided by Ch. 11, F. S.

"Section 3. All expenses incident to hearings held and investigations made by the committee appointed under the provisions of this resolution shall be paid as provided in §11.11, F. S., other than mileage and per diem of members which shall be paid as provided in §112.061, F. S."

Sub §(2) of §11.12, F. S., was amended by Ch. 29627, 1955, so as to provide as follows:

"(2) The sum of \$1,400,000 biennially, or so much thereof as is necessary, is appropriated out of the general revenue fund to cover legislative expenditures, and the same is made available as needed and authorized."

Subsection (3) of §11.13, F. S., was also amended by said Ch. 29627 to read as follows:

"(3) (a) Members of interim committees, authorized by law, of either branch of the legislature shall be paid per diem or mileage or per diem and mileage incurred while on official business within the state as provided for state employees unless otherwise provided by joint or concurrent resolution, and shall be paid per diem and mileage without the state as provided for the governor and members of the state cabinet under general law.

"(b) Per diem and mileage paid to members of legislative committees shall be paid out of legislative expense appropriation as provided in §11.12, F. S."

Senate (SB 631) and house (HB 1008) general appropriations acts contain items for legislative expenses with specific authority for paying the expenses of interim legislative committees "as provided and properly authorized by resolution to reimburse members of interim committees." We have no reason to think that these provisions will be deleted by the legislature prior to final enactment, especially in the light of the amendments made to §§11.12 and 11.13, F. S.

Section 11.08, F. S., provides in part as follows:

"Whenever required by any committee duly constituted by the senate, or the house of representatives, or by the senate and house of representatives of the legislature of Florida, the chairman thereof, shall issue subpoena and other necessary process to compel the attendance of witnesses before such committee, and the chairman, or any other member of such committee, may administer all oaths and affirmations, in the manner prescribed by law, to witnesses who shall appear before such committee for the purpose of testifying in any matter about which such committee may desire evidence, and the sheriffs in the several counties in this state shall make such service and execute all process, or orders, when required by such committee, said sheriffs to be paid the same fees as are allowed them by law for similar services."

In this connection see also §§11.09, 11.10 and 11.11, F. S., bearing upon the same question.

For the purposes of this opinion we shall presume that the said resolution and the above mentioned sections of the statutes and laws are constitutional; it having been the policy of the attorney general for many years last past to leave the question of constitutionality to the courts.

Section 10, Art. III, Fla. Const., provides: "Either House shall have power to compel the attendance of witnesses upon any investigation held by itself, or by any of its committees; the manner of the exercise of such power shall be provided by law." (Emphasis supplied.)

The foregoing statutes and laws, especially when we take into consideration the amendments made at the present session of the legislature, seem to indicate the following answers to the above questions:

1. Section 11.13, F. S., and the proposed general appropriations bills if enacted without deleting existing provisions, seem to provide for the payment of the costs and expenses incurred by interim committees, such as the one provided for by House Resolution 1628 above mentioned.

2. Members of the committee would appear to be entitled to the compensation and expenses provided by §11.13 (3), F. S., hereinabove quoted from, unless it should be otherwise expressly provided in the general appropriations acts, which have not yet been finally enacted. The indications at the present time seem to be that there is little danger of any such change being made by the proposed general appropriations bills.

3. Section 11.13 (3), F. S., seems to recognize the right of interim committees, when their duties call for or authorize the same, to go into other states. If it is deemed necessary that the duties of the interim committee under the said house resolution require a going outside of the state then the statutes would seem to authorize the same.

4. There is doubt that the interim committee may, under presently existing statutes, employ experts and clerical assistants; however, we understand that there is a possibility that the appropriations act may include such authority, but this may not be determined until such act becomes a law.

5. Sections 11.08, et seq., F. S., are not by express terms limited to committee action and meetings during a session of the legislature; provided, however, that interim committees are properly provided for and duly authorized to hold meetings between sessions of the legislature. The resolution providing for the interim committee clearly contemplates meetings between the 1955 and 1957 sessions of the legislature.

055-113—May 31, 1955

MOTOR VEHICLES

LICENSES—REGISTRATION—EARTH-MOVING VEHICLES

To: *H. N. Kirkman, Director, Department of Public Safety, Tallahassee*

QUESTION:

Do earth-moving vehicles mounted on pneumatic tires and used solely for off-highway work need Florida highway plates for moving from one job to another over Florida highways?

The registration and licensing of motor vehicles is governed by the provisions of Ch. 320, F. S. Section 1 of the cited chapter defines "motor vehicle" as including "automobiles, motorcycles, motor trucks and other vehicles operated over the public highways and streets of this state and propelled by power other than muscular power, but does not include traction engines, road rollers and such vehicles as run only upon a track." A "vehicle" is defined lexicologically as an instrument by which persons or things are or may be transported or carried from one place to another. The supreme court of Florida has construed the legislative definition of a motor vehicle to mean an instrument designed and used for the purpose of hauling merchandise or persons as a means of transportation over the highways, and excludes machines operated on the highway merely as a means of passage from and to a place where they are intended to be used.

Under this construction of the statute, a machine, even though operated by its own power, used upon the highways for the sole purpose of passage from one point to another as distinguished from the purpose of transporting or carrying merchandise or materials, is not a vehicle subject to registration or licensing as a "motor vehicle".

Your question is accordingly answered in the negative.

055-114—June 1, 1955

WELFARE

SOCIAL WELFARE—ADOPTION—APPLICATION OF CH. 29674, 1955, (AM. §§72.15, 72.17, 72.18, 72.20 AND 72.28 F. S.)

To: *State Department of Public Welfare, Jacksonville*

QUESTION:

Do the procedural changes in adoption cases provided by Ch. 29674, 1955, apply to cases pending at the time that chapter became a law as well as to cases filed after the law's effective date, which was May 20, 1955?

Frequently a new statute relating to court procedure and similar matters contains a provision making it inapplicable to pending cases. There is no such provision in Ch. 29674, 1955, and the provisions of that chapter became immediately effective on any pending case. 82 C.J.S., §422, p. 998.

055-115—June 1, 1955

EDUCATION

PERSONNEL, APPOINTMENT, REAPPOINTMENT—COUNTY SCHOOL BOARD, TRUSTEES, COUNTY SUPERINTENDENT—ATTORNEYS FOR TRUSTEES AND SUPERINTENDENT—§§230.23, 230.33, 230.34, 230.43, 231.35, F. S.

To: *Thomas D. Bailey, Superintendent, Department of Education, Tallahassee*

QUESTIONS:

1. On the appointment of principals and other instructional personnel as distinguished from REAPPOINTMENT of principals and other instructional personnel, may the superintendent recommend, after the 8 or 6 weeks provided in the statutes before the end of school, directly to the county school board?

a. If so, is the county school board required to show cause for rejection?

2. On what grounds may the county board bypass the county superintendent and proceed to fill vacancies on its own motion, without regard to the recommendations of the county superintendent?

3. In a dispute among the superintendent, trustees and county board, or between the superintendent and trustees, or between the superintendent and county board, is the county board required to pay attorneys fees for the superintendent and/or the trustees, when both latter groups have already had counsel of the regularly employed county school board attorney?

4. If a principal is duly nominated by the trustees and appointed by the county school board, after the 6

weeks period before the closing of school, is it necessary to go through the trustees in transferring him with his consent to another principalship having become vacant within the county; or may the superintendent make his recommendation of transfer directly to the county school board?

a. If the county board should reject the recommendation of the transfer, must it show cause for rejection?

Section 231.35, F. S., provides:

"Appointment of employees.—All employees of the county school system shall be appointed as prescribed in ch. 230; provided that the terms 'to consider the recommendations of' or 'to act upon the recommendations of' shall be interpreted to mean that neither the trustees nor the county board shall act on the appointment of employees without having considered any recommendations or nominations submitted as prescribed by law, that such recommendations or nominations may be rejected only for good cause, and that when any such rejection has been made, a second and if necessary a third recommendation or nomination shall be requested and if made within a reasonable time as prescribed by the county board, shall be considered or acted on as prescribed by law before the trustees or county board shall have a right to nominate or to appoint on their own motion; and, provided further, that the following procedure shall be observed in making appointments and reappointments of instructional personnel:

"(1) FILLING VACANCIES.—The county board shall prescribe regulations which define reasonable time limits within which trustees shall be required to submit nominations of persons to fill vacancies. If the trustees of any district fail to submit a proper nomination or nominations within the time limits prescribed by these regulations, the county board shall have the authority to appoint persons to fill any such vacancies after acting on nominations of qualified persons submitted by the county superintendent. Nominations to fill vacancies shall not be required to be submitted at the time nominations for reappointment are required by law except when prescribed by regulations of the county board.

"(2) REAPPOINTMENTS.—It shall be the duty of the trustees of each district to file with the county board in writing by the time prescribed by law and not more than 4 weeks in advance of the time prescribed by law for filing nominations for reappointment, a definite recommendation for or against the reappointment of each person subject to annual nominations for reappointment. It shall likewise be the duty of the county board through the county superintendent to notify in writing each person subject to annual reappointment whether or not he has been reappointed for the ensuing year. If the trustees

should fail to act on any reappointment by the time prescribed by law for such action, it shall be the duty of the county board to act on its own volition after considering nominations submitted by the county superintendent."

AS TO QUESTION 1:

Section 230.43, F. S., requires county boards or trustees to consider the recommendations of the county superintendent regarding all persons to be nominated by them for district supervising principals or principals of all district schools and to make nominations for such positions to the county board—and such nominations for *reappointment* shall be submitted to the board at least 8 weeks before the close of school, and nominations for *reappointment* of instructional personnel shall be made at least 6 weeks before the close of school.

The statutory requirement that nominations for *reappointment* by the trustees and superintendent be made 6 and 8 weeks prior to the close of the school year apparently applies only to reappointments and not to *original appointments*.

Section 231.35, F. S., quoted above relating to *appointment* of employees sets no specific statutory time limit for the nomination by the superintendent and trustees to the board but provides that, "... if made within a reasonable time as prescribed by the county board."

Although the statute may not be entirely clear on the subject, I believe that the legislature intended that on the selection of school personnel by the board that the board should have the benefit of the advice of both the county superintendent and the trustees and that their recommendations or nominations should not be omitted nor ignored except for good cause and that this procedure should be followed both in making appointments and reappointments. The superintendent should not recommend directly to the board unless the trustees fail to act on his recommendations within the time fixed by the board's regulations, or within a reasonable time if no regulation as to time has been provided. Your question 1. a. is answered in the affirmative in accord with the above discussion.

AS TO QUESTION 2:

I believe the answer is found in §231.35 (1) quoted above. In other words, if the ordinary procedure is not followed and the trustees have failed to submit a proper nomination, the school board shall have the authority to fill a vacancy "after acting on nominations of qualified persons submitted by the county superintendent." Under these circumstances I think the board should follow its usual procedure in rejecting a nomination only for good cause.

AS TO QUESTION 3:

I believe this problem has been partially answered in attorney general's opinion 053-119 (copy enclosed) in which I advised that a county school board is authorized within its discretion to employ an attorney for the superintendent in litigation

involving a serious controversy between the board and superintendent as to their respective authority and duties which can best be determined by the courts. The employment of an attorney under these circumstances by the board for the benefit of the superintendent is discretionary, however, with the board since I find no statutory mandatory duty on the part of the board to employ an attorney for the superintendent. I believe that the same reasoning would apply to the employment by the board of an attorney for the benefit of the trustees.

AS TO QUESTION 4:

By the provisions of §§230.23(7)(h); 230.34 to 230.43; and 230.33(7)(h), F. S. it appears that the same procedure is followed in making transfers regardless of when the transfer is made—that is, during the school year or at the end of the school year when reappointments and appointments are made.

Section 230.33 (7)(h), F. S. provides:

“Transfer and promotion.—Recommend employees for transfer and transfer any employee during any emergency and report the transfer to the county board at its next regular meeting; provided, that if the school to which the transfer is to be made is a district school and is located in another district from the one in which the employee was previously serving, the consent of the trustees shall be obtained, as provided herein, before the transfer is made; and recommend capable employees for promotion and advancement.”

At the time this law was enacted counties consisted of more than one school district; subsequently the legislature consolidated all county school districts into one district for each county. Apparently it was the intent of the legislature to give school trustees a voice in the transfer or promotion of school personnel employed in the trustee's district. This intent was not altered by the consolidation of school districts and it would appear that now, since each county has only one school district, that the trustees' authority in this respect would be county-wide rather than confined to a particular area of the county. In other words, I believe that the superintendent's recommendation on a transfer of personnel should be transmitted to the board through the trustees.

With regard to question 4. a., it would appear that although the board has final authority to make transfers of school personnel, said transfers must be made with the consent of the trustees and should take into consideration the recommendations of the superintendent unless the board can establish good cause in its discretion for rejection of the superintendent's recommendation.

055-116—June 1, 1955

PROFESSIONS AND VOCATIONS

DENTISTRY AND DENTAL HYGIENE—LICENSE—REQUIREMENT—STATE BOARD OF DENTAL EXAMINERS—
§466.13, F. S.To: *A. W. Kellner, D.D.S., Secretary-Treasurer, State Board of Dental Examiners, Hollywood*

QUESTION:

May an applicant for examination to be licensed to practice dentistry in Florida be considered eligible by the state board of dental examiners under the following conditions: The applicant graduated from a dental school in Columbia, South America; in 1949 he was admitted to the university of Michigan dental school and graduated from there after 2 years and 1 summer session?

Section 466.13, F. S., provides in part:

"... graduates of foreign dental colleges or schools shall have first completed a full 4-year course in dentistry in an accredited or approved dental college or school in the U. S. before being eligible for the examination. The board is hereby authorized and empowered to adopt such further rules in regard to the qualifications of applicants for examination, not in conflict with this section, as it from time to time may deem necessary and proper."

I assume that the degree conferred upon the applicant by the Michigan dental school was for a full 4-year course. I believe that the legislature intended, by the above quoted provision, to require that an applicant should graduate from an accredited or approved dental school in the U. S. and that the degree conferred upon him must signify that he has completed the necessary work for a 4-year course in such school. I do not believe that the legislature intended to require that the applicant must actually be in attendance at the school for a full 4-year period if he can accomplish the required amount of work in a shorter period. The essential requirement is that he must have graduated from the 4-year course—not that he has attended the school for 4 calendar years.

Assuming that the applicant is otherwise qualified and based solely on the specific factual situation assumed in the above discussion, your question is answered in the affirmative.

055-117—June 2, 1955

PUBLIC OFFICERS

NOTARY PUBLIC—ELIGIBILITY OF BLIND—§15, ART. XVI, STATE CONST., §117.02, F. S.

To: *LeRoy Collins, Governor of Florida, Tallahassee*

QUESTION:

Is a person partially blind and, by reason thereof,

unable to read, eligible for appointment to the office of notary public?

There is no constitutional provision which, in relation to public officers generally or to the office of notary public particularly, prescribes qualifications for holding the mentioned office. That office is referred to but once in the constitution; §15, Art. XVI, provides in part that, "Notaries public," and certain described other officers, "may be elected or appointed to fill any legislative, executive or judicial office." Ch. 117, F. S., relates to notaries public; and other than the provision authorizing appointment of women over 21 years of age to the office (§117.02, F. S.), no qualifications for the office are prescribed in the statute. No Florida case is of assistance.

The following is found in 42 Am. Jur., §43, p. 913: "While a blind person may labor at a disadvantage in certain public offices, his affliction does not necessarily disqualify him. If he possesses the other qualifications imposed by law, and there is no provision of the law excluding him from office because of blindness, he may be eligible to the office. At the common law, unfitness, if gross and palpable, is a disqualification for holding office. . . ." The following is quoted from 67 C.J.S. §25, p. 154: "Under the common law, unfitness, if gross and palpable, is a disqualification for holding an office." These are the only references in these two digests bearing upon the question which we have been able to locate. The 1st sentence quoted from American Jurisprudence and the part from Corpus Juris Secundum are footnoted to the sole case of State v. Cocking, Mont., 213 P. 594, 28 A.L.R. 772; and the 2nd sentence in the American Jurisprudence quotation is premised upon the mentioned case and Danforth v. Egan, S.D., 119 N.W. 1021, 20 Ann. Cas. 418. This last-named case is of little assistance, as shall be demonstrated, leaving only the Cocking case as relevant authority.

The court in that case, dealing with eligibility of Cocking, a blind person, to hold the municipal office of police judge, stated in substance: (1) Under constitutional and statutory provisions relating to eligibility, he was qualified to hold the office. (2) Blindness as a bar to the office could not be asserted by the court but only by the legislature. (3) The blind judge was precluded from the advantage of visually observing witnesses; however, it was remarked that some men are more observant than others, and that it was a matter of degree. (4) It was true the judge had to keep a docket and at times certify to matters appearing therein; however, he could cause such docket to be kept by a clerk, and while there might be room for imposition because of the handicap of blindness, "it would be no more so than if the judge were making his will, and testamentary capacity is not affected by the fact that the testator is blind. See Welch v. Kirby, 255 Fed. 451, 166 C.C.A. 527, 9 A.L.R. 1409 . . ." (5) In discussing the mentioned common law rule, the following was quoted from Throop, Pub Off. §7: "It is needless to say that the practical application of the doctrine is generally very difficult, and, as far as our examination has extended there is but one case in the U. S. where it has been

applied. That was in New York, where a person ignorant of any foreign language had been appointed interpreter, and it was held that he was incompetent to hold the office." (And at this point, it is remarked that the court in *Danforth v. Egan*, supra, made the same reference to *Throop*).

The remarks in the above-mentioned cases concerning application of said common law rule and the words "gross" and "palpable" as used in said rule, might discourage application of the rule here. Perhaps the most appropriate definition of the word "gross" as used in the rule is the archaic one of "plain; manifest; obvious" (Webster's New Collegiate Dictionary); and the same text defines "palpable" as, "Easily perceptible by the senses . . . plain; obvious."

In view of the foregoing, in my opinion the question is answered as follows:

Under our constitution and statutes, blindness is no bar to the appointment of a person, otherwise qualified, to the office of notary public. In the light of the reasoning and conclusions in the *Montana* case of *State v. Cocking*, supra, considerable doubt exists that our court, if presented with the question, would apply the mentioned common law rule to the situation here. Therefore, we do not believe there is to be applied any absolute legal bar rendering all blind persons ineligible for appointment as notaries. Rather, it lies within your official discretion to determine the factual situation in each case. If it appeared to you, for example, that a particular blind person with the assistance of another (a member of his family or an employee) could reasonably discharge the duties of a notary, the appointment could be legally made. As in so many instances of the exercise of administrative discretion, the matter resolves itself into a factual determination of the circumstances of each case.

055-119*—June 3, 1955

INSURANCE

SOCIAL SECURITY FOR PUBLIC EMPLOYEES—FLORIDA LEAGUE OF MUNICIPALITIES—OASI—ELIGIBILITY— CH. 650, F. S.

To: *James T. Vocelle, Chairman, Florida Industrial Commission,
Tallahassee*

QUESTION:

Is the entity known as "Florida League of Municipalities" eligible for voluntary OASI coverage under Ch. 650, F. S., as amended?

Congress of the U. S. has provided for the extension of certain features of the federal social security act to officers and employees of the state and their political subdivisions (42 U.S.C.A. 418, as amended). This federal law was originally recognized and made effective in Florida in a 1951 law now carried as Ch. 650, F. S. To implement amendments of the federal

law, effected in 1954, an act was introduced at this session of the legislature amending certain parts of Ch. 650, which act (Senate Bill No. 814) has passed both the house and the senate. Attached hereto is a copy of said amendatory act. It is to be noted that if the act becomes law it takes effect on July 1, 1955. Hence, it is immaterial at this time whether said senate bill has become law; however, should it become law, under its provisions this opinion will be equally applicable to Ch. 650 F. S. as it shall be amended thereby.

If employees of Florida League of Municipalities are eligible for OASI coverage under Ch. 650, F. S., it must be determined that said organization is a political subdivision of the state. An examination of Ch. 650 F. S. and of 42 U.S.C.A. 418, as amended, demonstrates that the organization is not a political subdivision of the state, and that its employees are not in service within the contemplation of the terms "employment" or "coverage group" as such terms are defined or used in said state or federal legislation.

It follows that since Florida League of Municipalities is not a political subdivision of Florida within the purview of Ch. 650, F. S., the employees of said organization do not fall within the term "employment" as defined or contemplated by said chapter.

The question, therefore, is answered in the negative.

*See amending opinion appearing next in this report.

055-119—Amendment—December 22, 1955

INSURANCE

SOCIAL SECURITY FOR PUBLIC EMPLOYEES—FLORIDA LEAGUE OF MUNICIPALITIES—OASI—ELIGIBILITY— CH. 650, F. S.

To: *Herbert W. Miller, Assistant Director of OASI, Tallahassee*
QUESTION:

Is the entity known as "Florida League of Municipalities" eligible for voluntary OASI coverage under Chapter 650, F. S.?

Your letter of November 7, 1955, has attached thereto reproduction of office memorandum of Justin F. Winkle, assistant commissioner, by J. F. Worley, chief employment tax branch, to district director, Jacksonville, on the subject of Florida League of Municipalities in relation to OASI coverage; copy of the letter dated Oct. 25, 1955, to Mr. Vocelle, chairman of the commission from Mr. James W. Murray, regional representative, bureau of old age and survivors insurance. Also attached to your letter is a copy of the amended charter of Florida League of Municipalities.

In the light of these, you request reconsideration of my opinion 055-119, dated June 3, 1955, in which I held, in effect, that the League was not a political subdivision of Florida within

the purview of Ch. 650, F. S., and that employees of that organization did not fall within the term "employment" as defined or contemplated by said chapter.

It was pointed out in certain of the remarks of these federal authorities that perhaps in the foregoing opinion I did not consider the italicized wording in section 650.02(6), F. S.: "The term 'political subdivision' includes an instrumentality of the state, or of one or more of its political subdivisions, but only if such instrumentality is a juristic entity which is legally separate and distinct from the state or subdivision and only if its employees are not by virtue of their relation to such juristic entity employees of the state or subdivision." I did consider those italicized words at the time said opinion was prepared. However, in the light of the very informative remarks of these federal officials, and my further research and consideration, it appears that I should resolve the doubt formerly entertained by me concerning said words in favor of the League's eligibility for coverage.

We are here dealing with remedial statutes, both state and federal. Further, in the realm of its operation, Ch. 650 F. S. is to be construed as in the interest of public welfare and involved with state policy. Such laws are susceptible of liberal construction. Heirs of Bryan v. Dennis, Mary and others, 4 Fla. 445; State ex rel Johnson v. Patterson, Fla. 65 So. 659; Arnold Construction Co. v. Richardson, Fla., 141 So. 133; Ideal Farms Drainage Dist. v. Certain Lands, Fla., 19 So. 2d 234.

In view of the foregoing, in my opinion Florida League of Municipalities falls within the purview of the italicized words in the above-quoted §650.02(6), F. S.; that said League is eligible for the coverage mentioned in your letter; and that former opinion 055-119 is amended to the extent that the same may be in conflict with the provisions hereof.

055-120—June 3, 1955

TAXATION

REAL ESTATE—UNDIVIDED INTEREST—ASSESSMENT—
§§192.21, 193.17, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where the owner of a parcel of land is also the owner of an undivided interest in an abutting or adjacent parcel, may both interests of the said owner be assessed in the same entry on the assessment roll?

It appears from your file, exhibited to us with your said request for opinion, that the several numbered lots in Unit "A" of Belleair Club Estates, in Pinellas county, are owned by several separate owners who are also the owners of undivided interests in that certain parcel of land, also located within said Unit "A" of said subdivision, more fully described in and by that certain deed of conveyance recorded in Deed Book 1269, p. 359, of the public records of Pinellas county. We gather from

the said file that if the lands described in said Deed Book 1269, p. 359, if not abutting or contiguous to the lots of the several owners aforesaid are at least adjacent thereto.

The tax assessor is directed by §193.17, F. S., to list on the assessment roll "all the lots of a block . . . in their regular order under the letter, number or other designation of the block as filed and recorded . . . blocks also to follow in their regular order" provided that "all lots or subdivisions of a block, when belonging to one owner and being numbered consecutively and lying contiguously, may be assessed together and the taxes extended on one line . . ." When assessing land according to the original federal survey the tax assessor is required to "begin with the lowest numbered section in each township and shall assess each lot, tract or parcel of land therein . . ." (§193.20, F. S.). If these provisions are mandatory then the above stated question should be answered in the negative. It appears from the decisions of the supreme court of Florida, rendered prior to the adoption of Ch. 10040, 1925, that such statutory requirements were mandatory; however, the court has subsequently held that said Ch. 10040, now appearing with amendments as §192.21, F. S., was designed to abolish purely formal objections to tax deeds (see *Overstreet v. Gordon*, 121 Fla. 180, 163 So. 477; *Price v. Gray*, 111 Fla. 1, 149 So. 804). Under said §192.21, F. S., "no act of omission or commission on the part of any tax assessor . . . shall operate to defeat the payment of said tax . . . and no sale or conveyance of real . . . property for nonpayment of taxes shall be held invalid except upon proof that the property was not subject to taxation, or that the taxes had been paid prior to the sale, or that the property had been redeemed" prior to such sale or conveyance. An assessment in accordance with the above and foregoing question, although not made as directed by the statute, would not be a void assessment and if objected to might be corrected at any time by the tax assessor as authorized by said §192.21, F. S.

Although a tax assessment may not be made exactly as is provided by the statute if the owner consents to such an assessment he may not subsequently object thereto (see *Kissimmee v. Drought*, 26 Fla. 1, 7 So. 525, 23 A. S. R. 546).

Answering the above question we are of the opinion that an assessment made in the manner stated in the above question would not be made in the manner directed by the statute; however, by reason of §192.21, F. S., we do not think that such an assessment would be void, and are further of the opinion that where the owner consents to an assessment in the same entry, as contemplated by the above question, he will be estopped to question its sufficiency.

055-123—June 10, 1955; Supplement—June 29, 1955*

LEGISLATURE

EXTRAORDINARY SESSION—LEGISLATION CONSIDERED
UNDER §3, ART. VII, STATE CONST.—PER DIEM—
§11.13, F. S.

To: *Thomas E. David, Speaker, House of Representatives, Tallahassee*
Verle A. Pope, State Senator, Tallahassee (Supplement)

QUESTIONS:

1. May the legislature, when called into extraordinary session pursuant to §3, Art. VII, State Const., consider bills, resolutions, or joint resolutions covering any subject other than reapportionment under said section of the constitution?

2. May either the senate or house of representatives, separately and without the consent or concurrence of the other, adopt resolutions dealing with the formation of interim committees, arrangement of the chamber or other quarters of either house, or the equipping of the same?

3. May the legislature, when called into extraordinary session as aforesaid, consider resolutions dealing with reapportionment under the requirements of said §3, Art. VII, instead of bills, or must such reapportionment be accomplished by legislative act only?

4. May the legislature, when called into extraordinary session as aforesaid, submit joint resolutions designed to amend §§2 and 3, Art. VII, of the State Const., relating to membership in the legislature and the apportionment thereof?

5. May the legislature, when in extraordinary session pursuant to §3, Art. VII, State Const., enact legislation, applicable only to the said extraordinary session, providing that each member of the legislature may be paid subsistence per diem, as provided by §11.13, F. S., only when in attendance at the legislature or in recess for not exceeding 3 days?

Section 3, Art. VII, of the State Const., as amended at the general election in 1924, provides for dividing the several counties of the state into 38 senatorial districts, "to be as nearly equal in population as practicable, but no county shall be divided in making such apportionment, and each district shall have 1 senator . . ." The apportionment of house of representatives is also provided, but such apportionment is here of minor importance. The legislature was required by this constitutional provision to make an apportionment of the senatorial districts in 1925 and every 10 years thereafter. The governor is required to call the legislature into extraordinary session when no apportionment is made at the required regular sessions. No re-

apportionment having been made at the 1955 regular session, the governor called an extraordinary session, beginning on June 6, 1955, to consider reapportionment of the legislature as required by said §3, Art. VII, State Const.

When the legislature is called into extraordinary session pursuant to §3, Art. VII, State Const., such extraordinary session is "mandatorily required to reapportion the representation as required by this amendment before its adjournment (and such extraordinary session so called for reapportionment shall not be limited to expire at the end of 20 days or at all, until reapportionment is effected, and shall consider no business other than such reapportionment." The quoted provision was new in the 1924 amendment of said §3, Art. VII. Section 8, Art. IV, provides for the convening of the legislature by the governor on extraordinary occasions (which sessions are limited to 20 days by §2, Art. III, State Const.) which sessions "when organized shall transact no legislative business other than that for which it is especially convened, or such other legislative business as the governor may call to its attention while in session, except by a $\frac{2}{3}$ vote of each house. In an advisory opinion to the governor, 64 Fla. 16, 59 So. 782, which appears to have related to the transmission of the names of officials, appointed to office by the governor, for confirmation at an extraordinary session, the governor was advised that such transmission of names and confirmation thereof was not "legislative business" within the purview of said §8, Art. IV. One of the grounds for holding such confirmations not to be legislative business was that the cooperation of the house of representatives was not required.

Under §8, Art. IV, State Const., the legislature may transact only such legislative business as may be within the call, with certain exceptions, while under §3, Art. VII, State Const., no business other than reapportionment may be considered. In the light of the above mentioned advisory opinion the legislature may, at extraordinary sessions convened under §8 of Art. IV, consider business not legislative in its nature; the limitation is upon legislative business not upon business not legislative. Under §3, Art. VII, the legislature, when called into extraordinary session under said section, "shall consider no business other than such reapportionment,"—this seems to be a limitation upon all business, whether legislative or otherwise, other than reapportionment; except such as may be permitted under subsequent constitutional amendments. It is doubted that the rule in the advisory opinion to the governor in 64 Fla. 16, 59 So. 782, is applicable under §3, Art. VII, State Const. The limitation against the transaction of any business other than reapportionment does not prohibit the adoption of rules for the extraordinary session, regulations concerning the operation of the session, and other regulation necessary for an orderly session. The care and repair of the property of the legislature during such session may also be provided for as well as its storage after the session is ended.

Sections 1 and 3, Art. XVII, State Const., must be considered in this connection (§1 of said Article XVII having been amended in 1948 and §3 in 1942, subsequent to the last amendment of §3, Art. VII, in 1924). Under said §1, Art. XVII, as amended in

1948, constitutional amendments may be proposed at extraordinary or special sessions only when within the governor's call or an amendment thereof. The amendments contemplated under said §1, Art. XVII, are constitutional amendments generally. Under §3, Art. XVII, State Const., a constitutional amendment may be proposed "at any regular or special or extra session" when the legislature "by a vote of *three-fourths* of all members elected to each house shall determine that an emergency requiring an early *decision by the electors of the state exists . . .*" The language of said §3, Art. XVII, indicates that emergency constitutional amendments may be submitted at *any regular or special or extra session* whether or not the same be within the call for such session or not, and said §3, Art. XVII, being later in point of time (1942) than §3, Art. VII, (1924), if there is any conflict between the two sections, §3 of Art. XVII controls. Said §3 of Art. XVII appears to have been submitted and adopted pursuant to the recommendation of the governor at the 1941 session of the legislature for a constitutional amendment providing for a more speedy amendment of the state constitution in the event *there should arise at any time a situation in the nature of an emergency* requiring a constitutional amendment. We feel that this provision for an emergency amendment to the constitution contemplated the submission of an amendment by the legislature whenever in session, whether in regular session, or extraordinary session without regard for the purpose called, including sessions called under §3, Art. VII, when there shall arise a situation in the nature of an emergency requiring a constitutional amendment.

The legislature is required, by §3, Art. VII, State Const., to make an apportionment of membership in the senate and house of representatives every 10 years, beginning with the 1925 session, and should it fail to make such an apportionment it may be called into extraordinary session as is provided in §3, Art. VII, State Const. Although the said constitution mandatorily requires reapportionment every 10 years no mention is made of the method of making the reapportionment whether by bill, resolution or otherwise. It has been the custom of the legislature in the past to reapportion by acts and not by resolution, beginning with Ch. 3703, 1887 (see also histories under §§10.01 and 10.02, F. S.). Although reference is made in the state constitution to "bills" (see §§14, 17, 28, etc., Art. III) and "laws" (see §§15, 16, 20, 21, 28, etc., Art. III), it is clearly required that "the enacting clause of every law shall be as follows: *Be it enacted by the Legislature of the State of Florida.*" (§15, Art. III, State Const.) The enacting clause prescribed by §15, Art. III, State Const., "is a prime essential to the validity of a law" (*Winter Haven v. A. M. Klemm & Son*, 132 Fla. 334, 181 So. 153, text 168; *Advisory Opinion*, 43 Fla. 305, 31 So. 348). We feel that the requirement that the legislature make an apportionment of the members of the legislature among the several counties contemplates that such reapportionment be by valid enactment containing the enacting clause provided by said §15, Art. III, State Const., unless otherwise expressly provided in the constitution.

In the light of these observations, authorities, and constitutional provisions, the above stated questions are answered as follows:

1. The legislature, when called into extraordinary session pursuant to §3, Art. VII, State Const., may not consider bills, resolutions or joint resolutions covering any subject other than reapportionment under said section of the constitution; except, should there arise at any time a situation in the nature of an emergency requiring a constitutional amendment such an amendment may be submitted under §3, Art. XVII, of the constitution, without regard to the subject matter of such proposed constitutional amendment.

2. Neither the senate or house of representatives, separately and without the consent or concurrence of the other, may adopt resolutions dealing with the formation of interim committees, arrangement of the chamber or other quarters of either house, or the equipping of the same, except in so far as the same may relate to or have some connection with the current session called under §3, Art. VII, State Const. This answer relates to official committees and not to unofficial committees that might be set up by the members of the legislature, or of either house, and not by the house or senate officially.

3. The legislature is required to make reapportionment as required by §3, Art. VII, State Const., by valid law, and for there to be a valid law there must be the enacting clause prescribed by §15, Art. III, State Const. Unless a resolution be drawn so as to contain the required enacting clause it would not meet the requirements of §3, Art. VII, State Const.

4. The legislature, when called into extraordinary session pursuant to §3, Art. VII, State Const., may submit joint resolutions designed to amend §§2 and 3, Art. VII, State Const., relating to membership in the legislature and the apportionment thereof, when and only when there exists a situation in the nature of an emergency, requiring an amendment of said constitutional provisions, at an early date. Jurisdiction to submit a constitutional amendment, by the legislature when in extraordinary session under §3, Art. IV, State Const., is dependent upon the existence of an emergency. We feel that the legislature is the judge of the existence of such an emergency.

5. Section 11.13, F. S., as amended by §2, Ch. 29627, 1955, provides in part that "during the time the legislature is in session, each legislator shall be paid for subsistence the per diem and mileage provided for the governor and members of the state cabinet under general law . . ." This section of the statutes is a general and continuing one applicable during all sessions, regular, special or extraordinary, of the state legislature, and will remain so applicable until amended or repealed. When an extraordinary session of the legislature convenes under §3, Art. VII, State Const., such session "shall consider no business other than reapportionment." Should legislation be enacted fixing a different rate of subsistence pay, or making rules and regulations concerning the same, even during an extraordinary session of the legislature, such legislation would amount to a change or amendment of said §11.03, F. S., as amended, and would constitute legislation or "business other than reapportionment" in violation of said §3, Art. VII, State Const. This answers the 5th question above stated in the negative.

No attempt has been made in our said opinion of June 10, 1955, or in this supplement thereto, to construe said §11.03, F. S., as amended, and determine whether it is additional compensation to members of the legislature or merely reimbursement for expenses incurred while attending the legislature in Tallahassee, when in actual session when no recess is taken in excess of 3 days as limited by §13, Art. III, of the State Const.

* The supplemental opinion treats with question 5.

055-125—June 14, 1955

STATE FINANCIAL MATTERS

PUBLIC WORKS CONTRACTS—WAGES—PAYMENT—SETTLEMENT OF DISPUTES—§215.19, F. S.

To: R. A. Gray, *Secretary of State, Tallahassee*

QUESTION:

When a dispute arises within the contemplation of §215.19, F. S., upon whom does the duty rest to refer the dispute to the secretary of state for settlement?

Subsection 1 of §215.19, F. S., requires that there be inserted in certain public work contracts entered into by governmental units of the state a provision that the rate of wages paid to workers under the contract "shall not be less than the prevailing rate of wages for similar classification of work in the city, town, village or other civil division of the state in which the said public work is located."

Subsection 2 of §215.19, reads in part as follows:

"In case of dispute which the contracting officer is unable to settle as to the prevailing rate of wages or the proper classification of skills of employees, the matter shall be referred to the secretary of state for determination."

The language of the last quoted provision indicates that the initial burden of settling a dispute within the contemplation of the section lies upon the contracting officer of the governmental unit involved in the contract. Since these officials are representatives of the government, and since it is the public policy of the government that prevailing wages should be paid to workers under the government contracts subject to this statute, it is lawful and proper that the governmental representative should be the party charged with the responsibility of implementing and enforcing the public policy.

In disputes of this sort the governmental representative, referred to generally in the statute as the contracting officer, stands in a position of arbitrator to whom the complaining laborers may appeal. If the contracting officer is unable to settle the dispute to the satisfaction of the parties involved in it, the burden of settlement should be referred by him to the secretary of state. The effectiveness of the attempt of the contracting officer to settle a dispute would be destroyed and an

unnecessary burden might be imposed on the secretary of state if the disputing parties were allowed to refer the matter to him before the contracting officer had completed his effort to settle the dispute.

However, after it clearly and unequivocally appears that the dispute cannot be settled by the contracting officer then the matter should be promptly referred by him to the secretary of state for decision. The reference ordinarily should be made by the contracting officer in a letter to the secretary stating that he has endeavored to settle the dispute but has failed to do so. If it should be made to appear to the secretary of state by either of the parties, that is the contractor or the laborers, that a reasonable time has elapsed during which the contracting party has been unable to settle the dispute, or that the contracting party has been called upon by either of the parties to take action to settle the dispute, but has failed to act within a reasonable time, then and in either such event, the secretary of state would be authorized to assume jurisdiction to settle the dispute.

It is therefore, my opinion that, considering the language and purpose of the statute, the contracting officer has the duty under §215.19, F. S., of referring to the secretary of state those disputes which he is unable to settle to the satisfaction of the disputing parties. In this connection see the law recently passed by the legislature and signed by the governor which covers this subject more comprehensively than does §215.19, F. S.

055-126—June 15, 1955

PROFESSIONS AND VOCATIONS

PHYSICIANS—REVOKED STATE LICENSES—REGISTRATION WITH BOARD OF HEALTH UNDER §458.13, F. S.

To: *William S. Walker, Attorney, State Board of Health, Jacksonville*

QUESTION:

If a physician whose license to practice medicine in the state of Florida has been revoked by the state board of medical examiners on ground of narcotic addiction and conviction for same in both state and federal court, legally entitled to register with the state board of health as prescribed in §458.13(3) F. S. and to practice under the supervision of a duly licensed physician for 3 years without a license?

Section 458.13(3), F. S., before it was amended by senate bill 485 at the 1955 session of the legislature, provided as follows:

“(3) Every graduate of a medical school or college, whether approved by the board or not, and every person practicing as a resident physician, assistant resident physician or intern in any hospital in this state, shall register with the state board of health showing the

date upon which he started to practice as aforesaid within this state. Every hospital employing a resident physician, assistant resident physician or intern, and every physician employing an unregistered graduate physician as his assistant, shall, on January 1 and July 1 of each year, furnish the state board of health with a list of their said employees. *No person may be employed or act as a resident physician, assistant resident physician or intern in the hospitals of this state, and 'no unregistered graduate physician may act as an assistant to a duly licensed physician or physicians' in this state, for a period of more than 3 years unless he shall become duly licensed as a physician by the board. Any person violating this subsection shall be deemed guilty of a misdemeanor.*" (Emphasis supplied.)

It appears that the purpose of said section was to permit a doctor *who has not been licensed* by the state board of medical examiners to practice for a period of 3 years, either in a hospital or as an assistant to a duly licensed physician, without a license. The purpose of registering with the state board of health appears to be only a means of keeping a record of the years and places of practice of all physicians.

I do not believe that it was the intent of the legislature to permit persons whose licenses were revoked (on any of the grounds for revocation prescribed by the legislature) to escape the disciplinary action or punishment lawfully inflicted by revocation of license. It is my opinion that when a physician's license is revoked he is prohibited from practicing medicine as defined by Ch. 458, F. S., until such time as his license shall be restored by either the courts or the state board of medical examiners.

The words of the statute that determine the question posed here are that no person shall be employed as assistant or resident physician for more than 3 years "unless he shall become duly licensed as a physician by the board." This language does not contemplate restoration of a revoked license. It has reference to securing of a license ab initio. The privileges granted under §458.13(3) F. S. are accorded only to persons previously unlicensed as physicians by the Florida board. Of course, the board in exercising its disciplinary powers under §458.12(2) F. S. might permit a licensed physician under discipline to carry on those limited activities prescribed in §458.13(3), F. S., but such dispensation would arise under the disciplinary authority of the board and not from the force of §458.13(3) F. S. itself.

Section 458.13(3), F. S., as amended by senate bill 485, enacted by the 1955 Florida legislature, provides as follows:

"(3) Every person practicing as a resident physician, assistant resident physician or intern in any hospital in this state, shall register with the state board of health showing the date upon which he started to practice as aforesaid within this state. Every hospital employing a resident physician, assistant resident physician or intern shall, on January 1 and July 1 of each year, furnish the

state board of health with a list of their said employees. *No person may be employed or act as a resident physician, assistant resident physician or intern in the "hospitals" of this state for a period of more than 3 years, unless he shall become duly licensed as a physician by the board. Any person violating this subsection shall be deemed guilty of a misdemeanor.* (Emphasis supplied.)

Senate bill 485 does not have specific effective date provision, therefore it will take effect 60 days after the adjournment of the legislature as provided by the constitution. However, when it does take effect the noted change in §458.13(3) F. S. is that only persons employed or acting as resident physicians, assistant resident physicians or interns in the hospitals may practice 3 years without license. Even in this instance it is my opinion that the persons referred to are those that have never been licensed in Florida. I do not believe the act is intended to protect persons whose licenses have been revoked.

Your question is answered in the negative.

055-128—June 15, 1955

PUBLIC HEALTH

TUBERCULOSIS SANATORIA—ESTABLISHMENT OF NORTH-EAST FLORIDA TUBERCULOSIS SANATORIUM—AUTHORITY OF STATE TUBERCULOSIS BOARD—CH. 29781, 1955 (§392.041); §§392.04, 392.14, F. S.

To: W. T. Edwards, Chairman, State Tuberculosis Board, Sarasota

QUESTION:

What legal responsibility does Ch. 29781, 1955, place on the state tuberculosis board to establish a tuberculosis hospital in Union county?

Section 392.04, F. S., provides as follows:

"State tuberculosis board may establish district sanatoria; financing.—The state tuberculosis board may divide the state into not more than 5 districts, and establish, conduct, maintain and operate in each of said districts a tuberculosis sanatorium for the treatment of persons suffering from said disease, and for that purpose obtain loans from the federal government, or any agency thereof, or from any other available source, and provide for the securing and repayment of said loans in any manner." (Emphasis supplied.)

Under the foregoing authority a tuberculosis hospital has been constructed and is now being operated in 4 of the 5 districts of the state. The northeast district is the only district in which a tuberculosis hospital has not been established.

Chapter 29781, 1955, authorizes and directs the state tuberculosis board to establish "The Northeast Tuberculosis Sana-

torium" in Union county. Said county lies in the northeast district.

Among other things, the said chapter provides that the situs of lands which the board shall select, shall be acquired without cost to the board or the state. Therefore, the act places the legal responsibility on the board to select a site in Union county on which to build a tuberculosis hospital.

It appears that the 1955 legislature in directing the construction of "The Northeast Tuberculosis Sanatorium" did not make any specific appropriation to defray the cost of construction, equipping or operation. Therefore, it further appears that in order to carry out the legislative mandate, the state tuberculosis board may either use the authority vested in it under §§392.04, 392.14, F. S., for securing funds for construction or await a specific appropriation by the legislature for the purpose of carrying out the provisions of Ch. 29781, 1955.

055-130—June 16, 1955

INSURANCE

DOMESTIC LIFE INSURANCE COMPANIES—RESERVES—
INVESTMENT—STATE TURNPIKE AUTHORITY
BONDS—§§626.04, 635.27-635.33 AND 340.21, F. S.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTIONS:

1. May a domestic life insurance company invest an amount equal to its reserves and entire capital, if any, in the securities described in §635.27(5), F. S.?
2. May a domestic life insurance company, with funds in excess of its capital and reserve requirements, as contemplated by §635.31, F. S., invest any of such funds, under authority of said section, in the described revenue bonds?

Since we have no statutes specifically authorizing the formation of a mutual life insurance company, perhaps the aspect of these questions in relation to a mutual's "capital" is moot; however, in this opinion when reference is made to "capital" it shall be construed to include unimpaired surplus of a mutual in an amount not less than minimum capital requirements for stock companies.

Florida State Turnpike Authority Revenue Bonds, Series of 1955, are issued by Fla. State Turnpike Authority, created by Ch. 28128, 1953, the proceeds thereof to be used for construction of the turnpike project described in said act and duly authorized by said authority. The principal and interest of the bonds are payable from revenues derived from operation of said turnpike as provided in such act; "and issuance of the turnpike bonds under the provisions of this act shall not, directly or indirectly or contingently, obligate the state to levy or to pledge any form of taxation whatever therefor, or to make any appropriation for their payment."

Chapter 28015, 1953, relating to investment of domestic life insurance company funds, now appears as §§635.27-635.33, F. S. Section 635.27 begins with the words, "Every domestic life insurer must have and continually keep to the extent of an amount equal to its entire reserves, as defined in §635.30, F. S., and entire capital, if any, invested in:" followed by 13 subdivisions describing coin or currency, securities and types of loans. §635.28, F. S., opens with the words, "No domestic life insurance company may directly or indirectly acquire or hold real estate except as follows:" succeeded by sub §§(1) to (5), inclusive, detailing mentioned permissible real estate investments.

Section 635.30, F. S., defines "entire reserves", to which attention is directed.

Section 635.31, F. S., provides that any funds of such an insurer "in excess of its life insurance reserves and capital, if any, may be invested without limitation in other securities or in any manner as may be approved by the commissioner."

Section 635.27(5) is quoted:

"Bonds which are payable from revenues or earnings specifically pledged therefor of any public toll bridge, structure, or improvement owned by any state, incorporated city, or legally constituted public corporation or commission, all within the U. S. for the payment of the principal and interest of which a lawful sinking fund has been established and is being maintained, and if no default on the part of the issuer in payment of principal or interest has occurred on any of its bonds, notes, warrants or other securities, within 5 years prior to the date of investment therein."

Section 626.04, F. S., a statute old in origin and last amended in 1927, provides that domestic insurers and surety companies shall not be licensed to begin business until they are possessed of and have \$100,000 "actually invested in bonds of the U. S., of any state or of any county or municipality in the U. S., or in mortgages or deeds of trust" on improved and unencumbered real estate as therein described and conditioned; with the proviso that "this section shall not apply to any domestic insurance company chartered prior to the effective date of the revised general statutes of Florida." The effect of §626.07, F. S., is that such capital investment requirements must be maintained. Undoubtedly the reference in such quoted matter is to the R. G. S. of 1920. Despite the wording of §635.27, F. S., to the effect that a domestic life insurer shall have its entire reserves and capital invested in the securities described in such section, we do not differ with the insurance commissioner's position that §626.04 F. S. was not disturbed by §§635.27-635.33 F. S. Should this question ever arise in relation to a domestic insurer chartered prior to the effective date of said revised statutes, this opinion would be subject to modification in relation to such company.

Section 21 of said Ch. 28128, 1953, (§340.21, F. S.) provides that said turnpike bonds are made securities in which public

officers and public bodies, described financial institutions, including "all insurance companies, insurance associations, and other persons carrying on an insurance business," and other persons "*who now or may hereafter be authorized to invest in bonds or other obligations of the state may properly and legally invest any funds, including capital belonging to them or within their control.*" (Emphasis supplied.) If the italicized words qualify this power to invest, as to a domestic life insurer the qualification is met by the provisions of §§626.04 and 635.27, F. S.

We assume without question that on the reasoning employed by the insurance commissioner which resulted in his determination that §626.04 F. S. was not disturbed by §§635.27-635.33, F. S., he will also determine that §340.21 has not disturbed the effect of §626.04 F. S. In our opinion the reasoning for these positions is sound.

Repeals by implication are not favored. The legal presumption is that the legislature does not intend to effect repeal of a statute without expressing an intent to do so. When 2 or more statutes relate to the same subject matter, they should be construed if possible to give effect to all as though said several statutes constituted one law. *State v. Gadsden County, Fla.*, 58 So. 232; *Dade County v. City of Miami, Fla.*, 82 So. 354; *Amos v. Conklin, Fla.*, 126 So. 283; *Curry v. Lehman, Fla.*, 47 So. 55. Applying these principles and in view of the purpose of §626.04, F. S., such section is construed as controlling with respect to investment of a domestic insurer's capital to the amount required by said section. It is also to be observed that §626.04 was included in F. S. 1953 along with the 1953 legislation mentioned; and this significantly evidenced legislative intent that the provisions of §626.04 F. S. were not disturbed by said later legislation. Applying the same principles, §340.21 and §635.27(5) are also to be construed in *pari materia*.

Adopting such constructions, there is left for consideration the investment in the mentioned securities of possible capital in excess of \$100,000 and of reserves.

In view of the foregoing in my opinion the questions are answered as follows:

1. Not less than \$100,000 of capital of a domestic life insurance company must be invested as required by §626.04, F. S. Possible capital in excess of \$100,000 and reserves of such an insurer may be invested in Fla. State Turnpike Authority Revenue bonds, Series 1955, under the authority of §340.21, F. S., and §635.27(5) F. S.; provided, that if at any time there should be default with respect to the principal or interest of such bonds, as contemplated by §635.27(5), then such bonds shall not be eligible for said investment purposes until the lapse of 5 years from the date of any such default.

2. While the answer to question 1. would seem to furnish an answer to this question, it is pointed out that a casual reading of §635.31 F. S. demonstrates that its wording is clear and unambiguous; that application of its provisions lies within the province of sound insurance practices and accountancy; and

that this question is to find its answer in the exercise of the commissioner's discretion in that province.

055-131—June 16, 1955

STATE OFFICERS AND EMPLOYEES

LEAVES OF ABSENCE—SERVICEMEN REEMPLOYMENT— §115.15, F. S.

To: *Board of Control, Florida State University, Tallahassee*

QUESTION:

Do state employees still have reemployment privileges under state and federal statutes, and, if so, for how long after entering the service?

An instructor at the university was called into active military service in July, 1951. He has completed his required service but remains in the service on a voluntary basis, declining, up to this time, to return to his employment. At the request of the university, the instructor recently resigned but insists that he has not waived his right to reemployment.

Section 115.15, F. S., enacted in 1941, adopted the reemployment provisions of the federal statute, 50 U.S.C.A. App. §308. On August 4, 1950, I gave you an opinion, 050-382, in which I held that §115.15, F. S., was still applicable to reemployment privileges. Copies of that opinion are enclosed herewith. The cited federal statute has now been superseded by 50 U.S.C.A. App. §459. Subparagraph (g) (2) reads as follows:

"Any person who, subsequent to June 24, 1948, enters upon active duty (other than for the purpose of determining his physical fitness), whether or not voluntarily, in the Armed Forces of the U. S. or the Public Health Service in response to an order or call to active duty shall, upon his relief from active duty under honorable conditions, be entitled to all of the reemployment rights and benefits provided by this section in the case of persons inducted under the provisions of this title, if he is relieved from active duty not later than 4 years after the date of entering upon active duty or as soon after the expiration of such 4 years as he is able to obtain orders relieving him from active duty."

You will observe that the reemployment privilege under the federal act continues as long as 4 years, or, in some instances, a little longer, and the service may have been either on a voluntary or involuntary basis. It is my opinion that the privilege still exists to the extent set out in 50 U.S.C.A. App. §459.

In all cases you may have problems of tenure, except where the employee had acquired tenure before entering the service. All of the facts and circumstances which exist at the time of application for reemployment are to be considered, and this opinion is not to be considered a determination of any particular case.

055-132—June 16, 1955

CONSERVATION

GAME AND FRESH WATER FISH—STATE CONSERVATION
AGENTS—ARRESTS—FEES—\$372.72, F. S.*To: Bryan Willis, State Auditor, Tallahassee*

QUESTION:

Is there any authority for the boards of county commissioners to pay from the county fine and forfeiture fund to the state for the use of the state conservation fund, fees for arrests and conveying of prisoners, when such services are performed by the state conservation agents?

As a background to your question, you have correctly observed and stated the provisions of Florida laws and the statutes pertaining to your question. We quote these observations from your letter:

"In 1927 (Ch. 11838, §13), the deputies of the State Game Commissioner, under the Department of Game and Fresh Water Fish, were entitled to the same fees as sheriffs for arrests and conveying prisoners, but the fees were to be deposited in the Game Fund. This identical provision appears in Ch. 13644, §12, which was enacted in 1929.

"In 1933, by Ch. 16178, the legislature abolished the Department of Game and Fresh Water Fish, and enacted as §11 of that Chapter the provision that State Conservation Agents were entitled to the same fees as sheriffs, such fees to be paid into the State Conservation Fund. (See CGL 1977(111), Perm. Supp.) The State Board of Conservation was created by this act.

"In 1925, by Ch. 17016, the Department of Game and Fresh Water Fish was re-created, by way of separation from the State Board of Conservation. (See Biennial Report of the Attorney General, 1935-36 Biennium, p. 630.) (See also, §§1902, et seq., CGL, Perm. Supp.)

"In the 1941 F. S., the provisions relating to fees above referred to were brought forward as §372.72, in the chapter relating to the Game and Fresh Water Fish Commission, but §1977(111), CGL, Perm. Supp., does not appear in Ch. 373, F. S. '41 (see §373.03 F. S.). Likewise, these provisions do not appear in Ch. 370, F. S. '53, although they do appear in §372.72, F. S. '53."

Section 16.20, F. S., provides as follows:

"Every statute of a general and permanent nature enacted by the state of Florida or by the territory of Florida, and every part of such statute not included in Florida Statutes, 1953, as adopted by §16.19, F. S., as amended, or recognized and continued in force by reference therein or in

§§16.21 and 16.22, F. S., as amended, *is repealed.*" (Emphasis supplied.)

The provisions found in earlier statutes, as you have recited, that state conservation agents were entitled to the same fees as sheriffs for arrests and conveying prisoners is a part of a statute of general and permanent nature. This provision is not included in Florida Statutes, 1953, and is, therefore, repealed by authority of §16.20, F. S., above quoted. Accordingly, this answers your question in the negative.

055-133—June 16, 1955

ADOPTIONS

FEES AND CHARGES—LICENSED CHILD-PLACING AGENCIES—§72.40, F. S.

To: *State Department of Public Welfare, Jacksonville*

QUESTION:

Do the provisions of §72.40, F. S., in regard to charging of fees, etc., apply to licensed child-placing agencies?

The statutes prohibit any person from charging certain fees in connection with the placing of children for adoption. Sub §1(a) of the statute specifically excludes licensed child-placing agencies from the definition of person. Accordingly, this section has no application to child-placing agencies.

Referring to your questions in regard to the basis on which fees and charges should be made by licensed child-placing agencies, I cannot advise you except to say that they should always be fair and reasonable for the services given, and within the financial capacity of the persons served. There are no statutory charges established for the services. Some of these agencies may have ample funds with which to absorb a part of the cost, and other agencies may find it necessary to support themselves from these and similar fees and charges. Insofar as you issue licenses to the agencies, I think it would become a problem for you only in the event they made unreasonable or exorbitant charges in violation of whatever rule or regulation you may have for them on that subject.

055-134—June 16, 1955

COUNTY ORGANIZATION AND OFFICERS

FINANCE—COUNTY COMMISSIONERS—OFFER OF REWARD IN CONNECTION WITH CRIME

To: *Bryan Willis, State Auditor, Tallahassee*

QUESTION:

May a board of county commissioners offer to pay a pecuniary reward for the apprehension, dead or alive, of a person who has committed a crime in that county?

In this connection we have examined the statutory powers and duties of boards of county commissioners under Ch. 125, F. S., and other statutes relating to county commissioners, and find nothing in the statutes expressly authorizing boards of county commissioners to pay pecuniary rewards for the apprehension and conviction of persons charged with a crime.

In *Brite v. Board of Commissioners of Siskiyou county*, the 3rd district court of appeals of California stated:

"... In the absence of an express provision giving a county or other municipality of the state express authority to offer rewards for the apprehension and conviction of offenders against the criminal laws of the state, the authorities generally hold that no such power exists. *Hanger v. City of Des Moines*, 52 Iowa, 193, 2 N. W. 1105, 35 Am. Rep. 266; *Gale v. Inhabitants of South Berwick*, 51 Me. 174; *Board of Commissioners v. Bradford*, 72 Ind. 455, 37 Am. Rep. 174; *Mountain v. Multnomah Co.*, 16 Or. 279, 18 P. 464; *Abel v. Pembroke*, 61 N. H. (357) 359; *Croft v. Danbury*, 65 Conn. 294, 32 A. 365; *Patton v. Stephens*, 77 Ky. (14 Bush) 324; *Murphy v. Jacksonville*, 18 Fla. 318, 43 Am. Rep. 323; *Baker v. Washington*, 7 D. C. 134; 24 A. & E. Ency. of Law (2d ed) 944." (68 Pac. 2d 1007, text 1011.)

It is noted that *Murphy v. City of Jacksonville*, 18 Fla. 318, is cited by the court as authority for the above statement. However, upon examination of said case, we find it related to the offering of a reward by the city of Jacksonville and not by a county.

The rule above mentioned by the California case appears to be supported by the text and authorities in 46 Am. Jur. 109, §8, and 77 C. J. S. 368, §10, and authorities cited.

The above authorities answer the above question in the negative. However, for your information we hand you a copy of our opinion of June 3, 1949, (049-246) from which it is hoped something may be worked out whereby the same thing may be accomplished.

055-135—June 16, 1955

EDUCATION

INSTITUTIONS OF HIGHER LEARNING—AGRICULTURAL SCHOLARSHIPS—AMOUNT—PAYMENT— §§239.25-239.28, F. S.

To: *Virgil L. Milbrath, County Attorney, Marion County, Ocala*

QUESTION:

May a board of county commissioners pay the holder of an agricultural scholarship the full amount of the cost of a 4-year scholarship if he graduates in 3 years?

You state in your letter that the agricultural scholarship

provided in Marion county amounts to \$600 a year for a regular 4-year college course.

The scholarship in question is authorized and provided for by §§239.25, 239.26, 239.27, 239.28, F. S.

The statutes do not stipulate a specific amount to be paid for the scholarship. §239.26 provides in part, ". . . and shall entitle the holder thereof to a full course of instruction at the university of Florida. . . ."

Section 239.28 provides in part, ". . . the board of county commissioners may appropriate from any funds at their disposal a sum sufficient to pay the board of the person receiving the said scholarship. The term 'board' herein named, shall be construed to mean the regular dormitory rate and shall be paid monthly while the holder of the said scholarship is in attendance at the university of Florida."

Apparently it was the intent of the legislature in the above cited acts to authorize the respective boards of county commissioners to provide the actual expenses of a full 4-year scholarship for students attending the university of Florida agricultural school. The exact amount of the scholarship is left to the discretion of the board except that the statute does stipulate that a sum shall be appropriated sufficient to pay the "board" of the scholarship holder; that this amount shall be at the regular dormitory rate and shall be paid monthly while the holder is in school.

It would seem, therefore, that the legislature did not intend for the scholarship holder to receive a fixed sum during his 4 years in school, but rather that his expenses would be paid during the time he was in actual attendance.

The holder can receive the payments only while he is in school and the amount allowed for his "board" must be the regular dormitory rate charged by the university. If, as in this case, the scholarship holder finished his course in 3 years rather than 4, there would be no authority for the county commissioners to pay for his "board" during the 4th year when he was not attending school.

Your question is therefore answered in the negative.

055-136—June 16, 1955

COURTS

SMALL CLAIMS COURTS—SERVICE OF PROCESS—COSTS
AND FEES—§§42.10, 42.11, F. S.

To: James T. Nelson, Judge, Small Claims Court, Daytona Beach

QUESTION:

May a small claims court established under Ch. 26920, 1951 (Chapter 42, F. S.) charge as costs the post office registry fee for sending the notice required by §42.10 (2) via registered mail?

We note from §42.10, sub §(2), F. S., that "the mode of service shall be by the sheriff or constable as provided by law; or by registered mail with return receipt; or by any person not a party or otherwise interested in the suit, especially appointed by the judge for that purpose."

Under §42.11, F. S., that "The plaintiff, when he files his claim, shall deposit with the court the sum of \$3.50, except proceedings of garnishment, attachment, replevin and distress, when the fee shall be \$10, which shall cover all costs of the proceedings, *including the service of notice.*" (Emphasis supplied.)

And in sub §(5) of §42.10, F. S.: "When served by the sheriff or constable, the actual cost of service shall be paid in addition to the filing fee as provided for in §42.11."

Considering the italicized portion of §42.11 and all of sub §(5) of §42.10, supra, it is my opinion that insofar as the service on one defendant is made by registered mail, the post office registry fee must be taken from the deposit required to be made by plaintiff when he files his claim.

Your question is therefore answered in the negative insofar as service by registered mail on one defendant is concerned.

As for service on more than one defendant, and failure of service by registered mail where plaintiff furnished the court with a wrong mailing address, I enclose a copy of my opinion 052-54, dated February 27, 1952, which fully discusses those situations.

055-137—June 17, 1955

MILITARY CODE

STATE RETIREMENT SYSTEM UNDER §250.22, F. S.— ELIGIBILITY FOR FEDERAL MILITARY RETIREMENT— REDUCTION OF BENEFITS—§250.22, F. S.

To: Mark W. Lance, State Adjutant General, St. Augustine
QUESTION:

Should the amount to be paid as retirement pay by the state, under the provisions of §250.22, as amended by the 1955 session of the Florida legislature, be reduced by the amount which a person would normally be eligible to receive from the U. S. government in cases where under other provisions of federal law said person is prohibited from receiving retirement pay from the federal government for military service?

As I understand the facts involved from your letter, the individual concerned is at present drawing retirement pay from the state. He is also legally entitled to a federal military retirement benefit except for the fact that at present he has accepted civilian employment with the federal government.

Under the provisions of senate bill 12 by which the 1955 session of the Florida legislature amended §250.22, F. S., the following is included:

"Eligibility for retirement under this section shall be in addition to any other retirement that such person is eligible to receive; provided, however, that retirement pay under this section shall be reduced by any amount of retirement pay, pension or compensation which such person is eligible to receive from the federal government for military service."

It would appear from your letter that the individual in question is not at present eligible to receive the federal retirement pay to which he is otherwise entitled since he is employed by the federal government in a civilian capacity and therefore comes under the dual salary restrictions enjoined by §212 of the federal act of June 30, 1932.

Since he is not eligible for the federal retirement pay at present, his state retirement benefit is not affected. Your question is therefore answered in the negative.

055-138—June 20, 1955

INSURANCE

GROUP LIFE INSURANCE PLAN—MINISTERS OF FLORIDA CONFERENCE OF METHODIST CHURCH—\$635.24, F. S.

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*

QUESTION:

Properly may a group life policy be issued to Florida Conference of The Methodist Church covering ministers of that conference on the premise that, within the meaning of amended §635.24(1), F. S., the employer-employee relationship exists between the conference and its ministers?

Legal authority for issuance of such coverage must be found in §635.24(1), as amended by Ch. 29740, 1955, which provides, in part, for issuance of a policy "to an employer, or to the trustees of a fund established by an employer, which employer or trustee shall be deemed the policyholder, to insure employees of the employer for the benefit of persons other than the employer subject to the following requirements; . . ." There follows in paragraphs (a), (b), (c) and (d) a recitation of these requirements, the only ones material here being: (1) "A policy on which part of the premium is derived from funds contributed by the insured employees may be placed in force only if at least 75% of the then eligible employees, excluding any as to whom evidence of individual insurability is not satisfactory to the insurer, elect to make the required contributions." (2) "The policy must cover at least 25 employees at date of issue."

Briefly, the group coverage is made available to all active full-time ordained, licensed or accepted supply ministers of the conference as of and prior to the date of issuance of the policy and those who become such ministers of the conference subsequent to date of the policy. Coverage for ministers age 65 or over is \$2500, and for others, \$5,000. We are informed that 40% of the required premium will be paid by the conference and

60% by the participating minister; further, that applications for participation in the proposed plan of coverage have been received up to this date from not less than 80% of such ministers of the conference, in numbers between 300 and 400. This opinion does not purport to examine policy provisions to determine if they comply with §635.25, F. S., it being assumed that such may be ascertained by those in the insurance department. This opinion is limited to the question as stated.

Florida Conference of The Methodist Church, as a distinct governmental unit of that church, has its territorial and jurisdictional aspects. It occupies a position in relation to the Methodist church similar to that occupied by Florida in relation to the U. S. Florida conference embraces all of Florida east of the Apalachicola river and the city of Apalachicola. Within that area authority of the church is exercised by and through officers and organizations of the church, as such authority has been defined and delegated by the church. For the purposes of this opinion, it is sufficient to mention only the exercise of church authority throughout Florida conference with respect to its ministers by the bishop and the annual conference. The annual conference is composed of ministers of Florida conference and delegates from churches within its boundaries and the bishop is its presiding officer. Let us not be confused concerning the identity of the policyholder. It is Florida conference, the church governmental unit wherein church authority is exercised through its officers and organizations in like manner as in our state, a political governmental unit, where authority is exercised through various officers, boards, commissions, etc. With these remarks, attention is now directed to the relationship existing between Florida Conference and its ministers. The following statements concerning that relationship derive from the 1952 *Discipline of The Methodist Church*, the last one issued. The annual conference shall be referred to hereinafter as the "conference."

The conference has sole power to admit members (ministers); and it has disciplinary control of its members. In the Methodist church ministerial orders are of 2 classes, deacons and elders; the former being constituted by the election of the conference and prescribed action of the bishop, and the latter by like election and the prescribed action of the bishop and elders. Every ordained minister in the effective relation to the conference is guaranteed full employment. The salary or "support" of a minister is fixed by the local church, but the quarterly conference has final authority to name the amount thereof. While the obligation rests upon the local church to meet salary requirements of its minister, provision is made for the conference to establish and adopt a minimum salary plan. A pastor has no claim against any church or charge he has served for unpaid salary after his pastoral connection with the church or charge has ceased. The bishop appoints preachers to pastoral charges annually and, whenever necessary, makes or changes the appointments of preachers in the interval between sessions of the conference, after consultation with district superintendents.

In opinion 052-180, of June 10, 1952, we dealt with the pro-

priety of a proposed plan for group life coverage of ministers and other personnel of the Presbyterian Church, U.S., the master policy to be issued to a corporate agency of the general assembly of that church. A reading of that opinion will quickly demonstrate that ministers of that church are not employees of its general assembly. In that opinion we relied upon the case of *Gentile Bros. Co. v. Florida Industrial Commission, Fla.*, 10 So. 2d 568, concerning the factors required to establish the employer-employee relationship (common law master-servant relationship), which factors are as follows: (1) selection and engagement of services, (2) payment of wages; (3) power of dismissal; and (4) power of control of the servant's conduct in relation to services to be done. Obviously factors (1), (3) and (4) are here met in the relation of Florida conference to its ministers; and in view of the guarantee of conference with respect to employment, the minimum salary plan, and the power to appoint a minister to any church in Florida conference (with amount of salary depending upon the ability of the individual church), the intent of above factor (2) relative to payment of wages is met.

Further, application of such technical common law rule was not necessary to reach the answer in opinion 052-180; and while such common law rule is here met, reasonably it should not be applied in the statutory construction here involved. We are confronted with the right freely to contract. It is elementary that such right is guaranteed by the federal constitution; and it has been stated that freedom to contract is freedom from undue restraint on the right to contract. *Standard Oil Company v. United States*, 221 U.S. 1, 55 L. Ed. 619. It is recognized that as the interests of public welfare may demand, the right is subject to the valid exercise of the police power; indeed, existing contracts are subject to reasonable regulation. *Southern Utilities Co. v. City of Palatka, Fla.*, 99 So. 256; 264 U. S. 580, 68 L. Ed. 859; 268 U. S. 232. Nevertheless, it appears that any police regulation affecting this right freely to contract should be liberally construed as against persons affected and strictly construed against the state. While this constitutional right may have limited application to corporations, the right is here involved in relation to the individuals proposed to be insured.

On this point of statutory construction, attention is directed to the case of *Rybasack v. Prudential Ins. Co. of America, N. J.*, 189 A. 378. While we do not necessarily agree with all conclusions of the court in that opinion, it is worthy of consideration in relation to this question. The case construed a group life law of that state which provided, in part, for group life insurance "covering not less than 50 employees written under a policy issued to the employer . . ." The regularity of group coverage of certain "employees" of a hospital was challenged, one ground being that included in the coverage were individuals working at the hospital who received no compensation. In discussing this feature, the court remarked that such individuals were under control of the hospital and that they were afforded certain laboratory and other hospital facilities, and then stated: "It seems clear that the status of employer and employee as set forth in the statute did not mean, literally, one who was paid for his services in money or who devoted his entire time to his

employer and was completely under his control and domination, but in a broader and more comprehensive sense where a relationship existed of a group or association of men engaged in a common purpose under an organization directed and controlled by constituted authority . . ."

In view of the foregoing, in my opinion the question is answered as follows:

Applying either the strict common law characterization of the master-servant relationship or a more liberal construction, the relationship of employer-employee, as contemplated by amended §635.24(1), F. S., exists between Florida conference of the Methodist church and the ministers of said conference. Hence, the question is answered in the affirmative.

As we have remarked, the answer set forth in prior opinion 052-180 is obviously correct. However, it is remarked that should any variance exist between conclusions expressed therein and in this opinion, the former opinion is modified to the extent of such variance.

055-139—June 23, 1955

CRIMES

TRESPASS UPON SOVEREIGNTY LANDS—TAKING SAND AND FILL MATERIAL FROM LAKE BOTTOMS— §§821.19 ET SEQ., F. S.

To: *Keith E. Collyer, County Prosecuting Attorney, Sebring*

QUESTION:

Does a person violate any criminal statute of this state when he, without the consent of the trustees of the internal improvement fund, fills in the shore (below high water mark) or water bottoms of non-tidal navigable lakes in this state, or takes sand or other fill material from such shore or water bottoms of such lakes?

Although the request for opinion may be construed as extending to both navigable and non-navigable lakes, we are here limiting our consideration of the question to navigable lakes and those presumed to be navigable by reason of having been meandered by the government surveyor. Non-navigable lakes, including those meandered by the government surveyor, have been treated as other than sovereignty lands and in most cases were treated as public lands and are now vested in private owners or the state or federal government as public lands. The taking of sand and fill material from such a lake would in most instances (except where vested in the state or government as public lands) be a trespass upon private property and not upon public property. See generally Ch. 821, F. S. We are limiting this opinion to trespasses upon sovereignty lands.

Where bodies of water were meandered by the government surveyor such meandering raises the presumption that such body of water is navigable (65 C. J. S. 52, §5). "Navigable waters include lakes, rivers, bays and harbors . . . whether affected by

the tides or not, and whether the water is navigable or not in all parts . . . or whether the waters are navigable during the entire year or not" (Martin v. Bush, 93 Fla. 535, 112 So. 274, text 283). Lands under navigable waters are sovereignty lands and belong to the state (Broward v. Mabry, 58 Fla. 398, 50 So. 826; Merrill-Stevens Company v. Durkee, 62 Fla. 549, 57 So. 428; Thiesen v. Gulf, F. & A. Ry. Co., 75 Fla. 28, 78 So. 491; Martin v. Busch, 93 Fla. 535, 112 So. 274; White v. Hughes, 139 Fla. 54, 190 So. 446; Watson v. Holland, 155 Fla. 342, 20 So. 2d 388) the title of the upland owners extends only to high water mark. See also §370.03, F. S., declaring that "all beds and bottoms of navigable rivers, bayous, lagoons, lakes, bays, sounds, inlets, oceans, gulfs and other bodies of water within the jurisdiction of Florida shall be the property of the state."

Although title to *certain tidal lands* has been vested in the trustees of the internal improvement fund by the state legislature (§§253.06-253.15, F. S.), as has title to certain marsh, wet and low lands (§§253.36-253.38, F. S.) and may be sold by the said trustees; nowhere in the statutes and laws of this state do we find general power or authority in the trustees of the internal improvement fund, or other state officer, board, or agency, to sell and convey reclaimed non-tidal lake bottoms; although such lake bottoms are under the administration, management, control, supervision and protection of the trustees of the internal improvement fund (see §253.03, F. S.). The said trustees are authorized to "sell or lease any phosphate, earth or clay, sand, gravel, shell, mineral, metal, timber or water, or any other substance similar to the foregoing . . ." (§253.45, F. S.). Chapter 271, F. S., usually referred to as the Butler act, authorizes the filling in of certain navigable streams, bays of the sea or harbors "as far as the edge of the channel," it is clear that the said Butler act does not extend to and apply to non-tidal lakes (§271.06, F. S.). It, therefore, seems that any attempt by an upland owner, or any other person, to fill in non-tidal navigable lake bottoms or to take sand, soil, or other fill material from the said lake bottoms would be a trespass upon state land.

Although it may be that §821.11, F. S., would be applicable to trespass upon state lands, it seems clear that such a trespass would be within the purview of §§821.19 et seq., F. S., and the above question is answered in the affirmative, in that the shore (below high water mark) and the bottoms of non-tidal navigable lakes in this state are sovereignty or state lands and the taking of sand, gravel, soil, etc., therefrom, or the filling in of such lands, would amount to a trespass under said §§821.19, et seq., F. S.

055-140—June 23, 1955

COUNTY ORGANIZATION AND OFFICERS

FINANCE—COUNTY COMMISSIONER—COMPENSATION FOR TRAVEL EXPENSES OUTSIDE OF COUNTY

To: J. Maston Bates, County Commissioner, DeSoto County,
Arcadia

QUESTIONS:

1. When county commissioners travel outside the

county on county business must their travel expense vouchers be itemized to indicate expenditures for meals, lodging, etc.?

2. When more than one commissioner on such trip rides in an automobile owned or rented by one of them, may the others claim mileage?

This opinion is limited to instances of travel on county business outside the county.

In the case of *Adams v. Lott*, 150 So. 596, the supreme court of Florida passed upon the legality of paying the traveling expenses of county commissioners on trips outside the county for county purposes. The trip in that case was to Tallahassee to attend a meeting of the state road department. Approval was on the basis that the trip was for a county purpose.

It is notable that in that case the court called attention to the fact that the traveling expenses incurred were authorized by a resolution of the board of county commissioners and were incurred pursuant to a budget regularly adopted by the board.

AS TO QUESTION 1:

Compensation is entirely different from traveling expenses. The latter is intended to be reimbursement for actual expenditures made by an individual commissioner traveling on county business, and the expense account should conclusively show that the expense was incurred strictly for county purposes. See cases collected in annotation 106 A. L. R., pp. 781-783.

Therefore, in my opinion, in the absence of a statute authorizing a fixed amount for each day used in official travel outside the county, and I find none applying to DeSoto county, an itemized statement of expenses actually incurred should be required and furnished. (See opinion 047-219, p. 142 A. G. O. 1947-1948)

AS TO QUESTION 2:

Mileage allowed for use of a private automobile on official travel necessarily implies that the automobile shall be owned or rented by the person claiming the mileage allowance. Question 2 is therefore answered in the negative.

055-141—June 24, 1955

INSURANCE

ISSUANCE OF CERTIFICATE THAT CARGO IS INSURED UNDER OPEN POLICY OF ALIEN INSURER

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*

QUESTION:

Would the issuance of a certificate by a Florida attorney of a large alien insurer that an air cargo shipped from Miami on a foreign airline carrier to a foreign port was insured under an open policy issued by said insurer to such carrier either in the country of the insurer or

the country of the carrier, be violative of the insurance laws of this state?

The situation as expressed by the attorney for the insurer is as follows: "This office is the attorney for a large alien insurer which is not qualified to do business in Florida or in any state of the U. S. This insurer has issued open policies of cargo insurance on a worldwide basis to certain foreign flag airlines—these contracts of insurance having been entered into either in the country of domicile of the insurer or in the country of domicile of the carrier. Some of these carriers, on occasion, haul air cargo from Miami, to foreign ports, and in this connection, with particular reference to the issuance of shipping documents and sight drafts through banks, it is necessary to provide certificate that the cargo is insured under such open policies." This attorney's client has asked him if he would be willing to issue these certificates of existence of insurance on its behalf. The attorney states that no commission would be paid, that no underwriting would be done, and that issuance of the certificate would be a purely administrative act providing evidence that cargo or goods were covered under said open policy.

Our knowledge of the nature of these particular open policies of cargo insurance is limited to the above. It may be stated generally that an open policy of marine insurance covers shipments to be made while the policy remains in force; that "it is a contract to effect future insurance only on shipments made in accordance therewith"; and at least in certain instances such policies require the insured to report all shipments made by or through the insured covered by the policy and to declare the amounts thereof. Generally on the subject see Appleman, *Insurance Law and Practice*, Vol. 4, pp. 256-258, §2390; and in connection with such citation, footnote 79 and the case of *Insurance Co. of North America v. Bernard*, 226 N.Y.S. 524, 222 App. Div. 512.

If issuance of said certificate is required to effect coverage under such an open policy in relation to a particular cargo or particular goods, it should not be issued by a Florida attorney for his client, the alien insurer. On the other hand, if the certificate has no relationship to coverage of such cargo or goods under the open policy but merely evidences such coverage, the execution of the certificate by said attorney would not offend the regulatory insurance laws of Florida.

055-142—June 27, 1955

JURORS AND JURY LISTS

SUMMONING PETIT JURORS—REGISTERED MAIL— CERTIFIED MAIL—§40.23, F. S.

To: *Sid M. Saunders, Sheriff, Pinellas County, Clearwater*

QUESTION:

May jurors be summoned by "certified mail" in lieu of "registered mail" under the provisions of §40.23, F. S.?

Below I give information concerning the new "certified mail" service which was initially operative on June 7, 1955. As can be seen,

part of the information is from official post office department publications. The elaboration thereon in the nature of explanation has been cleared with Mr. A. V. Matthews, superintendent of mails at Tallahassee.

For each piece of "certified mail" without return receipt one P O D Form 3800 is required. For each piece of "certified mail" with return receipt there is required in addition one P O D Form 3811.

Those forms are obtained from the post office without charge.

P O D Form 3800 is called "Receipt for Certified Mail" and is in two parts, each bearing the same number. Instructions are printed on the back of the left-hand portion, which, when not postmarked by the sending post office constitutes sender's record of the letter, but when postmarked by the sending post office becomes a postmarked receipt for the piece of certified mail bearing that number. The sender enters in the appropriate spaces on the left-hand portion (not gummed) of the form the name and address of the person to whom sent and indicates what type, if any, of return receipt service he wishes. He then sticks the gummed right-hand portion on the address side of the letter. If he wants a postmarked sender's receipt he presents the letter with the gummed sticker and sufficient stamps on it and the left-hand portion of the form to the postal employee, who postmarks the receipt.

P O D Form 3811 is the return receipt. It is perforated near the ends and gummed beyond the perforations so it is easily stuck to the back of the letter. Sender enters the number of the piece of the certified mail and his name and address in the spaces provided on the face of the form and sticks it on the back of the letter.

To every piece of certified mail must be affixed postage stamps to equal (1) the postage, (2) the certified mail fee of 15 cents, and, if desired, (3) the return receipt fee, which is for (a) the receipt to show to whom and when delivered, 7 cents, and (b) to show to whom, when, and address where delivered, 31 cents.

Thus, a surface-mail letter not over 1 ounce with return receipt showing to whom delivered would cost: postage, 3 cents; certified mail fee, 15 cents; return receipt fee, 7 cents; total, 25 cents.

All non-deliverable certified mail will be returned to the sender.

The carrier, when unable to deliver, leaves a notice that there is a piece of certified mail for the person to whom addressed, indicating where he may call for it. Upon request thereafter of addressee, another attempt to deliver will be made.

The following is from the May 17, 1955 Postal Bulletin:

"Carriers must handle certified mail in the following manner:

"a. Deliver the letter to the addressee or his authorized representative and obtain receipt on Form 3870 and on the return receipt Form 3811, if requested.

"b. If you cannot deliver the article, leave notice of arrival on Form 3870 and return the mail to the post office to be held awaiting call.

"c. A further attempt to deliver the article by carrier will be made only if requested by the addressee.

"d. Carriers and special delivery messengers must turn in all undelivered articles and receipts for delivered articles. No receipt will be given to the carrier or special delivery messengers for letters returned.

"e. *Refused* certified mail shall be so endorsed and returned immediately to the sender."

The following is from Part 168, Postal Manual, U. S. post office department:

"Part 168

CERTIFIED MAIL

168.1 Description

Certified mail service provides for a receipt to the sender and a record of delivery at the office of address. No record is kept at the office at which mailed. It is handled in the ordinary mails and no insurance coverage is provided. * * *

168.2 Class of Mail to Which Applicable

Only first-class letter mail having no value will be accepted as certified mail. This does not exclude articles of a nonnegotiable character and other matter which would involve a cost of duplication if lost or destroyed. The mail may be sent by air on payment of the required postage. Return receipt service requested at the time of mailing only, and special delivery services are available on payment of the prescribed fees.

168.3 Fees*

.31 Fee in Addition to Postage	15 cents
.32 Return Receipts:	
a. Showing to whom and when delivered	7 cents
b. Showing to whom, when, and address where delivered	31 cents
.33 Inquiry Fee	10 cents

168.4 Mailing

.41 Payment of Fees and Postage. A certified mail stamp is available for the fee. However, the fee and postage may be paid by ordinary postage stamps, meter stamps, or by permit imprints.

.42 Where to Mail. You may mail certified mail at the post office, branch, or station or give it to a rural carrier. It may also be deposited in mail drops

in post offices or in street boxes, provided you follow specific directions in 168.43.

.43 How to Mail. Obtain blank certified mail coupons (no charge) at your p.o. or from your rural mail carrier. Also obtain blank return receipt forms if needed. Following is the procedure:

a. Enter on the receipt portion of the certified mail coupon the name and complete address of the person or firm to whom the mail is addressed. If return receipt service is wanted, check block on the receipt to show the fee. (See 168.32)

b. If return receipt is wanted, enter the certified mail number on the return receipt card, address it to yourself and attach it to the back of the envelope. If you desire the return receipt to show the address where the letter was delivered, there is a block at the top of the form which must be checked by you.

c. Be sure to attach to the envelope sufficient postage stamps to pay for the certified mail fee, first-class postage, return receipt fee, or special-delivery fee.

d. If you want a postmarked sender's receipt, attach the certified mail sticker to the letter and present the letter and the completed coupon to the postal employee. If given to a rural carrier he will bring the postmarked receipt back to you.

e. If you do not want a postmarked receipt, attach the Certified Mail sticker to the address side of the envelope directly above the address, detach your receipt, and deposit the letter in the mail box. Mark your receipt to show the date.

* * *

168.5 Delivery

.51 Procedure. Mail for delivery by carriers is taken out on the first trip after it is received, unless the addressee has requested the postmaster to hold his mail at the p.o. The mail will be delivered to the addressee or his authorized representative after the delivery receipt is obtained by the postal employee. *Delivery rules are the same as for registered mail.* See 161.72. (Emphasis added.)

.52 Notice of Arrival. The carrier will leave a notice of arrival if he cannot deliver the certified letter for any reason. The letter will be brought back to the p.o. and held for you. If the letter is not called for or its redelivery requested, it will be returned at the expiration of the period stated by the sender, or after 15 days if no period is stated.

.53 Rural Delivery. Rural carriers will deliver certified mail to your residence if it is not more than $\frac{1}{2}$ mile from the route and if there is a passable road leading to it. Otherwise, a notice will be left in your box so that you may either meet him at the

box on his next trip, or call at the post office for the mail.

.54 Star Route Delivery. Star route carriers may deliver certified mail only when the addressee has authorized the postmaster in writing to give the mail to the carrier. The carrier will be required to sign for the mail and the responsibility of the Postal Service ends on delivery to the carrier.

.55 Delivery Records. The delivery records will be held for 6 months. At the end of that period the records will be destroyed.

168.6 Inquiry

Inquiry on Form 1510 concerning the loss of a certified letter may be made at the post office on payment of a fee of 10 cents. After a reasonable time has elapsed for the letter to have been received by the addressee, application for a duplicate return receipt may be made without charge. You must present your sender's receipt at the time an inquiry is filed or a request for a duplicate return receipt is made."

The receipts on Form 3870 mentioned above are post office receipts and are held by the delivering post office for 6 months.

Post office records of delivery of certified mail are the equivalent of those of registered mail except that the delivery receipts for certified mail are retained by the delivering post office for 6 months, whereas those for registered mail are retained for 3 years.

Section 40.23, F. S., reads:

"40.23 *Summoning petit jurors.*—The sheriff shall summon the persons named in such venire to attend such court as petit jurors at least 7 days previous to the sitting of such court, by registering to each person so named in the venire a written notice, addressed to his place of residence, and placing such notice in the U. S. mail with sufficient postage to carry the same and with return receipt requested, *unless otherwise directed by the court.* If otherwise directed by the court, then the sheriff shall summon such jurors in the manner directed, making the same returnable as directed by the court." (Emphasis added.)

The words referring to registered mail in §40.23, F. S., supra, appear to refer to ordinary registered mail. There is no requirement that the letter be delivered to addressee only.

While it cannot be said that "certified mail" is the same as "registered mail", it can be said that the sender may have a postmarked receipt for the letter and that he may have a return receipt.

Considering the italicized words of §40.23, F. S., supra, it is my opinion that the judge of the court directing the

summoning of the venire may, after studying the information concerning "certified mail", herein, find sufficient latitude in the statute that he may, in his discretion, by order, direct that the jurors be summoned by "certified mail".

055-143—June 27, 1955

MOTOR VEHICLES

DRIVERS' LICENSES—MINORS—PARENTS' SIGNATURES—
§322.09, CH. 743, F. S.

To: T. M. King, Jr., Supervisor, Drivers License Division, Department of Public Safety, Tallahassee

QUESTION:

Must parents sign the driver's license application, assuming full responsibility, of a minor between 14 and 18 years of age when said minor is married or divorced?

Section 322.09, F. S., was amended by Ch. 29671, 1955, and now provides:

"Application of minors.—(1) The application of any person under the age of 18 years for an instruction permit or operator's license shall be signed by both the father and mother of the applicant, if both are living and have custody of him, or in the event neither parent is living, then by the person or guardian having such custody, or by an employer of such minor, or in the event there is no guardian or employer, then by another responsible person who is willing to assume the obligation imposed under this chapter upon a person signing the application of a minor.

"There shall be submitted with each such application a certified copy of the birth certificate of the applicant. Upon the inability of the applicant to furnish such certified copy, a certificate from the public school authorities as to the age of the applicant upon entering school as required by §232.03, F. S., or the school authorities of the state where applicant enrolled in school, shall be submitted. Upon inability of applicant to establish a birth date as above provided, then the same may be established in the order of preference as provided by said §232.03, F. S."

Although Ch. 743, F. S., enacted in 1917 and subsequently amended in 1923 and 1947, was designed to remove the disability of nonage of all male and female minors who are married or divorced, it would appear that the later expression of the legislature in 1955 would limit the applicability of Ch. 743 when applied to the specific circumstances under consideration.

The 1955 act (Ch. 29671) would seem to be primarily concerned with the question of public safety in the operation of motor vehicles and fixing a method of insuring financial responsibility for minor drivers who are licensed to operate motor

vehicles. This assumption is strongly fortified by the language of the act which provides that if the minor in question has no parent or guardian who has legal custody of him, then he must secure the signature on his application for a driver's permit of his employer or some other responsible person who is willing to assume the obligation imposed under this chapter.

In other words, although Ch. 743 removes a minor's disabilities of nonage when he gets married, it does not necessarily make him a financially responsible individual within the evident intent of §322.09, F. S., which, as has been pointed out above, is a later expression of the legislature.

I feel, therefore, that until such time as the courts may rule otherwise, the provisions of §322.09, F. S., should be carried out regardless of the marital status of the applicant. Your question is therefore answered in the affirmative.

055-144—June 28, 1955

CIVIL PRACTICE AND PROCEDURE

VENUE—ACTIONS EX CONTRACTU—REPLEVIN PROCEEDINGS—SMALL CLAIMS COURT—PINELLAS COUNTY

To: *Edward P. Silk, Judge, Justice of the Peace Court, St. Petersburg*

QUESTIONS:

1. Is venue properly laid in a small claims court in Pinellas county, where the action is based on a contract entered into within the territorial jurisdiction of said court but the breach occurred beyond such territorial jurisdiction?

2. Is venue properly laid in a small claims court in Pinellas county, where the action is in replevin to recover personal property sold under a retain title contract within the territorial jurisdiction of said court but the personal property is located outside such territorial jurisdiction at the time of filing action?

From your letter it seems clear that you are concerned with venue instead of jurisdiction. In other words, you are concerned with where the action should be brought. The jurisdiction of small claims courts in Pinellas county is determined by §1, of Ch. 27256, 1951.

Venue of actions based on contracts is determined by §§46.01-46.05, F. S., and the venue lies (a) where the defendant, or one of them, resides, (b) where the cause of action accrued or, (c) where the property in litigation is located. This answers your 1st question.

It may here be observed that questions of venue, under (b) of the preceding paragraph, may, in particular cases, become troublesome. See the following cases: *Peters v. E. O. Painter Fertilizer Co.*, 73 Fla. 1001, 75 So. 749; *McLendon et al. v. Lurton-*

Hardaker Co., 83 Fla. 263, 91 So. 113; Nettles v. Gulf Fertilizer Co., 78 Fla. 490; 83 So. 298.

Actions in replevin are required by §78.03, F. S., to be brought in the county or justice's district where the property is. This answers your 2nd question.

055-145—June 27, 1955

INSURANCE

GROUP LIFE—SICK AND ACCIDENT—LABOR UNIONS

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTION:

May the employees of several employers, which employees are members of Sheet Metal Workers International Association, Local No. 57, Tampa, be covered under group life and health and accident policies of insurance, to the extent and under the circumstances recited below?

Items received with the request for opinion or subsequent thereto are mentioned.

Letter of June 15, 1955, from the representative of said labor union, inquires if it will be lawful "under the laws of the State of Florida" for insurance companies to issue to the trustees of its welfare fund group coverage to employees of certain employers (all of said employees except for a mentioned few being members of the union), as follows: "\$1,000—Life Insurance; \$1,000—Accidental Health and Dismemberment; \$21—per week sick benefit." Such representative states that at the present time 141 people are to be covered, and while the figure might vary, it is not expected to be less than 130 at any time; that of this number "5 are employers and 3 are classed as administrative forces employed by the employers"; and that, "The number of people employed by individual employers ranges from 1 to 30."

Attached to said letter is a "List of shops having agreements with Local 57", setting forth names of 33 concerns located in Tampa, Clearwater, Sarasota, Lakeland, Lake Wales, Bartow and Bradenton.

Also attached to said letter is a mimeographed form of "Agreement and Declaration of Trust", apparently intended to be executed by said local union, "Sheet Metal Contractors, composed of employers in the Sheet Metal industry", and certain trustees of the fund created by said instrument. The form is not a copy of an *executed* agreement. It is sufficient here to state that its terms, with one exception, appear to comply with the requirements for creating a welfare fund as contemplated by 29 U.S.C.A. §186(c) (5).

In a letter of June 21, 1955, the representative of said labor union advised the insurance commissioner that, "Sheet Metal Workers Local #57 and the West Coast Roofing and Sheet Metal Contractors Assn. are under the jurisdiction of the national

labor relations acts (National Labor Relations Act, Labor Management Relations Act and Taft Hartley Law)"; that this local's "International maintains a legal staff in Washington, D. C." and retains a named firm of insurance consultants "to assure us that all of our welfare funds and Collective Bargaining Agreements are in compliance with all federal laws . . ." On this point of applicability of federal labor acts, since it would seem that substantially all the materials necessary for the work of these employers and employees must be shipped into the state, the employer-employee relationship here reasonably falls within the purview of such laws. *N.L.R.B. v. Robert S. Greene, Inc.*, C.C.A. 125 F. 2d 485; *J. L. Brandeis & Sons v. N.L.R.B.*, C.C.A. 142 F. 2d 977, certiorari denied 323 U.S. 751, rehearing denied, 323 U.S. 815.

On the basis of the representations set forth in such letters and instruments, it is assumed: The "Sheet Metal Contractors," mentioned in said form of agreement and declaration of trust, and "West Coast Roofing and Sheet Metal Contractors Assn.," mentioned in such letter of June 21, 1955, are the same, and that the named concerns in said list of shops are said contractors; that collective bargaining agreements within the purview of federal labor relations acts exist between such employer concerns and their respective employees who are members of said union and creation of said trust fund is provided therein; that such form of agreement and declaration of trust has been duly executed by said employers, said local union and the trustees, that the fund thereby created derives from employer contributions (and accretions to the fund by investments and refunds) and that either in said instrument or collective bargaining agreements, the detailed basis upon which such employer contributions are to be made is specified; that the premiums for the group coverage here sought will be paid from said fund; that the term "Administrative Forces" means administrative employees; and that the persons to be covered (plus dependents, if applicable), with exception of the mentioned employers and administrative employees, are members of said union. This opinion is conditioned on said assumptions.

The case of *United States v. South Eastern Underwriters Assn., et al.*, 322 U.S. 533, resulted in the passage by congress of Public Law 15 of March 9, 1945 (15 U.S.C.A. §§1011-1015). This federal law provides that the business of insurance and every person engaged therein shall be subject to the laws of the several states which relate to the regulation and taxation of insurance, and that "no act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such law specifically relates to the business of insurance . . ." This federal legislation was upheld in *Prudential v. Benjamin*, 326 U.S. 408.

Federal labor relations acts constitute a preempting by the congress under authority of the commerce clause of employer-employee relations to the extent of their provisions, and a state law adopted in purported exercise of its police power pertaining

to matters in the field of such preemption must yield. *Hill v. Florida*, 325 U.S. 538.

A part of Title 29, U.S.C.A., §186(c) (5), is here relevant and is quoted:

"(5) with respect to money or other thing of value paid to a trust fund established by such representatives, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; . . ." (Emphasis supplied.)

This is a part of the 1947 Taft-Hartley act.

The quoted provisions constitute legislation of congress which "specifically relates to the business of insurance", as such words are used in 15 U.S.C.A. §1012. The constitution of the U. S. and acts of congress adopted in pursuance thereof "shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (Art. 6, Clause 2, U.S. Const.) Hence, the provisions of 29 U.S.C.A. §186(c) (5) relating to insurance is the controlling law in Florida, and constitutes an exception to state law upon the same subject to the same effect as though such provisions were state legislation.

Mention was made above that the form of agreement which accompanied the request for opinion appeared to comply in all respects with the provisions of 29 U.S.C.A. §186(c) (5), with one exception. Section 2 of said form defines "Employees" as used therein, and has the concluding provision: "At the option of the Employer he may include himself and his administrative forces as employees." It will be noted that the proposed insurance is intended to include a certain number of employees and persons in administrative positions. 29 U.S.C.A. Title 186 (c) (5) refers to a trust fund for the sole and exclusive benefit "of the employees of such employer, and their families and dependents." The proceeds of such fund may be applied for the benefit of only such persons. *Upholsterers International Union of North America v. Leathercraft Furniture Co.* D.C. Pa. 82 F. Supp. 570. While the agreement setting up such fund may exclude administrative employees of the employer not members of a union (*Van Horn v. Lewis*, D. C. 79 F. Supp. 541), apparently under the federal act they may be included.

In view of the foregoing, in my opinion the question is answered as follows:

Conditioned as above set forth, the group coverages contemplated by the question may be acquired by the trustees of the described fund through authorized life and/or health and accident insurers and their duly licensed agents in this state; provided, that such coverages shall not include any employer. Except to the limited extent that the provisions of 29 U.S.C.A. §186 (c)(5) permit these group coverages at variance with Florida laws relating to such coverages, the laws of Florida pertaining to such types of coverages, to authorized life and/or health and accident companies and their agents, to policy forms and provisions, and all other relevant state regulatory laws, are fully applicable in connection with the issuance of such coverages in this state.

055-147—June 30, 1955

STATE OFFICERS AND EMPLOYEES

STATE RACING COMMISSION—MEMBERS—SUBSISTENCE AND TRAVEL EXPENSES—§§550.03, 112.061, F. S.

To: *Stephen C. O'Connell, Attorney, State Racing Commission, Fort Lauderdale*

QUESTIONS:

1. Should members of the state racing commission be paid subsistence and travel expenses in accordance with §550.03, F. S., or with §112.061, F. S.?
2. Should the above question be answered by holding that §550.03 is the applicable statute, then may a member of the commission travel by chartered plane at a cost greatly in excess of the commercial air line rates?

Section 550.03, F. S., provides in part that the "compensation of each member of the racing commission shall be . . . together with necessary expenses, including traveling expenses, as may be approved by the commission, and the provisions of §112.06, F. S., shall be inapplicable." Said §112.06, F. S., was amended by Ch. 21913, 1943, by which amendment the said statute expired on June 30, 1945. Said §112.06 has been omitted from the statutes and thereby repealed; however, subsistence and travel expenses allowed by Chs. 22830, 23892, 25040, 26910 and 28303, 1945, 1947, 1949, 1951 and 1953, although separate and independent acts, are to all intents and purposes merely and only amendments of said §112.06, F. S., and for the purposes of this opinion should be so read (1945-6 Biennial Report, 623). Subsistence and travel expenses of the members of the state racing commission should, therefore, be allowed pursuant to §550.03 and not §112.061, F. S.

Section 112.06, F. S., as well as subsequent laws and statutes (see §112.061, F. S.), provides that when state officers and employees travel by common carriers on state business that they shall procure from the state comptroller and use transportation requests. The only other means of transportation mentioned in the said statute is travel by private motor vehicle. It is usually held that travel "expenses must have been incurred in the dis-

charge of official business, or in the performance of the officer's statutory duties." (81 C. J. S. 1052, §92). It is indicated in *Marshall County v. Rokke*, 134 Minn. 346, 159 N. W. 791, Ann. Cas. 1918 D. 932, that an officer should avail himself of the ordinary mode of travel and the usual route taken by persons generally. The statutes applicable to travel expenses of officers and employees of the state, including those allowed under §550.03, F. S., contemplate use of the usual and regular means of transportation in the state. The fact that unusual means of transportation may be desirable in some instances by an officer or employee will not usually justify the use of such means. The fact that a state officer or employee might charter a plane and make a trip quicker and travel more directly will not of itself justify such charter, although usual means of transportation is slower and requires a greater distance of travel. In either case public funds are involved. Even should unusual means of transportation be justified under unusual circumstances their use can be justified only under such unusual circumstances; mere convenience to the officer or employee cannot and will not justify such use.

Although we are not in position to say that under no circumstances might a member or members of the racing commission charter a plane, we do say that only under very rare and pressing circumstances, where the interests of the state (and not the desires or convenience of the members) are impaired or endangered may such a chartered plane be used. These observations indicate a negative answer, subject to very unusual circumstances, to the 2nd question. The request for opinion reveals no unusual, rare or pressing circumstances justifying reimbursement in this case.

055-149—July 5, 1955

TAXATION—ELECTORS AND ELECTIONS

HOMESTEAD EXEMPTION—SEPARATE, HUSBAND AND WIFE—APPOINTMENT OF COMMITTEEWOMAN AS ELECTION INSPECTOR—§7, ART. X, STATE CONST., §102.021, F. S.

To: Board of County Commissioners, Sanford

QUESTIONS:

1. Where a husband, residing with his wife in a home in "S" county, properly files his application for homestead tax exemption in said county, and the wife, who owns real property in "V" county, but does not permanently reside thereon and make the same her permanent home, files an application for homestead tax exemption in said "V" county, should the application of the husband be also denied on the ground of fraud?

2. May a duly elected and qualified committeewoman of a political party in this state be appointed and serve as an inspector in a regular primary or general election?

"Homestead laws are not founded on the principles of equity, but are enacted as a matter of public policy in the interest of humanity. Their purpose is to provide a home for each citizen of the government, where his family may be sheltered and live beyond the reach of financial misfortune, and, likewise, their purpose is to encourage and provide home ownership, to inculcate in individuals those feelings of independence which are essential to the maintenance of free institutions, to protect society from the danger of citizens becoming paupers, and in general to promote the stability and welfare of the state. These laws are based on the theory that the preservation of the homestead is of greater importance than the payment of debts, and their purpose is to protect the family as a whole and not merely the individual who for the time being is the head of the family" (40 C. J. S. 431, §2.) Although the above rule was derived from many court decisions relating to homestead exemption from forced sale, §7, Art. X, Florida Const., has extended the rule to include ad valorem taxes against homesteads under the limitations mentioned in the said constitutional provision. In Florida the homestead exemption rights of a husband inures "to the widow and heirs of the party entitled to such exemption" (§2, Art. X, Fla. Const.).

In the light of the above authorities we doubt that fraud unconnected with the husband's homestead claim and rights may defeat his claim to the exemption, in that the right is for the benefit of the entire family and not merely for the owner of the homestead property. The 1st question is answered in the negative.

At this time printed copies of all laws enacted at the recent legislative session and amending our election laws are not available, but will be within a short time. In the absence of the availability of such copies, it is rather difficult to locate and examine such laws or possible laws. The statutory revision department has prepared a summary of election law changes made by the 1955 legislature; from this it appears that only one 1955 law relating to this question was enacted. The answer below is premised on the assumption that this is correct. When copies of such election laws are available, if any provision thereof should bear upon this subject, without delay the answer will be conformed to such possible requirement.

Section 102.021, F. S., provides for the appointment of inspectors and clerks of election; that each election board shall be composed of 3 inspectors and a clerk, all of whom must be registered, qualified electors of the precinct in which they are appointed, and all of whom shall belong to the same political party, provided (new matter supplied by senate bill 1131, 1955 session), that in any primary in which only one party has candidates on the ballot all inspectors and clerks may be of that party; and that only electors who can read and write the English language can be appointed to said board. Inspectors and clerks are required to take and subscribe to an oath, as prescribed by §102.051, F. S. Those are the qualifications for inspectors and clerks of election boards. There appears to be nothing in our statutes prohibiting a member of a party executive committee,

otherwise qualifying as above noted, from serving as such an inspector or clerk; and there appears to be no reason from the standpoint of public policy why such a party committee member may not so serve. These observations answer the 2nd question in the affirmative, subject to the possible existence of an applicable 1955 enactment.

055-150—July 6, 1955

SHERIFFS

DEPUTY SHERIFF—MINOR TRAFFIC VIOLATION— METHOD OF HANDLING—OPINION 055-90

To: *John A. Madigan, Jr., Attorney, Sheriffs' Association, Tallahassee*

STATEMENT:

A deputy sheriff or county patrol officer apprehends a traffic violator at a considerable distance from the courthouse or the office of a committing magistrate. He recognizes the violator or identifies him by his driver's license, license tag number or otherwise and concludes that he can reasonably assume that there will be no attempt to escape or ignore the charge. The officer believes the circumstances at that time demand that he stay on duty patrolling the highway in order to give the maximum possible overall protection to the traveling public. Therefore he does not arrest and take the violator to the sheriff's office or to a magistrate. Instead, he gives him a "ticket," called a "summons," or "citation," the effect of which is that the person apprehended voluntarily agrees to go before a committing magistrate or to the sheriff's office at the courthouse or elsewhere at a time specified for further proceeding, such as formal charge, posting bond, etc.

QUESTION:

What effect, if any, does opinion 055-90 have on the procedure outlined above?

The procedure described above and the "ticket", "summons" or "citation" constitute an informal arrangement for the convenience of the person apprehended and the officer. It is in no sense a warrant or court summons and has no legal status.

Since by that procedure the violator agrees voluntarily to appear at the time and place specified, it constitutes a waiver by him of his right to immediate arrest and commitment or bail, and consequently violates none of his rights.

Procedure in a sense analogous to that outlined above is authorized by officers of the highway patrol by sub §(4) of §321.05, F. S., except that by that subsection the highway patrol officer is authorized to obtain from the violator a "recognizance, cash bond or other sufficient security conditioned for his appearance before the proper tribunal. . ." See opinion 054-177, p. 381, Biennial Report of the Attorney General, 1953-1954.

There is nothing inherently illegal in the procedure outlined in the 2nd paragraph hereof, provided it is not made the predicate for improper fees and mileage charges nor permitted to degenerate into lax law enforcement. Arrest fees and mileage charges should be computed from the point where the person appears for the formal arrest (courthouse, sheriff's office or appropriate magistrate's office) and further proceedings.

Opinion 055-90 dated May 30, 1955, and addressed to Sheriff R. L. Kendrick, is released from suspension and is not modified.

Assuming that all required legal procedures will be faithfully performed by the officer subsequent to the issuing of the "ticket", "summons", or "citation", the opinion cited is not to be construed as precluding the informal procedure outlined herein. This answers your question.

055-152—July 7, 1955

PUBLIC BUSINESS

STATE PURCHASING COUNCIL—STATUS—APPROPRIATION—CH. 287, F. S.

To: *Ralph R. Siller, Executive Secretary, State Purchasing Council, Tallahassee*

QUESTION:

Are all the provisions of Ch. 287, F. S., which created the state purchasing council, and prescribed its duties and powers, now in effect, including §287.09, notwithstanding the absence of any specific appropriation for the council in the 1955 general appropriations act?

Chapter 287, F. S., was compiled from Ch. 28056, 1953, §287.09, F. S., reads:

"287.09 *Appropriation.*—For the purpose of carrying out the provisions of this chapter ("act" in Ch. 28056) there is hereby appropriated from the moneys in the general revenue fund in the state treasury not otherwise appropriated the sum of \$25,000 (figures in addition to words in Ch. 28056) *annually*, being \$50,000 (figures in addition to words in Ch. 28056) for the biennium, or so much thereof as may be necessary, from which the purchasing council shall pay all costs and expenses of its operations, the costs of supplies, materials and equipment and the salaries of personnel, including the annual salary of \$7,500 (figures in addition to words in Ch. 28056) for its executive secretary." (Emphasis added.)

Conversation with you indicates there may be some doubt in the minds of some members of the purchasing council whether the words "... , being \$50,000 for the biennium, . . ." (emphasis added) are words of explanation or words of limitation. Therefore, I quote from the Oxford English dictionary:

"Annually: adverb;

In annual order or succession; yearly, every year, year by year."

"The: demonstrative adjective;

13. Used before names of weights and measures, in stating a rate: as (*so much*) *the pound, gallon, yard, day, etc.*

b. So with prepositions *by, in, on* (for), . . . , chiefly with reference to time, as (*so much*) *by the day, equals (so much) each day.*"

"For: preposition:

- 12.c. Introducing the intended recipient, or the thing to which something is intended to belong, or in connection with which it is to be used."

From the foregoing, it is seen that the words "\$50,000 for the biennium" are not words of limitation, but are merely explanatory of the preceding words, "\$25,000 annually", and that both have the same practical meaning.

The budget commission made a specific recommendation that the 1955 legislature appropriate \$37,500 for the first year and \$75,000 for the entire 1955-57 biennium, those sums representing a 50% increase over the appropriation made by \$287.09, *supra*, and added a further recommendation, as follows:

"The budget commission recommends that the legislature review the current operations under the purchasing council law with a view to strengthening the power and authority of the council, or abolish it entirely. If proper authority is given to the council, additional funds for personnel will be needed." (P. 426, Budget Commission Report to the Legislature, 1955-57 Biennium.)

In house bill 372 (the department of finance bill) the regular session of the 1955 legislature had before it a bill proposing specifically to abolish the purchasing council. The bill failed to pass.

A specific sum to cover the cost of operation of the purchasing council was not included in the general appropriations act.

From the two immediately preceding paragraphs it is clear that the 1955 legislature did not either increase the powers of the council, abolish it, or increase the appropriation to cover its operations.

Instead, by enacting Ch. 29615, 1955, §1 of which adopts "Florida Statutes, 1955", it continued all of Ch. 287 as part of "the only official statute law of this state". Section 287.09 was included therein in the precise language appearing on p. 1115, F. S., 1953.

An appropriation to pay the salaries and expenses necessary and proper to or growing out of a law itself may be contained in such law, even though not found in the general appropriation law, as is seen from the case of *State v. Southern Land & Timber Co.*, 45 Fla. 374, 33 So. 999, where the distinction

is drawn between general appropriation laws and a law making an appropriation. There it was contended that inasmuch as there was no appropriation for board of health purposes in the general appropriation law of 1897, and notwithstanding §784, Rev. Stat., there could be no levy of taxes for that purpose. The supreme court upheld the assessment, saying:

"... The legislature seems to have regarded §784, Revised Statutes, as being *ex propria vigore*, equivalent to an appropriation law, as we can discover no appropriation in the general appropriation laws for the board of health purposes. . . No error of law appears in the rate of state taxation for 1897." (See also *Amos v. Moseley*, 74 Fla. 555, 77 So. 619; *State v. Allen*, 83 Fla. 214, 91 So. 104; *Carlton v. Matthews*, 137 So. 815, at p. 837.)

Under the principles enunciated by our supreme court in the case of *State v. Lee*, 163 So. 859, it is clear that so long as the legislature by its general system of state laws erects and requires to be maintained a state agency, it is obligated to provide the means by which the agency shall function. The 1955 legislature did so provide by adoption of Ch. 29615, *supra*.

The language in §287.09, F. S., *supra*, "... there is hereby appropriated from the moneys in the general revenue fund in the state treasury not otherwise appropriated the sum of \$25,000 annually, being \$50,000 for the biennium, or so much thereof as may be necessary, ..." constitute a continuing appropriation, even in the absence of a specific appropriation item therefor in the general appropriations act, for the purposes named in Ch. 287, so long as the said Ch. 287, in its present form, remains the law.

Section 282.001, F. S., (Ch. 25068, 1949) a statute abolishing certain continuing appropriations has no application to a later enactment carrying a continuing appropriation such as the state purchasing council act, Ch. 28056, 1953, brought forward as Ch. 287, F. S.

To sum up: The 1955 legislature did not abolish the state purchasing council nor did it repeal its continuing appropriation. On the contrary, by its biennial adoption of the statute it expressly carried forward the chapter in the Florida Statutes embracing the council, including the section providing for the continuing appropriation. Under the circumstances we necessarily conclude the state purchasing council law is still in effect.
055-153—July 8, 1955

COURTS

JUVENILE COURT—TRAFFIC VIOLATIONS—SUSPENSION OR REVOCATION OF DRIVER'S LICENSE—PROCEDURE—§§39.01, 39.02, 39.05, 39.06, 39.09 AND 39.10, F. S.

To: *Mattie H. Farmer, Judge, Orange County Juvenile Court, Orlando*

QUESTION:

What is the required procedure to be followed by

the juvenile court under the amendment to §39.02, F.S., designated (1) (a) of the juvenile court act, relating to traffic violations, which said amendment is contained in Ch. 29900, 1955?

The pertinent portion of the amendment empowers the judge, "** * * after filing of a petition and holding a hearing as hereafter provided * * **", to revoke or suspend "** * * the driver's license of a child * * **" *he finds to have violated " * * * a federal law, state law, or city ordinance relating to the operation of a motor vehicle; * * * "* (Emphasis supplied.) The court may or may not adjudge the child a delinquent child.

In the absence of a particular procedure provided by the amendment, the words "** * * after filing a petition and holding a hearing as hereinafter provided * * **", undoubtedly refers to other provisions of the juvenile court act. Upon examining the act we find the petition provided for in §39.05; process and service by §39.06; the hearing by §39.09, F. S., and adjudication by §39.10, F. S. It should be noted that the proceeding thereunder is one to determine whether or not the child is delinquent or dependent. By reference to the "definitions" found in §39.01, F. S., sub §(11), a "delinquent child" means a child who commits a violation of law * * * while under sub §(12). "Violation of law" means violation of any law of the U. S., the state of Florida, or another state within the U. S., or a city or town ordinance of a city or town within the U. S."

Construing the 1955 amendment in *pari materia* with the remaining pertinent provisions of the juvenile court act, we must conclude that it is necessary for the traffic violation to form the basis upon which the court will entertain a petition to determine whether or not the offender is a "delinquent child". However, the court in its discretion may or may not revoke or suspend the offender's license, without adjudicating him to be a "delinquent child".

055-154—July 11, 1955

LEGISLATURE

EXTRAORDINARY SESSIONS—RECESSES—§3, ART. VII, STATE CONST.

To: W. Turner Davis, President Florida State Senate, Tallahassee

QUESTIONS:

1. May either or both houses of the state legislature, when in extraordinary session under §3, Art. VII, of the state constitution, by and with the joint consent of both houses, adjourn or recess to a day certain in excess of 3 days?
2. If the 1st question is answered in the affirmative, may the said legislature be reconvened by the governor, or called into another extraordinary session, prior to the day certain to which adjourned as aforesaid?
3. If the 1st question is answered in the affirma-

tive, then may the legislature, by resolution or otherwise, waive the per diem and travel expense allowance to members of the legislature during the period of said adjournment?

The Florida constitution is not a grant or delegation of power, but is a limitation or restriction of power (16 C. J. S. 132, §70; *Harry E. Prettyman, Inc. v. Florida Real Estate Commission*, 92 Fla. 515, 109 So. 442, text 445; *Fowler v. Turner*, 157 Fla. 529, 26 So. 2d 792, text 794). A state constitution should be construed as a whole and effect given to every part, if possible (16 C. J. S. 62, §23; 11 Am. Jur. 661, §53; *Weinberger v. Board of Public Instruction*, 93 Fla. 470, 112 So. 253, text 256). Constitutional provisions should be considered as a whole and not as separate provisions complete within themselves, unless the context so requires (*Thomas v. State*, Fla., 58 So. 2d 173; *State v. Couch*, 139 Fla. 353, 190 So. 723; *Wheeler v. Meggs*, 75 Fla. 687, 78 So. 685). Constitutional amendments become a part of the constitution as a whole and should be read in *pari materia* with all other portions of the constitution, unless the context clearly requires otherwise (Advisory Opinion 152, Fla. 686, 12 So. 2d 876; *Scarborough v. Webb's Cut Rate Drug Company*, 150 Fla. 754, 8 So. 2d 913; 11 Am. Jur. 663, §54). Every word of a constitutional provision should be given appropriate effect (*State v. Couch*, *supra*; *State v. Board of County Commissioners*, 147 Fla. 278, 3 So. 2d 360). Special provisions in a constitution will usually control over conflicting general provisions (16 C. J. S. 65, §24). Of two conflicting constitutional provisions, the last in order of time and position will usually be preferred, if they cannot be harmonized (16 C. J. S. 66, §26). When an amendment to a constitution is adopted by the people it becomes a part of the constitution and must be construed in *pari materia* with all other parts and provisions having a bearing upon the same subject (*Sylvester v. Tindall*, 154 Fla. 663, 18 So. 2d 892) as such amendment becomes a part of the said constitution, but being the last expression of the people on the subject will control in case of conflict (*Wilson v. Crews*, 160 Fla. 169, 34 So. 2d 114). A legislative construction of an ambiguous constitutional provision should be given serious consideration when construing such provision (16 C. J. S. 72, §33).

Section 13, Art. III, State Const., provides in part that neither house "shall without the consent of the other, adjourn for more than 3 days . . ." which by inference permits an adjournment for more than 3 days upon the joint consent of both houses. The constitution provides for at least 3 different types of legislative sessions: (1) regular sessions of 60 days (but which may be extended for an additional 30 days by joint consent of both houses), (2) extraordinary 20 day sessions, and (3) unlimited sessions for reapportionment purposes under §3, Art. VII, State Const. When we compare the several provisions in the state constitution relating to adjournments of the state legislature (See §§13, 18 and 28, Art. III and §§10 and 15, Art. IV, State Const., for examples.) we find that *sine die* adjournments are usually, if not in every case, referred to as "final adjournments" and other types of adjournments as "adjourn" or words of similar import. We have concluded that the term "adjourn" used in §13, Art.

III, refers to a temporary adjournment or recess and not to a final or sine die adjournment. We think that said §13 is clearly applicable to regular and extraordinary sessions under §2, Art. III, State Const. There is no language in §3, Art VII, State Const., expressly excluding extraordinary sessions of the legislature called thereunder from the operation of said §13, Art. III, and denying them the right to take recesses as provided in said §13; this being true if §13, Art. III, is to be construed as having no application to the extraordinary sessions convened under §3, Art. VII, State Const., such must be by construction. An inspection of the journals of the 1945 extraordinary session, convened pursuant to said §3, Art. VII, State Const., reveals numerous instances of adjournments for 3 days or less, evidently pursuant to said §13, Art. III, State Const. There have been numerous such adjournments during the current extra session of the legislature convened under said §3, Art. III. These instances clearly indicate a construction by the legislature itself that said §13, Art. III, is applicable to extraordinary sessions convened pursuant to said §3, Art. VII.

Although the state constitution, prior to the amendment of §3, Art. VII, thereof in 1924, required reapportionment every 10 years, beginning with the 1887 session, there was no provision for convening the legislature in extraordinary session to consider any business other than reapportionment as is required by the said 1924 amendment. The said 1924 amendment completely changed said §3, Art. VII, State Const., and included therein the provision for convening extraordinary sessions limited to reapportionment only. It is clear that the purpose of the amendment was to provide machinery for compelling compliance with the mandatory requirements of the said section. The following provision in said §3, Art. VII, is set off from the remainder of the section by parentheses, to wit, "such extraordinary session so called for reapportionment shall not be limited to expire at the end of 20 days or at all, until reapportionment is effected, and shall consider no business other than such reapportionment."

We are, therefore, of the opinion that §13, Art. III, is applicable to extraordinary sessions of the legislature convened pursuant to §3, Art. VII, State Const., and that the 1st question should be answered in the affirmative. However, we feel that such adjournments may not be used to avoid the mandate of the constitution. We feel that it is the intent and purpose of the constitutional requirement that reapportionment be accomplished with sufficient dispatch to permit nominations in the primaries next following the convening of the legislature under said §3, Art. VII, and elections at the following general elections. Sovereign power resides in the people, and the government is but a means of exercising the sovereignty of the state the life of which is continuous (81 C. J. S. 924, §25); the people alone are sovereign (81 C. J. S. 924, §25, note 12). The people of the state act by and through their representatives in the legislature; members of the legislature act in the nature of agents of the people of the state. This being true we see no reason why the legislature might not go to the people as a whole to determine their wishes in matters of legislation; and temporary adjournments may be made by the legislature so that its members may

go to the people and ascertain their wishes and desires as a whole.

In advising you as indicated above we do not presume nor should we presume that the legislature would use such recess power abusively or from any design to circumvent or defeat the mandate to it embraced in §3, Art. VII. Undoubtedly in determining the length of time of any such period of recess or adjournment and the purpose to be served by it the members of the legislature would exercise self-restraint and not circumvent the mandatory provisions of §3, Art. VII but conform to its spirit and intent.

The 1st question having been answered in the affirmative it becomes necessary that we answer the 2nd question. The governor's power and authority over the legislature seems to be to call it into extraordinary sessions (§2, Art. III, §8, Art. IV, and §3, Art. VII, State Const.); adjourning the legislature in case of disagreement between the two houses (§10, Art. IV, State Const.); reporting suspensions to the legislature (§15, Art. IV, State Const.) and other powers not here material. We find nothing in the state constitution authorizing the governor to require that a session of the legislature reconvene, when in recess or temporary adjournment, prior to the date upon which it will reassemble pursuant to such recess or temporary adjournment. Adjournments under §13, Art. III, State Const., whether by one house for less than 3 days or for more than 3 days with joint consent of both houses, does not terminate the session but is nothing more than the interposition of an interval in the legislature's program of parliamentary business; the session continues. We, therefore, do not think that the governor has power and authority to require that the legislature in recess or temporary adjournment be assembled during the period of recess or temporary adjournment provided by the legislature itself.

There is authority that "the governor may convene the legislature into a special session during the recess of a regular term without regard to the duration of the recess (Opinion of Justices, 249 Ala. 153, 30 So. 2d 391; Opinion of Justices, 222 Ala. 353, 132 So. 311), it seems reasonable that this rule may be applicable to the legislature of Florida in case of an extended recess or temporary adjournment during a regular session. It might also be applicable during a recess or temporary adjournment of a session of the legislature called under §3, Art. VII, State Const., should such recess or adjournment be of sufficient time for the holding of an extraordinary session under §2, Art. III and §8, Art. IV, State Const. The two houses of the legislature are continuing bodies, even when not in session (Executive Communication, 14 Fla. 289, text 298).

We do not think that the governor has any power or authority to direct that a session of the legislature, either regular or extraordinary, in recess or adjournment pursuant to §13, Art. III, State Const., be reconvened and enter upon its program of parliamentary business prior to the day to which it may have adjourned; the legislature remains in session, although inactive, during such interval. However, we are of the further opinion that where the recess or adjournment pursuant to §13, Art.

III, is of sufficient length of time to permit an extraordinary session under §2, Art. III, and §8, Art. IV, State Const., that an extraordinary session may be convened under said sections. The supreme court of Alabama (Opinion of Justices, 249 Ala. 153, 30 So. 2d 391) has indicated that where the legislature deems it necessary for the proper dispatch of its business that a recess be taken that "there is no authority to question the motives of the legislature in so doing." These observations seem to answer the 2nd question.

We gather from the 3rd question that a concurrent resolution is contemplated designed to waive the subsistence per diem and travel expenses all members may be entitled to and not merely the per diem and travel expenses of those who vote for the resolution; in other words, the resolution might, as to some members, amount to a forced waiver of such per diem and expenses. Although we feel that members of the legislature should they elect by personal agreement may either waive any payments coming to them (other than salary) as subsistence per diem or travel expenses, we further feel that any resolution attempting to do the same thing without the active consent of every member would in effect be, or be the equivalent of, legislation indirectly amending §11.13, F. S., which may not be done at an extraordinary session convened pursuant to §3, Art. VII, State Const. This question was substantially answered by question 5 of our opinions of June 10 and 29, 1955 (055-123). These observations appear to answer the 3rd question in the negative; however, in this connection, the following observations are here made.

Section 4, Art. III, State Const., provides that "during the time the legislature is in session each legislator shall receive per diem and travel expenses as provided by law, but such may not exceed the allowances for such expenses provided for other state officials under general law." Subsistence per diem and mileage for members of the legislature are provided by §11.13, F. S., as amended by §2, Ch. 29627, 1955; however, by reason of the above constitutional provision, such compensation may be limited by §112.061, F. S., as amended by §1, Ch. 29628, 1955. When we read said §112.061, F. S., as a whole, and in connection with prior laws and statutes upon the same question, we are forced to the conclusion that the subsistence per diem and mileage allowance provided by said section is and was not intended as additional compensation but as reimbursement of expenses incurred when traveling or away from his place of residence on state business. The per diem and mileage allowed members of the legislature are intended to reimburse them for the additional expense they have to incur while in Tallahassee, on legislative business. When we consider sub §(3) of §112.061, F. S., we are led to the conclusion that when members of the legislature are away from Tallahassee for an extended period of time that it may well be presumed that they are no longer on legislative business and not entitled to the per diem above mentioned; however, this presumption may be overcome. If the said per diem for subsistence was paid without the legislature being put to additional expense for any extended period of time such payments would have the effect of increasing the consti-

tutional compensation of the members. We feel that during the time the legislature is in active session (no adjournments for more than 3 days) that it should be conclusively presumed that the member has incurred additional expenses equal to or in excess of the said per diem for subsistence.

In the light of the above authorities, laws and observations the 3 above questions are answered as follows:

1. The 1st question is answered in the affirmative, subject to the observations and limitations above mentioned.

2. The 2nd question is answered in the negative as to the power and authority of the governor to reconvene the existing session, but in the affirmative as to his power to convene a 20-day extraordinary session during an extended recess.

3. The 3rd question is answered in the negative; however, certain observations are made concerning subsistence per diem and travel allowance of members of the legislature.

055-155—July 12, 1955

LABOR

UNEMPLOYMENT COMPENSATION LAW—EMPLOYER STATUS—§443.03, F. S.

To: *Burnis T. Coleman, General Counsel, Florida Industrial Commission, Tallahassee*

QUESTION:

May all employment experience throughout the calendar year 1955 be considered when applying either §443.03(7)(a) 2. or §443.03(7)(h)2., F. S., as set forth in Ch. 29772, 1955?

These laws as amended are concerned with the definition of "Employer".

Section 443.03(7)(a) 1. provides: Prior to January 1, 1956, any employing unit which for some portion of a day, but not necessarily simultaneously, in each of 20 different calendar weeks, whether or not such weeks are or were consecutive, within either the current or preceding calendar year (and for the purpose of this definition, if any week includes both Dec. 31 and Jan. 1, the days up to Jan. 1 shall be deemed one calendar week and the days beginning Jan. 1 another such week) has or had in employment *eight* or more individuals (irrespective of whether the same individuals are or were employed in each such day)." (Emphasis supplied.) This section is the same in substance as former §443.03(7)(a).

Section 443.03(7)(a) 2. begins with the words, "On and after January 1, 1956 . . ." and thereafter the wording is identical with §443.03(7)(a) 1. except that the italicized word "eight" in the latter is changed to "four" in the former.

Section 443.03(7)(h) 1. provides: "Subsequent to June 30, 1953, and prior to January 1, 1956, any employing unit which in either the current or preceding calendar year, (a) has paid wages

in any calendar quarter in excess of \$12,000, and, (b) has or had in employment *eight* or more individuals for some portion of a day, but not necessarily simultaneously, in each of eight different calendar weeks in the same calendar year, whether or not such weeks are or were consecutive. Any employing unit becoming an employer pursuant to this paragraph shall be liable for the payment of contributions upon all wages paid for the entire calendar year during which it becomes an employer and for the calendar year subsequent thereto and until terminated pursuant to §443.09 hereof upon a showing that in the preceding calendar year there was no calendar quarter in which it paid wages in excess of \$12,000, and that there were not eight different days, each day being in a different calendar week, in such preceding calendar year within which such employing unit had in employment *eight* or more individuals; *provided, however, that contributions due from an employer solely by reason of the provisions of this paragraph shall be due and payable only with respect to wages paid subsequent to June 30, 1953.*" (Emphasis supplied.) This section is similar in effect to former §443.03(7) (h).

Section 443.03(7) (h) 2. begins with the words, "Subsequent to January 1, 1956 . . ." and thereafter the wording is the same as that found in §443.03(7) (h) 1. with these exceptions: the italicized amounts "\$12,000" and the italicized words "eight" appearing in the latter are changed in the former to "\$6,000" and "four," respectively; and the italicized proviso in the latter does not appear in the former.

The title of the act is quoted: "An act to amend paragraphs (a) and (h) of sub §(7) of §443.03, F. S., 1953, known as the 'Unemployment Compensation Law', relating to the definition of 'employer', and making this act effective July 1, 1955." §3 of Ch. 29772 is quoted: "This act shall take effect on July 1, 1955." The significance of the wording of the above amendments, the effective date of the act, and the change effective on and after Jan. 1, 1956, in relation to the question are instantly apparent.

It is our understanding that counsel for the unemployment compensation division has assumed the position that under neither of these amended subsections which are effective on and after January 1, 1956, is there authority to determine from 1955 experience that a person is an employer *subject to contributions for the year 1955*. We do not quarrel with that construction. Hence, the question is concerned with 1955 experience in relation to employer status in 1956.

Contributions required to be paid by employers under Ch. 443, F. S., are excise taxes. It is recognized that tax statutes are strictly construed against the state and liberally construed from the standpoint of the taxpayer. However, Ch. 443 is not primarily tax legislation; it is primarily a law in the interest of public welfare (see "Declaration of Public Policy", §443.02, F. S.); and laws which have reference to the public welfare should be construed liberally in relation to their purpose. *Bryan's Heirs v. Dennis*, 4 Fla. 445; *Ideal Farms Drainage Dist. v. Certain Lands*, Fla., 19 So. 2d 234.

It is sufficient here to state that a retrospective law is one

which impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect of transactions or consideration already past. Within certain limits, there is no constitutional bar in this state to retroactive legislation; but our courts apply a strict rule of construction against retrospective operation. 50 Am. Jur. 492, §476; 82 C.J.S. 980, §412; *Re Seven Barrels of Wine*, Fla., 83 So. 627; *Sammis v. Bennett*, Fla., 14 So. 90; *Larson v. Independent Life & Accident Ins. Co.*, Fla., 29 So. 2d 448; *City of Miami v. Bd. of Public Inst. of Dade County*, Fla., 72 So. 2d 901. However, there is a line of authorities to the effect that a statute is not regarded as operating retroactively because of the mere fact that it relates to antecedent events or draws upon antecedent facts for its operation. 50 Am. Jur. 493, §476; 82 C.J.S. 981, §412; *Lewis v. Fidelity & Deposit Co.*, 292 U.S. 559; *Reynolds v. United States*, 292 U.S. 443; *Burger v. Unemployment Compensation Board of Review*, Pa., 77 A. 2d 737; *Morrison v. Lamarr*, R.I., 65 A. 2d 217. Reasonably, it would appear that these authorities and like cases not mentioned prescribe the rule here applicable, provided, the effective date of July 1, 1955 in the act does not bar the application of said rule.

Article III, §18, Florida Const., provides that no law shall take effect until 60 days after final adjournment of the session of the legislature at which it may have been enacted, unless otherwise specially provided in such law. Subject to possible qualifications, it may be stated that an effective date in a bill shortening the constitutional period falls in the category of an emergency effective date as used in certain of the other states. In relation to the question of the retrospective operation of a law, use of such an emergency effective date may be evidence of the legislative intent that the law is to be construed as *prospectively* operating from said date. *Chadwick v. Crawfordsville*, Ind., 24 N. E. 2d 937; *Morrison v. Lamarr*, *supra*; *Larson v. Independent Life & Accident Co.*, *supra*. The legislature is not presumed to employ useless language in an act, and in absence of compelling circumstances a specified effective date should not be ignored. However, if ambiguity exists in a statute, legislative intent should be ascertained by a consideration of the entire act and effect should be given all material portions thereof. *State v. Beardsley*, Fla., 94 So. 660; *Realty Bond & Shore Co. v. Englar*, Fla., 143 So. 152; *Ozark Corporation v. Pattishall*, Fla., 185 So. 333. An examination of said Ch. 29772 and the law existing prior to July 1, 1955, evidences that the real effective date of this act is Jan. 1, 1956; hence the stated effective date of July 1, 1955, loses significance in this connection.

In the light of the above, the wording in amended §§443.03 (7) (a) 2. and 443.03 (7) (h) 2. "either the current or the preceding calendar year", is to be given the effect the words impart.

In view of the foregoing, in my opinion the question is answered as follows:

On and after January 1, 1956, employment experience throughout the entire calendar year 1955 shall be considered when applying §§443.03 (7) (a) 2. and 443.03 (7) (h) 2. as such

subsections are set forth in Ch. 29772, 1955, in connection with determining employer status for the year 1956.

055-156—July 12, 1955

ADOPTION

ADOPTION OF MINORS—CLERK'S RECORDS, INDICES AND DOCKETS—§§72.27, F. S. (AM. CH. 29703, 1955)

To: *Frank H. Marks, Clerk Circuit Court, Broward County, Fort Lauderdale*

QUESTION:

What is the practical application of Ch. 29703, Laws of Florida, 1955, relating to indices, dockets, etc., in the office of the clerk?

In your letter you refer to my opinion addressed to the state department of public welfare, dated June 1. In that opinion I construed Ch. 29674, 1955. That chapter has no reference to indexing, docketing, etc. Apparently, you have in mind another 1955 act, Ch. 29703, which amends §72.27 of the Florida Statutes, and I have re-stated your question accordingly.

Prior to the 1955 amendment, §72.27, F. S. required the clerk to index adoption cases "in the name borne by the minor before adoption and in the name borne by the minor after adoption." Ch. 29703 amended §72.27 by providing that the adoption records "shall be indexed only in the name or names of the petitioners asking such adoption and neither the name of the minor before or after the adoption shall be noted on any docket, index, or other record outside of the court file in such proceedings."

You will observe that there is a complete change in the manner of indexing and docketing of adoption cases.

Chapter 29703 became effective on May 30, 1955. There is nothing in that chapter which indicates any legislative intent to make the act retroactive and it will therefore follow the general rule under which statutes are prospective only in their application. That rule is set out in 82 C.J.S. 998, §422, as follows:

"Procedural statutes are ordinarily accorded a retrospective construction in the sense that they will be applied to pending actions and proceedings, as well as to future actions, *but will not be so applied as to defeat procedural steps completed before their enactment.*" (Emphasis added.)

The practical application of the section amended by Ch. 29703 should be as follows: the indexing, docketing, or other notation in your records prior to May 30, 1955, should follow §72.27 as it was before that date. Docketing, indexing, or other notation in your records after May 30 should follow the provisions of §72.27 as amended by Ch. 29703, 1955.

You are not authorized to obliterate the name where it was entered in compliance with the law at the required time of its entry. As to cases pending on May 30, the minor's name will

appear in your index and on your docket, but the minor's name will be omitted from all entries thereafter. If, after May 30, you receive a pleading which bears the name of the minor, e.g. Final Decree of Adoption of Thomas Jones, a minor, omit the name and make the entry simply Final Decree of Adoption.

055-157—July 13, 1955

**REGULATION OF TRADE, COMMERCE AND INVESTMENTS
INTER-AMERICAN CULTURAL AND TRADE CENTER—ARTI-
FICIAL NAVIGABLE WATERS—TITLE TO WATER
BOTTOMS—CH. 554, F. S.**

To: Inter-American Center Authority, Miami

QUESTIONS:

1. Should the Inter-American center authority construct and establish artificial navigable canals, boat and yacht basins, and other similar bodies of water, upon lands owned by it, would its title to the lands under said canals, basins and other bodies of water be divested and vested in the state?

2. Would such canals, basins and other bodies of water be available for general navigation or may the said authority regulate traffic upon such waters?

The Inter-American center authority was organized and established by Ch. 26614, 1951, with express authority "to acquire in its own name by purchase, grant, gift or lease. . . or by condemnation . . . real property and rights or easements therein" the said authority was "created and constituted an agency of the state of Florida" as a public corporation "having all the usual and ordinary corporate powers." The act declares that the authority "will be performing an essential governmental function in the exercise of the powers conferred upon it" by the act of incorporation. The authority can "establish and maintain proper and adequate zoning and building requirements and restrictions" upon the center property. Title to any lands acquired by the authority for Inter-American center purposes will be held by it, in its corporate capacity as an agency of the state, for public purposes. Should the authority deem it necessary it may construct artificial navigable canals, boat and yacht basins, and similar bodies of water upon its lands for public use in connection with its Inter-American center authority facilities. The authority is authorized by law "to establish and maintain proper and adequate zoning and building requirements and restrictions upon property owned or controlled by it . . ."

Where existing navigable waters are improved by raising the level thereof by artificial means, navigation will not be confined to the original channels but extends to such of the waters as may be navigable after the raising of the level of waters (65 C. J. S. 89, §20, notes 25, et seq.). The navigability of a body of water is to be determined, not only from its natural conditions, but also from its possible availability for navigation after the making of reasonable improvements (U. S. v. Appala-

chian Electric Power Co., 311 U. S. 377, 61 S. Ct. 291, 85 L. ed. 243). These observations are made in case the improvement of existing waterways is contemplated, instead of the digging of a waterway or other facility where none now exists.

Where waters were not previously navigable the public acquires no right to navigate an artificial channel made by the owner of the underlying soil (65 C. J. S. 89, §20, notes 33 et seq.; *Dwinel v. Barnard*, 28 Me. 554, 48 Am. Dec. 507; *Wadsworth v. Smith*, 11 Me. 278, 26 Am. Dec. 525; *Harvey v. Patter*, 18 La. Ann. 264, 92 Am. Dec. 532). The proprietor of a tract of land has the right to excavate, entirely within his own boundaries, and exclusively at his own expense, a canal for purposes of navigation (12 C. J. S. 896, §2, note 14). To permit the public to use a canal constructed upon private property, where no navigable waterway previously existed, would amount to the taking of private property for public use without just compensation. Only when the water bottoms are changed gradually along navigable streams do the boundaries of the abutting lands change; sudden changes do not affect the said boundaries (56 Am. Jur. 892-893, §477). The digging and construction of a canal, basin or other facility where none previously existed would be a change of the latter instead of the former type.

The 1st question is answered in the negative; however, as the Inter-American center authority is a state agency and may constitute an arm of the state or a state facility it may be that title is in effect already vested in the state for the use and benefit of the authority.

As a general rule canal companies owning and operating canals or similar facilities are entitled to make and enforce reasonable rules and regulations as to the use of such canals and similar facilities (12 C. J. S. 919, §32); however, as the canal or similar facility is in the nature of a public utility the state, through its legislature, may provide for rules and regulations concerning the use of such canals and similar facilities (12 C. J. S. 919, §30.) and the U. S., by reason of its supervision of navigable waters, may also have the right to provide rules and regulations governing the use of such canals and facilities (12 C. J. S. 918, §29).

Answering the 2nd question we feel that the Inter-American center authority may regulate the water traffic within its canals, basins and similar facilities, subject, however, to any rules and regulations made applicable by the state or the U. S. by reason of the navigability of the waters and its use in the nature of a public utility.

055-158—July 14, 1955

CONSERVATION—TAXATION

OCCUPATIONAL LICENSES—SALT AND FRESH WATER FISH DEALERS—§§205.13, 370.07 AND 372.65, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Is a wholesale dealer who sells either salt or fresh

water fish subject to the payment of a state and county occupational license?

Section 370.07, F. S., provides for licenses for wholesale and retail dealers who sell salt water products.

Section 372.65, F. S., provides for wholesale and retail fresh water fish dealers' licenses.

Section 205.13, F. S., provides as follows:

"Other license taxes to be in addition to occupational license tax.—Fees or licenses paid to any board, commission or officer for permits, registration, examination, inspection or other regulatory purposes shall be in addition to and not in lieu of any occupational license tax required by this chapter or other law unless otherwise expressly provided by law." (Emphasis supplied.)

Sections 205.15 and 205.16, F. S., provide certain exemptions from occupational license taxes for veterans, cripples, aged, deaf, dumb and invalids, but being a retail or wholesale dealer in salt or fresh water fish is not included in the exemptions.

In view of the foregoing, it is my opinion that a wholesale dealer in either salt or fresh water fish is not exempt from state and county occupational licenses just by virtue of being such a dealer. Your question is therefore answered in the affirmative.

055-159—July 14, 1955

REGULATION OF TRADE, COMMERCE AND INVESTMENTS**SALE OF SECURITIES—SECURITIES COMMISSION—INSURANCE POLICIES—REGISTRATION REQUIREMENTS—**

§§517.02, 517.05 AND 517.06, F. S.

To: *Florida Securities Commission, Tallahassee*

QUESTIONS:

1. May a foreign company duly licensed to transact business within this state "acquire an office building in this state by exchanging therefor 10,000 shares of the common stock of the said company" without registering the same with the Florida securities commission?

2. Is an insurance policy which provides participating dividends and guarantees that such dividend, "apportioned per \$1,000 of insurance, shall be paid in cash and shall not be less than the cash dividend" declared by the corporation and paid in such year on 5 shares of its common stock, a security within the purview of the Florida securities statutes so as to require registration?

AS TO QUESTION 1:

The shares of the common stock of the foreign insurance company mentioned in the 1st question is clearly a "security"

within the purview of Florida sale of securities statutes (§517.02, F. S.). We find nothing in §517.05, F. S., exempting the securities in question from the operation of the said sale of securities statutes. This brings us to the question of whether or not the transaction of exchanging corporate stock for a parcel of real property is an exempt transaction under §517.06, F. S. If such transaction is exempt it must be exempt under either sub §(3), sub §(4) or sub §(11) of said §517.06, as it is clear that no other subsection in said section would or could be applicable.

Under §517.06(3), an "isolated sale of securities, when made by or on behalf of a vendor *not the issuer* or underwriter thereof, who, being the bona fide owner of such securities disposes of his own property for his account and such sale is *not made directly or indirectly for the benefit of the issuer* or underwriter of such securities" (Emphasis added.) It appears from the 1st question that the stock in question was exchanged or sold by the *issuer* for real property to the possible benefit of the said issuer. The transaction, therefore, does not appear to have been an exempt one under said §517.06(3), F. S., unless the transaction was by and between the issuer and one of its stockholders and within the purview of §517.06(4), F. S.

Under §517.06(4), "the issuance of additional capital stock of a corporation sold or distributed by it among its own stockholders exclusively, where no commission or other remuneration is paid or given directly or indirectly in connection with the sale or distribution of such increased capital stock" is an exempt transaction. Unless the transaction mentioned in the 1st above question was by and between the issuing corporation and one of its stockholders it would not be within this exemption.

Under §517.06(11), the corporation must be one organized under the *laws of this state*, (the corporation in question was organized under the laws of another state), the total number of stockholders may not exceed 20 (we are not informed as to the number in the instant case), and the total value of the sales price of the stock may not exceed \$10,000. (It appears from the file before us and the records of the secretary of state that the value of the stock is in excess of \$1 per share and that the property exchanged for the stock in question exceeded \$10,000 in value.) It, therefore, appears that said sub §(11) did not authorize the transaction mentioned in the 1st question.

The facts currently before us are insufficient to enable us to determine a final answer to the 1st question, as there seems to be a possibility that the transaction in question may have been with a stockholder.

AS TO QUESTION 2:

The insurance company in question is a stock company and not a mutual company. The policies in question are what are often referred to as participating policies where the participating dividends are derived "from (1) savings in mortality, (2) interest earnings in excess of reserve requirements, (3) profits from lapses, (4) savings in expense loadings from economy in management and *other profits* on the company's participating insur-

ance" under the laws of its home state. Following the above statement of the source of dividends on participating policies there appears the following provision:

"It is understood and agreed that the Annual Participating Dividend apportioned per \$1,000 of insurance shall be paid in cash and shall not be less than the Cash Dividend and/or Par Value of any Stock Dividend declared by the Board of Directors and paid to the stockholders of the National Union Life Insurance Company in such year on 5 shares of the common stock."

A contract should be construed as a whole and, whenever possible, effect will be given to all its parts (17 C. J. S. 707, et seq., §297); that being true, the above quoted portion of the contract here in question should be construed with every other portion thereof, including the provision for the payment of participating dividends and the source of such payments. "In the payment of dividends by stock insurance companies, it must be noted that there is a distinction between dividends payable to stockholders and those payable to policyholders (29 Am. Jur. 83, §49). Stock dividends are usually payable from the surplus of the corporation (13 Am. Jur. 655, §657) and not from capital, except in connection with liquidation (18 C. J. S. 1095, §460) and where the officers of the corporation or the directors wrongfully refuse to pay a stock dividend courts of equity in proper cases may require the payment of same (18 C. J. S. 1112, §466). Under the terms of the policy in question the dividends to the stockholders are payable from funds derived from savings on mortality, interest earnings in excess of reserve requirements, profits on lapses, savings in expense loadings, and profits on the company's participating insurance, there is nothing in the policy providing for the payment of such dividends from the corporation's general surplus. The above quoted provision providing for the payment of dividends to policyholders equal to that paid on 5 shares of its common stock is not a guarantee from the general surplus of the corporation, but is dependent upon there being sufficient funds from the sources provided in the policy to pay a dividend equal in amount to such payment of stock dividends. There is nothing in the said policy, when read as a whole, that brings the policy in question within the definition of a "security" as defined in §517.02, F. S.

However, the above-quoted provision relative to payment of dividends upon the insurance policies in not less than the amount of stock dividends upon 5 shares of common stock should be closely examined by the insurance department to determine whether it is misleading to the average purchaser of insurance or otherwise violative of any of the insurance laws of the state. In this connection consideration should be given to a determination of whether this type of insurance dividends is contrary to traditional dividends and is predicated upon a premise unauthorized by state insurance laws as being an inducement or purported guarantee of dividends on a basis which has no proper relation to insurance or actuarial standards.

The 1st question is answered in the negative, unless the

transaction was between a stockholder of the corporation under the provisions of sub §(4) of §517.06, F. S.

The 2nd question, with regard to the particular policy before us, is answered in the negative; however, it is not necessary for the purposes of this opinion that we determine whether the contract by reason of the provision may be misleading under the insurance laws of this state by reason of its provision relative to the payment of policyholders' dividends in amounts not less than the stock dividends paid on 5 shares of common stock.

055-160—July 15, 1955

PUBLIC LANDS

INTERNAL IMPROVEMENT FUND—LAKE OKEECHOBEE—
TITLE TO LANDS—§§253.06-253.15, 253.36-253.38, F. S.

To: *City of Pahokee Florida*

QUESTIONS:

1. Is the title to the lands lying beneath Lake Okeechobee vested in the trustees of the internal improvement fund?

2. What estate or title has been vested in the U. S. for the purpose of constructing the existing dikes or levees surrounding the southern shore of the lake and the intercoastal waterways channel?

When Florida was admitted as a state it, by virtue of its sovereignty, became the owner, for the benefit of its inhabitants, of all lands under bodies of navigable and tidal waters within its territorial limits, including the foreshore. State law regulates title to the submerged lands in the state and the rights of riparian owners with reference thereto. The use and disposition of such lands are within the regulating province of the state legislature, subject to the dominant power of the U. S. over the navigable waters covering such water bottom lands (see Judge Whitfield's notes, Volume III, F. S., 235 and authorities there cited.) The foreshore and water bottom lands of navigable waters in this state became vested in the state, in its sovereign capacity, when admitted into the Union and has remained there unless divested under authority of statute or constitutional provision.

Turning now to the Florida Statutes we find that the title to sovereignty *tidal* water bottoms, with some exceptions not here material, has been vested in the trustees of the internal improvement fund (§§253.06-253.15, F. S.); however, we find no statute vesting all the non-tidal water bottoms of navigable waters in the said trustees or in any other board or agency of the state. Title to "all marsh, wet or low lands as have been *permanently reclaimed*" (sovereignty lands) was vested in the said trustees by §§253.36-253.38, F. S.; however, this grant does not appear to have extended to any lands that have not been permanently reclaimed belonging to the state. Although §253.03, F. S., vests the trustees with "the administration, management, control, supervision, conservation and protection" of nontidal navigable water bottoms,

such statutes do not vest title to such lands in the said trustees or give them any power to sell such lands, unless such power be granted by some other statute. Some such lands have been granted by special acts of the legislature to individuals, municipalities and maybe to counties. A cursory examination fails to reveal any specific grant of the lands underlying Lake Okeechobee, especially such lands within the boundaries of the city of Pahokee. The 1st question should be answered in the negative.

We have examined the minutes of the trustees of the internal improvement fund, with reference to the right-of-way across state owned (including agency owned) lands for the improvement, by the federal government, of the Caloosahatchee river and Lake Okeechobee drainage area, in accordance with the report submitted in Senate Document 115, 71st Congress, 2nd Session (Volume XIX, Trustees Minutes, 86, 110, 143, 153, 205, 239, 367, 417, 418 and 459; Volume XX, Trustees Minutes, 6, 25, 38, 98, 165 and 188; Volume XXI, Trustees Minutes 147 and 175; Volume XXII, Trustees Minutes, 121 and 423) and find an intention on the part of the trustees to grant a right-of-way easement across state lands, including water bottom and sovereignty lands, necessary for the construction and maintenance of the Okeechobee levee in connection with the Caloosahatchee river-Lake Okeechobee drainage area. Right-of-way easement deeds in favor of the U. S. appear to have been presented to the trustees of the internal improvement fund, on October 22, 1940, which the said trustees directed be executed and transmitted to the war department (Vol. XXII, Trustees Minutes, 423). These instruments grant to the federal government "the right, privilege, power and authority to enter upon, occupy and use any or all of said land for right-of-way purposes and the deposit of material excavated in the construction, improvement and maintenance" of the works constructed in connection with the said Caloosahatchee-Lake Okeechobee drainage area (Okeechobee levee.). The Okeechobee flood control district was created and established (Ch. 13711, 1929) for the purpose of assisting and cooperating with the U. S. in the construction of the project. From the above and foregoing we are inclined to the view that the U. S. has a perpetual right-of-way easement or license for the construction, upkeep, maintenance and reconstruction of the said works. Doubtless this right-of-way easement or license extends to lands other than the area on which the dikes or levees are located but extend to rights-of-way necessary for upkeep, maintenance and reconstruction. Although the fee title remains in the state neither the state nor anyone else may in any way interfere with the upkeep, maintenance and reconstruction of the dikes or levees. These observations seem to answer the 2nd question as well as the same may be answered.

055-161—July 15, 1955

CITIES AND TOWNS

**FIREMEN'S RELIEF AND PENSION FUND—RETIREMENT—
ELIGIBILITY—CITY OF LAKELAND—\$175.11 F. S.**

To: C. M. Deal, Chief, Lakeland Fire Department, Lakeland

QUESTION:

May a fireman who has been continuously employed as such by the city of Lakeland for more than 30 years and is now 53 years old be now retired without pension and become eligible for the pension allowed under §175.11, F. S., when he attains the age of 55?

All that follows is predicated on the assumption that the administration of the firemen's relief and pension fund of the city of Lakeland is controlled entirely by the provisions of Ch. 175, F. S.

The text of the opening paragraph and sub §(1) of §175.11, F. S., reads:

"The following persons shall be entitled to a pension, payable in equal monthly installments and equal to 75% of their average yearly salary for a period of 2 years immediately preceding their enrollment as a pensioner; provided, however, that in no event shall the pension of any person under any provision of this chapter amount to more than the sum of \$100 monthly:

"(1) Any person who, upon the taking effect of this chapter, or thereafter, shall have attained the age of 55 years and shall have served as a duly appointed and enrolled fireman for a period of 25 years, in any capacity or rank whatever, in the city or town in which said pension is sought, shall be, upon his application to the board of trustees, retired on a pension as in this section is provided." (Emphasis supplied.)

Subsection (2) of that section contains the provisions for retirement on a pension of firemen who, in line of duty, become totally and permanently disabled to perform duties as firemen.

Your letter does not inform me whether the fireman sought to be retired is disabled, either in line of duty or not, therefore I assume there is no such disability.

Considering the italicized words quoted above from §175.11, I find no decision of a court construing the precise language there italicized. Therefore I am unable to predict the effect on his future pension of a fireman leaving the service 2 years before he can, under the statute, receive a pension.

Chapter 87, F. S., offers a possible solution. A petition filed under the provisions of that chapter would, no doubt, obtain a judicial interpretation of the rights and duties of the fireman in question and of the board of trustees of the firemen's relief and pension fund.

055-162—July 15, 1955

TAXATION

EXCISE TAX ON DOCUMENTS—EXEMPTIONS—§201.21, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

When are "principal obligations," secured by collateral obligations pledged or deposited with the payee or holder thereof, exempt from excise taxes under §201.21, F. S., as added by the 1955 legislature?

This question arises by reason of the following language found in said §201.21, F. S., as amended by the 1955 legislature, to wit:

"There shall be exempt from all excise taxes imposed by Ch. 201, F. S., all . . . principal obligations, when the maker thereof shall pledge or deposit with the payee or holder thereof, *pursuant to any agreement commonly known as a wholesale warehouse mortgage agreement*, as collateral security for the payment thereof, any collateral obligation or obligations . . . provided all excise taxes imposed by this chapter upon or in respect to such collateral obligation or obligations shall have been paid . . ." (Emphasis supplied.)

He who would shelter himself under an exemption clause in a license taxing law "must clearly show that he is entitled under the law to the exemption, and the law is strictly construed as against the person claiming the exemption and in favor of the public . . ." (Harper v. England, 124 Fla. 296, 168 So. 403.) A reading of the exemption statute in question reveals that it relates to obligations, secured by collateral pledged or deposited with the payee or holder of such obligation, "pursuant to any agreement commonly known as a wholesale warehouse mortgage agreement . . ." Applying the rule of strict construction it seems to limit the exemption to those obligations secured by collateral pledged or deposited "pursuant to a wholesale warehouse mortgage agreement." Obligations are not exempt under the statute "when the maker thereof shall pledge or deposit with the payee or holder thereof, as collateral security for the payment thereof, any collateral obligation or obligations, . . . , unless *such pledge or deposit be made pursuant to an agreement commonly known as a wholesale warehouse mortgage agreement . . .*" (Emphasis added.) These observations answer the above question.

055-163—July 15, 1955

TAXATION

MURPHY ACT LANDS—CONVEYANCE TO COUNTY BOARDS OF PUBLIC INSTRUCTION—§192.38, F. S.

To: Trustees Internal Improvement Fund, Tallahassee

QUESTION:

Is the answer given in AGO 045-202 to the following question correct:

Do the trustees of the internal improvement fund, for and on behalf of the state, have authority to convey Murphy Act lands, under the authority of §192.38, F. S., to county boards of public instruction?

The said opinion of July 14, 1945, answered the question in the negative, evidently upon the theory that a conveyance to a county board of public instruction was not a conveyance to a "county in the state" within the purview of paragraph (c) of sub §(1) of §192.38, F. S., which authorizes the conveyance of *any tract or parcel of Murphy Act lands "to any agency of the state, or any county in the state . . ."* (Emphasis supplied.)

The supreme court of this state, in *State v. Board of Public Instruction for Dade county*, 126 Fla. 142, 170 So. 602, text 607, remarked that "we think, therefore, that it (the Board of Public Instruction for Dade county) may appropriately be termed a 'county' or, by ejusdem generis, it may be an 'other taxing district' as contemplated by Ch. 15772, Acts 1931," which law related to the refunding of outstanding bonds. It has been said by the supreme court of this state that the "term county purposes, may also embrace . . . the maintenance of the . . . *public schools*, and such other matters of public concern as may peculiarly affect the people of the county in their property and local interests" (Opinion of Justices, 12 Fla. 687, text 688; *Gadsden County v. Green*, 22 Fla. 102, text 110.) §6, Art. VIII, and §10, Art. XVIII, State Const., clearly treats the "county superintendent of public instruction" as a county officer. County school funds, county school taxes, and the payment of the compensation of county school officers from county school funds are recognized by the state constitution (§§8, 9, 10 and 15, Art. XII.) The county board of public instruction holds title, as a corporation, to all county school property (§230.23, F. S.) and represents the entire county (§230.11, F. S.). The supreme court has held the county superintendent of public instruction to be a county officer (*Armistead v. State, Fla.*, 41 So. 2d 879; *Thomas v. State, Fla.*, 58 So. 2d 173). A county school fund has been held to be a county fund (*Clifton v. State*, 76 Fla. 244, 79 So. 707). A county tax is authorized to raise a general county school fund (§193.32, F. S.) to be levied as provided in §237.18, F. S.).

In *First National Bank v. Board of Public Instruction*, 93 Fla. 182, 111 So. 521, text 524, it was contended that the board of public instruction of a county was merely a branch of the sovereignty of the state itself, concerning which the court said, "we take the contrary view. The board of public instruction is a county instrumentality, a corporation organized to conduct certain affairs in that particular county, and occupies the status of a trustee for the purposes for which it was created as to county property and county funds" To the same effect see also *Roberts v. Board of Public Instruction*, CCA 5th (Fla.), 112 Fed. 2d 459. The board of public instruction holds title to the county school lands and property as trustee for the county. The people of the county are the cestui que trustant. The county school lands and property are county property, although under the jurisdiction and control of the county board of public instruction instead of the board of county commissioners. Under the plan adopted in this state there is a dual control of the county, the county board of public instruction having jurisdiction of the school property and its operation, and the board of county commissioners having jurisdiction of other county functions and property.

We, therefore, feel that the conveyance of Murphy Act lands to a county board of public instruction would either be a conveyance to an agency of the state or to a county, within the purview and intent of §192.38, F. S., above mentioned, and that the above question should be answered in the affirmative. The opinion of July 14, 1945, is expressly overruled.

055-164—July 15, 1955

LEGISLATURE

ADJOURNMENT OF HOUSE—COMPUTATION OF TIME— §13, ART. III, STATE CONST.

To: Ted David, Speaker, House of Representatives, Tallahassee

QUESTION:

Does the provision in §13, Art. III, Fla. Const., that "neither (house) shall, without the consent of the other, adjourn for more than 3 days" fix a time limit of 72 hours or refer to 3 days without regard to fractional parts of a day? As an example, if the house, without the consent of the senate, should adjourn on Friday, 12 noon, July 15, 1955, when must it reconvene to avoid violation of the constitutional provision?

Intentionally, I have stated an example involving a Sunday. The intervening Sunday, July 17, is excluded in any method of computing such time. *Croissant v. DeSoto Imp. Co. Fla.*, 101 So. 307.

Respectable argument can be made that the "3 days" here involved should be construed as 3 clear days. However, in absence of specific court ruling, we feel that ordinary caution dictates a more limited construction.

It seems well established that when an act is to be performed within a specified time the general rule for the computation is to exclude the 1st day and include the last. *Croissant v. DeSoto Improvement Co.*, supra; *Smithie v. State, Fla.*, 101 So. 277. Both those cases involved the 10-day period of time "after the adjournment" of the legislature, originally provided in §28, Art. III, Fla. Const. The cases actually settled the question of whether intervening Sundays should be included or excluded in the count of time. However, in the former case the court in stating the mentioned general rule above remarked that, "This rule has been applied in computing the period of time within which a bill duly passed and presented will become a law if not returned or filed with his objections by the governor. *State v. Michel*, 52 La. Ann. 936, 27 South. 565, 78 Am. St. Rep. 364; *Beaudean v. Cape Girardeau*, 71 Mo. 392; *Carter v. Henry*, 87 Miss. 411, 39 South. 690," and others. It appears further from the case that the 1921 regular session of the legislature adjourned sine die at 12:00 noon Friday, June 3, 1921; and the court remarked that "the period of time from June 3 to June 14, applying this rule, excludes the 3 and includes the 14. The number of days within this period is 11." The *Smithie* case above involved the same question concerning Sundays in relation to the same legislative session. The court stated in that case: "Our

conclusion, therefore, is that the act became a law on June 13, 1921, and that the governor's objections to it were filed too late", such objections having been filed on June 14, 1921.

It is to be noted that in neither of these Florida cases is mention made of a fractional part of a day or of computing the mentioned 10-day period from 12:00 o'clock noon, Friday, June 3, 1921. The general rule seems to be that fractions of a day are not considered in the legal computation of time, the day on which an act is to be done or an event occurs being wholly included or excluded. 52 Am. Jur. 399, §15; 86 C.J.S. 900, §16. In *Carter v. Henry*, supra, the court held that the word "day" as used in its constitution providing that if any bill shall not be returned by the governor within 5 days, Sundays excepted, after it shall have been presented to him, it shall become a law, meant a full day of 24 hours. In the case of *State v. Michel*, supra (cited in the *Croissant* case) it was stated that "day" was used in the Louisiana constitution in the sense of beginning at 12 o'clock midnight and extending to the next 12 o'clock midnight. And to same effect see *Price v. Whitman*, 8 Cal. 412; *Opinion of Justices*, 45 N. H. 610; *People v. Hatch*, 33 Ill. 137; *Seven Hickory v. Ellery*, 103 U.S. 423; *Hyde v. White*, 24 Tex. 137; *Alabama Building Commission v. Jordan*, Ala., 48 So. 2d 565; *Annotation*, 6 Ann. Cas. 717.

As far as we have been able to ascertain our supreme court has only once touched upon the matter of fractional days in the computation of time, and that quite recently. In the dissenting opinion of Justice Terrell in the case of *Tappy v. State of Florida*, etc., Case No. 26342, opinion filed July 8, 1955, we find this statement which does not appear to be in conflict with any part of the majority opinion in the case:

"Since the law does not recognize fractions of the day and under the last cited provisions of the constitution Collins was elected to fill the unexpired term of McCarty 'commencing on the 1st Tuesday after the 1st Monday in January next,' there can be no escape from the conclusion that Collins' term commenced at midnight, January 3, 1955, at which time Acting Governor Johns' tenure expired."

In view of the foregoing, in my opinion the question is answered as follows:

In computing adjournment "for more than 3 days", as such words are used in §13, Art. III, Fla. Const., fractional parts of days are not to be considered; hence, the 72-hour rule stated in the question is disregarded. In the particular example given immediately following the question, and disregarding fractional parts of days, it appears that the 3-day period following Friday, 12 noon, July 15, 1955 (excluding Sunday, July 17) expires at midnight, Tuesday, July 19, 1955.

055-165—July 20, 1955

COURTS

SMALL CLAIMS COURTS, SERVICE OF NOTICE BY CERTIFIED MAIL—§42.10, F. S.

To: James T. Nelson, Judge, Small Claims Court, Volusia County,
Daytona Beach

QUESTION:

May "certified mail", with return receipt requested, be used instead of registered mail in serving notice to appear on defendant in small claims court?

The provisions regarding service by mail in small claims court actions are found in sub §§(2) and (3) of §42.10, F. S., as follows:

"42.10 Commencement of actions; service of notice; failure of defendant to appear.

"(2) A notice to appear shall be served on the defendant, to which shall be attached a copy of the verified statement of claim, and such service shall be sufficient to give the court jurisdiction in the premises. The time for appearance, at which time a hearing on the claim shall be had, shall be not less than 5 nor more than 15 days from the date of the service of said notice. The mode of service shall be by the sheriff or constable as provided by law; or by registered mail with return receipt; or by any person not a party to or otherwise interested in the suit, especially appointed by the judge for that purpose.

"(3) When notice is to be served by registered mail, the clerk shall enclose a copy of the statement of claim, verification, and notice in an envelope addressed to the defendant, at his last known address, prepay the postage from the filing fee provided for in §42.11 and mail the same forthwith, noting on the record the day and hour of mailing. When such receipt is returned, the clerk shall attach the same to the original statement of claim and it shall constitute prima facie evidence of service upon the defendant." (Emphasis added.)

It is apparent that the language quoted does not require that the sender demand that the letter be delivered to addressee only.

As you can see from my opinion 055-142, dated June 27, 1955, a copy of which is enclosed herewith, "certified mail" offers a return receipt, which, of course is to be signed by the person to whom the letter is actually delivered by the post office employees, but does not offer a "deliver to addressee only" service.

The principal distinction between certified mail and registered mail is that with registered mail the post office can trace a registered letter from each employee handling it to each successive employee handling it, whereas with certified mail no such detailed records are kept.

It is to be noted that the last sentence of §42.10(3), *supra*, reads:

"When such receipt is returned, the clerk shall attach the same to the original statement of claim and it shall constitute prima facie evidence of service upon the defendant."

It was said in my opinion 055-142:

"While it cannot be said that 'certified mail' is the same as 'registered mail', it can be said that the sender may have a postmarked receipt for the letter and that he may have a return receipt."

That opinion was directed to summoning of jurors under the provisions of §40.23, F. S.

Here we are concerned with service of notice on a defendant under §42.10 (2) (3), F. S., which is the method prescribed by the legislature of acquiring jurisdiction over the defendant. Service by mail cannot be called personal service.

The tenor of the decisions concerning *constructive service* indicates that the authorizing statutes shall be strictly followed. See *McGhee v. McGhee*, 156 Fla. 346, 22 So. 2d 817, and cases there cited.

Any defendant served by "certified mail" against whom a default judgment may have been rendered might succeed in an assault on the judgment on the ground that the provisions of §42.10 (2) (3), *supra*, had not been followed.

Therefore I am unable to say that, in this situation, where the purpose of using "registered mail" is to acquire jurisdiction over the defendant, "certified mail" could be substituted.

055-166—July 20, 1955

CLERK OF CIRCUIT COURT

DEPUTY CLERK—APPOINTMENT—ELIGIBILITY MINOR—
§15, ART. V; §4, ART. XVI, FLA. CONST.; §28.06, F. S.

To: *Edwin Bauer, Clerk of the Circuit Court, Quincy*

QUESTION:

Must a person, in order to be eligible for appointment as a deputy clerk of the circuit court, have reached majority?

Specifically you wish to know whether or not a person 19 years of age may be appointed a deputy clerk.

Article V, §15, State Const., creates the office of clerk of the circuit court while Art. XVI, §4 requires that the clerk or a sworn deputy reside within 2 miles of the county seat. Section 28.06, F. S., reads as follows:

"28.06 *Power of clerk to appoint deputies.*—The clerk of the circuit court may appoint a deputy or depu-

ties, for whose acts he shall be liable, and the said deputies shall have and exercise each and every power of whatsoever nature and kind as the clerk himself may exercise, excepting the power to appoint a deputy or deputies."

This is, of course, specific authority for the appointment of deputy clerks for whose acts the clerk will be held directly responsible. The deputy clerk is not required to give bond. It is significant to note that the deputy may perform any duty required of the clerk.

We find no Florida cases directly touching upon this proposition. As regards the principal, a deputy is, in effect, an agent and his acts are considered those of his principal. (43 Am. Jur. Public Officers, §462. See also 67 C. J. S., §148, p. 450.) The case of *Blackburn v. Brorein, et al.*, 70 So. 2d 293 held that a deputy sheriff is an officer as distinguished from an employee. The case points out that a deputy may do anything his principal is empowered to do and is one for whose acts the principal is responsible. If this same line of reasoning were extended to a deputy clerk, he would be considered an officer to the same extent as his principal.

At common law an infant might not hold an office where his duties required the exercise of judgment and discretion, although he might hold a ministerial office. (67 C. J. S., §17, p. 129; see also 43 C. J. S., Infants, §§24 and 43 Am. Jur., p. 914). However, in the absence of constitutional or statutory requirements, officers need not necessarily have the qualifications of electors (*State ex rel. Attorney General v. George*, 23 Fla. 585, 3 So. 81). The governor, in *Re opinion of Judges*, 62 Fla. 1, 57 So. 351, requested advice of the supreme court whether he might appoint a woman to the office of county treasurer. The court advised he might appoint an *adult* unmarried woman, thereby indicating that an officer, male or female, must be 21 years of age.

Since the clerk performs other than purely ministerial duties, I must conclude that he is required to have attained his majority to hold office. Inasmuch as his deputy has every power of the clerk "... excepting the power to appoint a deputy or deputies", I am of the opinion that the deputy must be 21 years of age.

Hence, the question is answered in the affirmative. We have not considered the effect of removal of the disabilities of the minor or his marriage upon his eligibility.

055-167—July 21, 1955

PUBLIC BUSINESS

FLORIDA DEVELOPMENT COMMISSION—DUTIES OF BOARD OF ADMINISTRATION IN CONNECTION WITH BONDS—CH. 288, F. S. (CH. 29788, 1955)

To: *Ralph A. Potts, Executive Secretary, State Board of Administration, Tallahassee*

QUESTIONS:

1. Under the provisions of Ch. 29788, 1955, and

other applicable statutes, what are the duties and responsibilities of the state board of administration in relation to pending bond issues that have been authorized for issuance by Florida state improvement commission and validated by a court of competent jurisdiction and approved by the state board of administration as to legal and fiscal sufficiency, all prior to July 1, 1955?

2. Under such laws, what are the duties and responsibilities of said board in relation to future bond issues that may be authorized by the newly created Florida development commission?

Chapter 29788, effective July 1, 1955, in substance abolished Florida state advertising commission and Florida state improvement commission and by detailed enactment or reference vested in the newly created Florida development commission powers, duties and functions theretofore exercised by one or the other of said abolished commissions. With respect to the powers of Florida development commission in the field in which the improvement commission formerly functioned, attention is directed to sub §§3(t) and 11(b) and (c) of Ch. 29788.

Subsection 3(t) provides that the development commission shall perform all the powers and duties and exercise all of the authority prescribed by Ch. 420, F. S., or any other state statute or laws, therein vested in the improvement commission.

Subsection 11(b) abolished the improvement commission and vested in the development commission all of the powers and duties granted to and vested in the improvement commission by Ch. 420, F. S., and by any other statutes or laws of this state; that all Ch. 420, except §420.02, and said statutes and laws shall remain in full force and effect, subject to the powers and duties therein prescribed being performed by the development commission; and there is provision for performance by the development commission of outstanding contracts, commitments or other obligations of the improvement commission.

Subsection 11(c) provides that notwithstanding the provisions of sub §11(b), in the event at the time Ch. 29788 takes effect, there were any bonds 'therefore' (theretofore) authorized by the improvement commission and validated in pursuance of Ch. 75, F. S., not heretofore issued and sold, then the improvement commission shall be continued solely for the purpose of issuance, sale and delivery of such bonds; that the improvement commission shall have power to issue such bonds in the manner provided in Ch. 420, or other statutes relating to the improvement commission; that such bonds shall be so issued, sold and delivered not later than July 1, 1956; and after issuance, sale and delivery thereof, the development commission shall succeed to all duties, obligations and rights of the improvement commission with respect to said bonds.

It is to be noted that the questions are general. The efficient and long-time functioning of the board evidences beyond doubt that had not Ch. 29788 been enacted, no necessity would have existed for the questions. Hence, the questions are answered generally and without detailing matters which in all possibility

are familiar to the board. If there is any particular situation in relation to a provision of law concerning which the board requires advice, such will be answered upon its request for advice.

The questions are answered in their numbered order as follows:

1. It is assumed that the wording in this question, "validated by a court of competent jurisdiction" is equivalent in meaning to "validated in the manner provided in Ch. 75, F. S.", as such words are used in said sub §11(c) of Ch. 29788; that the word "therefore" in the 3rd line of said subsection is to be construed as "theretofore". With these qualifying and explanatory remarks, the bonds as described in this question may be issued, sold and delivered by the improvement commission "in the name of Florida state improvement commission . . . in the manner provided in said Ch. 420" or other statutes relating to the improvement commission, up to July 1, 1956. Hence, until the last-named date, the duties and responsibilities of the state board of administration in relation to such bonds of the improvement commission are the same as such duties and responsibilities existed prior to the adoption of Ch. 29788, the board to take notice that after issuance, sale and delivery of any such bonds, the development commission shall succeed to all the duties, obligations and rights of the improvement commission with respect to said bonds.

2. The duties and responsibilities heretofore imposed under the laws of Florida on the state board of administration in relation to bonds authorized and issued by Florida state improvement commission continue unchanged in relation to bonds which may hereafter be authorized by Florida development commission.

055-169—July 21, 1955

CONSERVATION

SALT WATER FISHERIES—LICENSES—FISHING BOATS USED FOR PLEASURE—§370.06, F. S.

To: Ernest Mitts, Florida State Board of Conservation, Tallahassee

QUESTIONS:

1. Does §370.06(1), F. S., require the owner of a boat used for pleasure fishing in the salt waters of the state, that measures by length LESS than 16 ft. and by beam MORE than 4 ft. with a total combined length and beam in excess of 20 ft., to obtain a boat license for his craft?

2. Does §370.06(1), F. S., require the owner of a boat used for pleasure fishing in the salt waters of the state, that measures by length MORE than 18 ft. and by beam LESS than 4 ft., with a total combined length and beam in excess of 20 ft., to obtain a boat license for his craft?

For instant purposes, §370.06(1) provides that "from and after the passage of this law, there shall be a license required of all boats, vessels, schooners and launches equipped to take

salt water products from the tide or salt waters of the state," that such licenses shall be issued and granted to the boat, vessel, schooner or launch according to the following schedule:

"Commercial boats under 16 ft. long *and* under 4 ft. beam, \$1.05; all boats over 16 ft. long *and* over 4 ft. beam, 20¢ for each additional foot or fraction thereof of length or beam." (Emphasis supplied.)

Present §370.06(1) was originally sub §6, of §2 of Ch. 28145, 1953, and replaced certain of the provisions of former §373.10(1), F. S. Such former section provided that, "No boat, schooner, launch or other vessel that plies or operates in the tidal or salt water of this state, may engage, in any way, in fishing, transporting fishermen or fishing parties, or otherwise have anything to do with salt waters fishing, seafoods or other products of the salt waters of this state, until a license therefor" shall have been obtained; that license should be issued upon payment of the following license tax: "(a) Boats under 16 ft. long and under 4 ft beam, \$1.05. (b) Boats over 16 ft. long and over 4 ft. beam, 20¢ for each additional foot or fraction thereof of length or beam; provided, however, each and every person, or individual shall use and operate 1 boat 16 ft. long or less with a beam of 4 ft. or under, for his, her, their or its own use, benefit and purpose without paying any fee" and such boat was declared exempt from registration and payment of license fees, but that, "said exempt boat shall not be hired out by the owner thereof."

It is to be noted that the questions deal with boats used "for pleasure fishing." Conceding that a boat is "equipped to take salt water products," as contemplated by §370.06, the provisions thereof deal with "commercial boats" and all other boats so equipped; hence, reasonably the questions deal with such boats not used commercially or for hire but by or with consent of the respective owners thereof.

The quoted word "equipped" in §370.06(1) requires construction. "Equip" is defined in Webster's New Collegiate Dictionary as, "To furnish for service . . ."; and the word "furnish" is named as a synonym. In *Irwin v. Auto Finance Co., Tex.*, 40 S. W. 2d 871, the court held that a mortgage on an automobile and "equipment" covered the equipment that went with or belonged to the automobile. "Equipment" used in a mortgage of railroad property covering "tracks, depots, real estate, and equipment" was held in *C. M. & St. P. Ry. Co. v. Hoyt, Wis.*, 62 N.W. 189, to refer to locomotives, cars, furniture, etc., with which a railroad was equipped. In relation to a boat, it was held in *Metz v. California R. Co., Cal.*, 24 P. 610, that the word "equipment" was defined as the act of equipping or being equipped, as for a voyage or expedition. Nets used in connection with a boat were held, in *Luketa v. American Packing Co., Wash.*, 247 P. 964, as part of a boat's equipment. In *Burke v. Oates, Ky.*, 169 S.W. 2d 608, the court remarked that legislative intent in using the word "equipment" was to be gathered from the face of the statute. Our court stated in *American Seating Co. v. Board of Public Instruction, etc., Fla.*, 192 So. 598, that: "We are unable to ascribe to the word 'equipment' the definition that makes it the antonym of 'current' . . . we cannot say that 'supplies

and equipment for the running and operation and management of schools are articles of such nature as to categorize them 'permanent' as in contra-distinction to 'current.' The word "furnish", mentioned as a synonym of "equip" is defined in the mentioned dictionary as, "To provide what is necessary for; equip; fit out or fit up"; and synonyms of "furnish" there named are, "equip, outfit, appoint, accouter, arm."

In the light of these authorities, it would appear that a boat "equipped to take salt water products" is a boat operated in the tidal or salt waters of this state and which is supplied with equipment, attached or not attached to said boat, which is sufficient for or may be utilized in the taking of "salt water products" from said tidal or salt waters. Further, a boat "used for pleasure fishing in the salt waters of the state", as expressed in the questions, is a boat "equipped" to take salt water products within the meaning and intent of §370.06(1). The wording of former §373.10(1) in this connection, while more detailed was apparently less comprehensive than §370.06(1).

Reasonably it appears that to meet obvious legislative intent, the 2nd italicized "and" in the above-quoted part of §370.06 (1) is to be construed as "or." It is elementary that the intent of a statute is the law; and that legislative intent is to be sought in construing a statute. *State v. Patterson, Fla., 65 So. 659; Davis v. Florida Power & Light Co., Fla., 60 So. 759; State v. Rose, Fla., 122 So. 225.* If the 2nd italicized "and" is to be given a conjunctive meaning, as an example we are confronted with a commercial boat measuring not in excess of 16 ft. in length and with a beam of 5 ft. falling in neither the \$1.05 category nor under the tax features of the remainder of the law. Such a result would be absurd; and statutes are to be construed to avoid absurd and ridiculous consequences obviously never intended by the legislature, even though such legislative intent may appear contradictory to the strict letter of the statute. *Curry v. Lehman, Fla., 47 So. 18; Payne v. Payne, Fla., 89 So. 538; State v. Sullivan, Fla., 116 So. 255.* To attain this end of legislative intent, courts at times have been required to construe "and" as "or". *Crawford Statutory Construction, §188 and citations; 2 C.J. 1339; 3 C.J.S. 1067.* And it is remarked that the following from the above-quoted wording of §370.06(1), "20¢ for each additional foot or fraction thereof of length or beam", evidences legislative intent that said 2nd "and" should be construed "or".

It is recognized that we are here dealing with a tax statute with provision for criminal prosecution for its violation. No necessity exists to labor the proposition that in construing ambiguities in tax and criminal statutes, doubts are to be resolved in favor of the accused or person sought to be taxed. Yet such rule is subordinate to the rule that legislative intent shall be given effect. *Chapman v. Lake, Fla., 151 So. 399; Haworth v. Chapman, Fla., 152 So. 663. In A.C.L. v. State, Fla., 74 So. 595,* the court stated: "... we would say that statutes in derogation of the common law and penal statutes are not to be construed so strictly as to defeat the obvious intent of the legislature as found in the language actually used according to its true and obvious meaning." In *United States v. Gaskin, 320 U.S. 527, 88 L. Ed. 287,* (on appeal from the U. S. district court for the northern

district of Florida), the court said: "The appellee invokes the rule that criminal laws are to be strictly construed . . . That principle, however, does not require distortion or nullification of the evident meaning and purpose of the legislation." And for authorities specifically construing "and" as "or" in criminal statutes, see 2 C.J. 1340, footnotes 66 and 67.

In view of the foregoing, in my opinion the questions are answered as follows:

1. A boat used "for pleasure fishing in the salt waters of the state", as such words are used in this question, is a boat "equipped to take salt water products from the tide or salt waters" of the state, within the purview of §370.06(1). Under said law, as construed above, such a boat that is less than 16 ft. in length with a beam of more than 4 ft., should be licensed and is subject to a tax of 20¢ for each foot or fraction of a foot of the beam in excess of 4 ft. It is remarked that such boats are not subject to be taxed or licensed if they are less than 16 ft. in length and less than 4 ft. in beam.

2. Following the same reasoning, a boat used for "pleasure fishing in the salt waters of the state" that measures by length more than 18 ft. and by beam less than 4 ft., is required to be licensed and subject to tax of 20¢ for each foot or fraction thereof that the length exceeds 16 ft.

In connection with the above, it is noted that the department has followed the custom of requiring the owners of boats within the purview of §370.06(1) to obtain a license when the length of the boat plus beam has totaled over 20 ft., regardless of whether the length was less than 16 ft. or the beam less than 4 ft. In fixing the tax per foot or fraction thereof, it should be computed separately as to length and/or beam, depending on whether either or both exceed the mentioned measurements. For examples: A boat 16½ ft. long with a beam of 4½ ft. will require 20¢ for the fractional ½ ft. in length and 20¢ for the fractional ½ ft. in beam, or 40¢. A boat 17½ ft. in length with a beam of 3½ ft. will require 40¢ for the 1½ ft. in excess of 16 ft. in length.

055-170—July 26, 1955

REGULATION OF TRADE, COMMERCE AND INVESTMENTS
MILK COMMISSION—VIOLATIONS—REVOCATION OR SUS-
PENSION OF LICENSES—FINES

To: *L. K. Nicholas, Jr., Administrator, Florida Milk Commission, Jacksonville*

QUESTIONS:

1. If the Florida milk commission finds that a licensee or permittee is guilty of a violation of Ch. 501, F. S., must the offer to pay a fine be initiated by the guilty party?

2. If the answer to the 1st question is in the affirmative, may the commission then assess the amount of

the fine or must the guilty party submit to the commission the amount of fine which he is willing to pay in lieu of suspension or revocation?

3. If the answer to the 2nd question is that the amount of the fine must be set by the guilty party in the 1st instance, may the commission refuse the initial offer and then advise the guilty party the amount of the fine which the commission would accept in lieu of suspension or revocation?

Section 501.09(3) (k), F. S. provides, among other things, "In case of conduct by a licensee or permittee which would authorize the commission to suspend or revoke a license or permit, the licensee or permittee may propose to the commission the imposition of a fine in lieu of revocation or suspension, and the commission in its discretion may accept such offer and impose a fine. If such fine be promptly paid, revocation or suspension shall not be imposed, but if such fine be not promptly paid, the commission shall proceed to such revocation or suspension. Such fine, however, shall not be imposed unless the commission in its discretion determines that such fine would be adequate punishment and will probably procure future compliance with this law and the rules of the commission by such licensee or permittee; nor shall such fine be imposed unless the permittee or licensee shall in writing state to the commission his desire that a fine be imposed in lieu of revocation or suspension." (Emphasis supplied.)

In view of the foregoing statute your 1st question is answered in the affirmative.

Replying to your 2nd question, it is my opinion that it is the responsibility of the Florida milk commission to assess the amount of the fine the guilty party must pay in lieu of suspension or revocation.

Replying to your 3rd question it is my opinion that the answer to your 2nd question makes your 3rd question moot.

055-172—July 26, 1955

REGULATION OF TRADE, COMMERCE AND INVESTMENTS

PUGILISTIC EXHIBITIONS—PROFESSIONAL WRESTLING §548.03, F. S.

To: Emerson Allsworth, County Solicitor, Broward County, Ft. Lauderdale

QUESTION:

Does professional wrestling come within the purview of Ch. 548 of the Florida Statutes which relates to pugilistic exhibitions?

Section 548.03, F. S. defines a pugilistic exhibition as follows:

"... Any voluntary fight or personal encounter, by blows, between 2 or more persons, for money, prize of any char-

acter, points, distinction or fame, or other thing of value, or upon the results of which any money or thing of value is bet or wagered, or for which an admission fee is charged, directly or indirectly; . . ."

and further provides:

" . . . that nothing contained herein shall be construed to prohibit any municipality from exercising its police powers to regulate boxing and wrestling exhibitions held under the auspices (sic) of the above named organizations." (Emphasis supplied.)

Wrestling is defined in Webster's New International Dictionary, Second Edition:

"Act of one who wrestles; specif., the sport consisting of the hand-to-hand combat between 2 unarmed contestants who seek to throw each other. The various styles of wrestling differ in their definition of a fall and in the governing rules."

Professional wrestling falls within the same category as "prize-fighting". (See: *Ward v. Drennon*, Ga., 46 S.E. 2d 549.)

There can be no question but that in wrestling, as we know it, that there is an encounter by blows and that it comes within the definition of §548.03, F. S.

Therefore, your question is answered in the affirmative.

055-173—July 26, 1955

COURTS

SMALL CLAIMS COURTS—SERVICE OF NOTICE—CERTIFIED MAIL—CH. 28551, 1953

To: *Alice C. Williams, Judge, Small Claims Court, Madison County, Madison*

QUESTION:

May "certified mail, deliver to addressee only" be used in lieu of registered mail in serving notice on defendants in small claims court?

I enclose one copy each of my opinions 055-142 and 055-165 which, I believe, answer your question, except that since opinion 055-142 was written the P. O. has authorized "delivery to addressee only" service for "certified mail" upon payment of an additional fee of 20¢.

According to §§161.31 and 161.41 of the U. S. Postal Manual the lowest value classification for registered mail is now from 1¢ to include \$5.00, and the registration fee for that bracket is 40¢. §161.31 (b) reads:

"b. nonnegotiable securities (including certificates of stock), warehouse receipts, and valuable papers (checks, drafts, deeds, wills, abstracts, and similar documents)—No value."

In every case, however, there would be a reproduction cost.

Therefore, to comply with the requirements of §42.10 (2) (3), F. S., by using registered mail will cost: postage, 3¢; registry fee, 40¢; return receipt, 7¢; total 50¢. To substitute "certified mail, deliver to addressee only" will cost: postage, 3¢; certified mail fee, 15¢; deliver to addressee only, 20¢; return receipt, 7¢; total, 45¢.

For the reasons assigned in opinion 055-165, I cannot say that any form of "certified mail" can be substituted for registered mail, in acquiring jurisdiction over the defendant under §42.10, F. S.

While the small claims court of Madison county exists by authority of Ch. 28551, 1953, the requirements of §9 of that act are identical with those of the cited portions of §42.10, F. S. Therefore the reasoning and conclusion of this opinion apply to your court as well as small claims courts existing by virtue of Ch. 42, F. S.

055-174—July 27, 1955

HIGHWAYS, BRIDGES AND FERRIES

TURNPIKE AUTHORITY—TITLE INSURANCE—COMPETITIVE BIDDING—§340.06(13), F. S.

To: *Jackson L. Peters, General Counsel, Florida State Turnpike Authority, Dania*

QUESTION:

The turnpike authority desires to obtain title insurance on the right-of-way it is acquiring for the construction of the Sunshine State parkway. Does the Florida Turnpike Act require competitive bidding by title insurers?

Section 6 of the Florida Turnpike Act, which enumerates the powers of the Florida state turnpike authority, in sub §13 authorizes the authority to enter into all contracts necessary for the accomplishment of its purpose and, among other things, provides:

"... When the cost under such contract or agreement, other than compensation for personal services, involves an expenditure of more than \$1500 the authority shall make a written contract with the lowest and best bidder after advertisement for not less than 2 consecutive weeks in a newspaper of general circulation published in Dade county, Fla., and in such other publications as the authority may determine. Such notice shall state the general character of the work and the general character of the materials to be furnished, the place where plans and specifications therefor may be examined, and the time and place of receiving bids. Each bid shall contain the full name of every person or company interested in it and shall be accompanied by a sufficient bond or certified check on a solvent bank that if the bid is accepted a contract will be entered into and the per-

formance of its proposal secured. The authority may reject any and all bids. A bond with good and sufficient surety as shall be approved by the authority, shall be required of all contractors in an amount equal to 100% of the contract price, conditioned upon the faithful performance of the contract."

There are certain exceptions to the requirement of competitive bidding for public works. Among these exceptions are contracts for personal services. In 43 Am. Jur. 770 the rule is set out as follows:

"As a general rule, statutory and constitutional provisions prohibiting letting of contracts by a state or by municipal subdivisions, without first advertising for bids, do not apply to contracts for professional services, such as the services of physicians or attorneys, or to contracts requiring special training and skill, such as contracts calling for the services of architects, engineers, accountants, or the like, and such contracts may be let without bids. Other contracts for services, such as the hiring of men at daily wages for road repair, the employment of inspectors, clerks, and stenographers, are exempt from the requirement that public contracts must be let only after calling for bids."

Title insurers examine the records and base their policy of insurance on such examination. There would be few policies issued without exceptions to the title. These exceptions will include major or minor defects in title, encumbrances, and so forth. Title insurance companies accumulate many documents affecting the titles which are not of record; and some title insurers are more liberal than others in the matter of exceptions and coverage. Accordingly, different title insurers would in many instances make different exceptions to the coverage.

Your purchase of title insurance is not only for insurance but also to enable you to more promptly determine the nature of defects, if any, appearing in the title as indicated by the exceptions. Actually, therefore, you come back to the abstractor on whom you are to depend for skill and accuracy in preparing his title examination for the insurance policy. An abstractor's work is clearly within the exception covering personal services referred to above.

It is my opinion that the provisions of §340.06(13) do not require competitive bids for your purchase of title insurance.

055-175—July 29, 1955

INSURANCE

INSURANCE COMMISSIONER—AUTHORITY TO DELAY APPLICANT'S TAKING EXAMINATION UNDER
§§627.71-627.97, F. S.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee
QUESTION:

Where the insurance commissioner has ascertained

that an applicant to take an examination for an agent's or solicitor's license has violated the "Insurance Agent's and Solicitor's License Law" by soliciting insurance when not licensed as agent or solicitor, as contemplated by §627.76, F. S., may said officer deny such application during the period of time that he might, in pursuance of §627.94, F. S., suspend an agent's or solicitor's license for the holder's violation of said license law?

Section 627.76, F. S., provides in part that a person who is not a licensed agent or solicitor in pursuance of the above-mentioned license law (§627.71-627.97, F. S.), shall not act as or hold himself out as an agent or solicitor and shall not solicit, negotiate, effect, procure, receive, deliver or forward, directly or indirectly, any contract of insurance or renewal thereof. The amendment of the section by Ch. 29618, 1955, did not affect the section in its application to this question. See §627.96, F. S., relating to prosecution for violation.

Section 627.81(1), F. S., provides in part that, "Should the commissioner, from the application filed by the applicant or from his own inquiry into the general fitness of the applicant, deem such applicant unfit to be an agent or solicitor, he may forthwith deny the applicant the right to take the examination."

Section 627.93, F. S., provides in part that the commissioner "may deny, suspend, revoke or refuse to renew any license issued in pursuance of said law for any ground specified in any other provision of the insurance laws of this state, or for any of the following causes: (a) For any cause for which issuance of the license could have been refused had it then existed and been known to the commissioner. (b) Violation of any provision of this law . . ." There is a further provision that when, in the judgment of the commissioner, "the licensee has, in the conduct of affairs under the license, demonstrated incompetence; or untrustworthiness . . ." a license may be denied, suspended, revoked, etc. Section 627.94, F. S., provides that, if upon hearing on charges against an agent or solicitor, the insurance commissioner "shall determine that the said agent or solicitor is guilty of the wrongdoing or improper conduct alleged in said charges, he shall thereupon revoke the license of such agent or solicitor, or suspend the same for a definite period of time to be fixed in the order of suspension, and for a period of 2 years thereafter no license which has been revoked shall be issued or reissued to such agent or solicitor." The quoted words are construed as authorizing suspension by the insurance commissioner of such a license for any period less than 2 years.

In view of the foregoing, in my opinion the question is answered as follows:

Conditioned as set forth in the succeeding paragraph, under the provisions of §627.81(1), F. S., where the insurance commissioner has ascertained that an applicant to take an examination for an agent's or solicitor's license has violated the insurance agent's and solicitor's license law by soliciting insurance when not licensed as an agent or solicitor, the commissioner may deny such applicant the right to take the examination applied

for during the period of time subsequent to said applicant's violation of law that the commissioner in pursuance of §627.94, F. S., might suspend the license of an agent or solicitor for violation of said license law by the holder of such license.

The conclusion set forth in the preceding paragraph is conditioned as follows: (1) It is to be noted that any order the insurance commissioner might enter in connection with his suspension or revocation of an agent's or solicitor's license is reviewable in proper proceedings by the appropriate circuit court on appeal as provided in §627.95; and any such review might involve the reasonableness of the time of suspension fixed by the commissioner or his revocation of any such license. This rule of reasonableness would apply with equal force to the reasonableness of the time during which the insurance commissioner might deny an applicant the right to take an examination as contemplated by this question. (2) This opinion deals strictly with the question as stated and is not to be construed as fixing any limits on the period during which the insurance commissioner under §627.81(1) might deny an applicant the right to take an examination.

055-176—August 1, 1955

CLERK OF CIRCUIT COURT

DEPUTY CLERK—ELIGIBILITY—MINOR, DISABILITIES REMOVED—OPINIONS 043-100, 055-166—§§62.23-62.26, F. S.

To: *B. Helms, Clerk of the Circuit Court, Holmes County, Bonifay*

QUESTION:

May a minor whose disabilities have been removed pursuant to statutory procedure be appointed a deputy clerk of the circuit court?

In opinion 055-166, dated July 20, 1955, holding that a minor might not be appointed a deputy clerk, we specifically stated we were not then passing upon the question you ask.

Sections 62.23-62.26, F. S., provide the means by which circuit courts may remove the disabilities of nonage of all minors, male or female, over the age of 18 years residing in this state.

State ex rel. Lamson v. Baker, 25 Fla. 598, 6 So. 445 held that a minor whose disabilities were removed should, if otherwise qualified, be admitted to the practice of law. In State ex rel. Curington v. Swope, 160 Fla. 277, 34 So. 2d 429 the court followed the Lamson case by holding that removal of disabilities of nonage entitled an applicant to be examined as to his qualifications to become a real estate salesman.

My immediate predecessor in office, in opinion 043-100, dated April 15, 1943 (AGO 1943-1944, p. 173) held that a minor whose disabilities had been removed was qualified to hold the office of notary public.

In view of the foregoing authorities, I am of the opinion that the question should properly be answered in the affirmative.

055-177—August 1, 1955

INSURANCE

UNIVERSAL GUARANTY CORPORATION—DISTINCTION
BETWEEN SURETY AND GUARANTY CONTRACTS—
§§625.01(6), F. S.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTION:

Do the "guaranty agreements" of Universal Guaranty Corp. (herein referred to as "corporation"), described below, constitute a contract of insurance or suretyship?

In the memorandum delivered to this office by the attorney for the corporation, it was remarked in effect that this corporation was organized subsequent to issuance of our former opinion 050-260 and that the contracts of the corporation were carefully drafted in the light of such opinion and the authorities set forth therein. That former opinion dealt with a proposed form of assignment of conditional sales contracts from a dealer to a corporation, the effect of the assignment being that the dealer guaranteed payment of the full amount remaining unpaid on the contract to all subsequent assigns, but that as between the dealer and corporation (1st assignee) after a purchaser had made a minimum of 3 instalment payments on the contract, the corporation would be responsible to subsequent assignees in case of default. Actually, the situation dealt with in said opinion was in effect that of a dealer assigning a conditional sales contract without recourse after the purchaser had made 3 payments. The contracts here are more involved, and require us to distinguish between contracts of guaranty, indemnity and surety.

Section 625.01(6), F. S., defines an insurer as any person, firm, etc., who issues or enters into contracts or policies of insurance, indemnity or surety with another. In opinion 050-260, we dealt with certain distinctions between a contract of guaranty and a contract of indemnity, to the following effect: A guaranty is a contract by which one person is bound to another for fulfillment of a promise or engagement of a 3rd party (38 C.J.S. 1134, §4). A guaranty is a collateral undertaking presupposing some contract or transaction as principal thereto, while a contract of indemnity is original and independent, to which there is no collateral contract and with respect to which there is no remedy against a 3rd person. In an indemnity contract the engagement is to make good and save another from loss on some obligation which he has incurred or is about to incur to a 3rd person; whereas, in a guaranty the promise is to one to whom another is answerable. (38 C.J.S. 1134, §5.)

Differences between contracts of guaranty and surety are not so clearly defined.

The following is quoted from Simpson on Suretyship, § 14: "Traditionally, the surety's undertaking and resultant obligation, is direct; and as to the creditor, primary; i.e., 'I will pay'. It is usually, though not necessarily, made jointly or jointly and severally with the principal, at the same time and for the same

consideration. But it may be made after the principal became bound, if based upon a new consideration, as where S promises C to pay P's debt if C will extend maturity. On the other hand, guaranty is a secondary obligation, created by a promise expressly conditioned upon the principal's default, and necessarily is a separate undertaking from that of the principal. It also may be based upon the same consideration that supports the principal's promise, as where S contracts with C: "Sell goods to P, and if P does not pay you, I will'." In footnote 26 to this section, there is discussed certain distinctions between guaranty and surety contracts as set forth in *Saint v. Wheeler & Wilson Mfg. Co., Ala.*, 10 So. 539: (1) When sponsors for another assume primary and direct liability, whether conditional or not in the sense of being immediate or postponed till some subsequent occurrence, to the creditor, they are sureties. (2) When the responsibility is secondary, and collateral to that of the principal, they are guarantors. (3) A surety is one who undertakes to pay if the debtor does not; a guarantor, if the debtor cannot. (4) The contract of suretyship is the joint and several contract of the principal and surety; the contract of the grantor is his own separate undertaking in which the principal does not join. See also Elder's Revision of Stearns Law of Suretyship, 5th Ed. §1.5; 38 C.J.S. 1130-1138.

In *Frank v. Williams, Fla.*, 18 So. 351, dealing with request of the defendant to plaintiff to furnish credit to one Cohen and engagement of defendant to "guaranty payment" of the same, the court stated, among other things: "Whether an engagement is a collateral agreement or an original undertaking is sometimes a question of difficulty, but when the promise is to do a particular thing, which another person is bound to do in the event he does not do it, the obligation is regarded as an original undertaking, and not a strict or collateral agreement . . . The position of a guarantor, however, even in an original undertaking, to do something that another is under obligation to do, is in the nature of surety as between himself and the principal debtor, and must be dealt with as such."

In *Goldring v. Thompson, Fla.*, 51 So. 46, Thompson requested Goldring to ship certain goods to one Hall, with the statement of Thompson, "Your money is good." The court stated that on its face, Thompson's letter constituted an original undertaking.

In *Cochrane v. Town of Boca Raton, Fla.*, 150 So. 611, the court quoted from 28 C.J. p. 891: "The contract of the surety is a direct original agreement with the obligee that the very thing contracted for shall be done, whereas a guarantor enters into a cumulative collateral engagement, by which he agrees that his principal is able to and will perform a contract which he has made or is about to make, and that if he defaults the guarantor will, upon being notified thereof, pay the resulting damages. A surety is an insurer of the debt . . . while a guarantor is an insurer of the ability or solvency of his principal. A strict guarantor is entitled to notice of his principal's default, while a surety is held to know every default of his principal and is liable without notice.'" The court further quoted from *Frank v. Williams, supra*.

Certain other Florida cases are mentioned by the attorney for the corporation: *Little v. Bradley*, Fla., 31 So. 342; *Harvey v. Center Hill Bank*, Fla., 90 So. 699; *Pincus v. Memphis Furniture Co.*, Fla., 126 So. 913; *Jones v. McConnon & Co.*, Fla., 130 So. 760; *Brandon v. Pittman*, Fla., 158 So. 443; *Sapp v. McConnon & Co.*, Fla., 169 So. 622; *Goodkind v. Wilkowsky*, Fla., 9 So. 2d 553; and others. These cases deal with contracts of guaranty and are of value here; however, it would seem that the Florida cases heretofore cited and described are the ones specifically distinguishing between original and collateral agreements to pay on default of another.

We measure the nature of these contracts of guaranty by the above authorities. Attached to the file are copies of these contracts. They are here sufficiently described as follows:

A dealer in motor vehicles makes a sale on a conditional sales agreement with a purchaser, wherein the purchaser agrees to pay the dealer on an instalment basis, and provision is made that in the event of default, the dealer will repossess the motor vehicle, sell same, retain the balance due him plus described costs, and if any proceeds of sale then remain, pay same to the purchaser. The corporation, in connection with such a sale, enters into a contract with the dealer and a contract with the purchaser.

Contract with dealer: The guaranty by the corporation to pay the dealer the balance due from a purchaser, subject to certain limitations and conditions among which are the following: Upon default of purchaser, repossession by the dealer of the motor vehicle within a stated period of time; notice to corporation of repossession; where dealer retains motor vehicle and sells same, the doing of that and distribution of proceeds within a limited period; where dealer delivers repossessed motor vehicle to corporation, the doing of that within a stated period; procedure to be followed in instances where dealer has assigned conditional sales agreement to a finance company; payment by the corporation to the dealer as follows: (1) where dealer sells motor vehicle, any deficiency due dealer on selling price and costs, and (2) where corporation takes the motor vehicle, the balance due dealer on conditional sales agreement.

Contract with purchaser: The guaranty by corporation to the purchaser that the dealer shall pay to the former proceeds of sale of a motor vehicle in excess of amount due dealer, upon 30 days' notice of default of dealer; or, where dealer repossesses motor vehicle and does not sell same within 45 days thereafter or does not deliver the motor vehicle to the corporation, payment to purchaser of any amount due him on the basis of the market value of the motor vehicle.

Neither of these "guaranty contracts" is the joint or joint and several contracts of the corporation and the dealer or purchaser. Both contracts are conditioned upon the motor vehicle being financed in not more than a certain percentage of the market value of the vehicle. Further, the corporation is not charged with responsibility for defaults without notice.

Some states have removed distinctions between contracts of surety and guaranty. Until this state shall definitely assume the position, either legislatively or judicially, that such distinctions are no longer recognized in this state, it would seem that a contract of guaranty is not a contract of surety within the meaning of our insurance laws.

In view of the foregoing, in my opinion the question is answered as follows:

The "guarantee agreements" executed by this corporation are independent contracts collateral to particular conditional sales contracts identified therein, and as such are agreements of strict guaranty. Hence, they are neither contracts of indemnity or surety within the meaning of our insurance laws.

055-179—August 2, 1955

CLERK OF CIRCUIT COURT

FEES—COMPUTATION—SUMS DEPOSITED INTO COURT
REGISTRY—§§54.04, 54.05, 28.24, F. S.

To: *Arthur W. Newell, Clerk of the Circuit Court, Orange County, Orlando*

QUESTION:

Where sums are deposited into the registry of the court and later paid out pursuant to order of court by several vouchers or checks, under the provisions of §§54.04 and 54.05, F. S., are the clerk's fees provided by §28.24, F. S., as amended, to be computed upon the face value of each check or voucher or the total thereof?

My opinions dealing with the question of registry fees to be paid the clerk are found in opinion 049-494, dated Oct. 17, 1949 (AGO 1949-1950, p. 37), opinion 052-164, dated May 27, 1952 (AGO 1951-1952, p. 42) and opinion 054-40, dated Feb. 22, 1953 (AGO 1953-1954, p. 21). However, these opinions do not answer the question you have raised. Opinion 052-164 holds that the fee is not earned until the money is paid out of the registry.

The Florida Clerk's Manual, at p. 323, contains the following statement:

"... The fee is based upon the total amount of each individual deposit. Whenever more than one disbursement is made in connection with a particular deposit, then a separate fee is not computed for each disbursement; instead only one fee is collected, and the fee is based on the entire amount received and paid out. The clerk receives a commission of 1% for handling any amount up to \$500, and ½% for handling any subsequent amount above \$500, in connection with each individual deposit."

Cited in support of this statement is opinion 045-210, dated Aug. 1, 1945 (AGO 1945-1946, p. 109). In that opinion it was stated that the mere fact there may have been several defendants to

whom separate disbursements were made does not control the compensation of the clerk. I agree and concur with said opinion.

The pertinent portion of said §28.24, F. S., as amended, provides a fee upon monies received into the registry and paid out on the first \$500 of 1%, and each subsequent \$100 of ½%. It is my opinion that the clerk's fee is to be computed upon the total amount paid into the registry of the court and later withdrawn pursuant to law, in each case irrespective of the number of disbursements by way of voucher or check which may be required to pay out the monies so deposited. The clerk is to compute his fee of 1% on the first \$500 and ½% upon the actual amount received and paid out in excess of said \$500. For example, if \$750 is paid into and out of the registry of the court, the clerk's fee would be \$6.25.

055-181—August 3, 1955

COUNTY ORGANIZATION

COUNTY COMMISSIONERS—COMPENSATION—OKALOOSA COUNTY—CHS. 29784 AND 29752, 1955

To: *Clyde Campbell, Attorney, Board of County Commissioners,
Crestview*

QUESTION:

Where Ch. 29752, 1955, which amends the entire §125.161, F. S., relating to the annual compensation of county commissioners, and Ch. 29784, 1955, amending paragraph (c) of sub §(1) of said §125.161, F. S., are in conflict as to the amount of compensation to be paid county commissioners in counties having certain population, which of the two acts controls the compensation to be paid said county commissioners in Okaloosa county?

From an examination of the records in the office of the secretary of state we find that Ch. 29784, 1955 passed the senate on April 19, 1955; the house on May 20, 1955 and was filed in the office of the secretary of state on June 3, 1955, without the governor's approval. By its provisions the said act took effect immediately upon becoming law, or on June 3, 1955. An examination of Ch. 29752, 1955 reveals that it passed the senate on May 17, 1955 and the house on May 23, 1955 and was filed in the office of the secretary of state on June 2, 1955, without the governor's approval. This act became effective July 1, 1955.

So, it may be seen that said Ch. 29752, 1955, is the last expression of the legislature in that its final passage was 3 days subsequent to said Ch. 29784, 1955.

From the enclosed copy of opinion 053-272, dated Oct. 14, 1953 (AGO 1953-1954, p. 144) we dealt with a quite similar question. There we said:

"It is stated in Sutherland Statutory Construction, 3d Ed. §2020, that acts on the same subject matter enacted at the same session of the legislature create a pre-

sumption that both were intended to exist to effectuate the intent of the legislature. In other words, they should, if possible, be construed in *pari materia*. However, when such acts are in irreconcilable conflict, as here, the statute which is the latest enactment will operate to impliedly repeal the prior statute at the same session, to the extent of the conflict in their provisions. See also *Winslow v. Fleischner et al*, 228 P. 101; *State v. Marcus*, 281 P. 454; *State ex rel Kell v. Kremer*, 160 N. E. 60; *Neubauer v. State*, 161 N. E. 826; *Williams v. State*, 223 S. W. 2d 190; which held that an act passed later and going into effect earlier will prevail over one passed earlier and going into effect later. *Sumpter v. Burchett*, 202 S. W. 2d 735; *Campbell County Election Commission v. Weber*, 42 S. W. 2d 511; *Wright v. Broether*, 196 S. W. 2d 82; *Adams County v. Smith*, 23 N. W. 2d 873; *People ex rel Martin v. Oak Park*, 24 N. E. 2d 571; *People ex rel Christensen v. Board of Education Cook County*, 65 N. E. 2d 825; *Gates v. Hickman*, 70 N. E. 2d 441; *State ex rel Shomaker v. Superior Court for King County*, 70 P. 2d 306; *City of Council Grove v. Schmidt*, 127 P. 2d 250."

In view of the foregoing authority, I feel that the last expression of the legislature, that is to say Ch. 29752, 1955, fixes the compensation to be paid county commissioners in those counties covered by paragraph (d) of sub §(1), §125.161, F. S., which includes Okaloosa county.

We assume for the purpose of this discussion that all legislative acts referred to herein are constitutional, since I feel that only a court of competent jurisdiction in an appropriate proceeding may settle the question with finality.

055-182—August 3, 1955

COUNTY ORGANIZATION

COUNTY COMMISSIONER—REMOVAL FROM DISTRICT— VACATION OF OFFICE—§114.01(4), F. S.

To: *LeRoy Collins, Governor, State of Florida, Tallahassee*

QUESTION:

A county commissioner, elected in district 5 of a county, took office and discharged his duties. During his term, but approximately 3½ yrs. later, he sold his home in said district, moving into a rented home in an adjacent district where he apparently has established his permanent residence. Has said county commissioner by reason of §114.01 (4), F. S., vacated his office?

As you know, residence, or domicile, is in many instances difficult to determine. In view of the statements in the commissioner's letter of July 22, 1955, the enclosure attached to your request, I assume that when he sold his house he intended to become permanently domiciled or reside elsewhere than in district 5. My discussion, therefore, is predicated upon that assumption.

Section 114.01 (4), F. S., reads: "Every office shall be deemed vacant in the following cases: . . . (4) By his ceasing to be an inhabitant of the state, district, county, town or city for which he shall have been elected."

Section 5, Art. VIII, Fla. Const., provides "... There shall be one county commissioner in each of the 5 county commissioner's districts in each county . . ." It further provides that county commissioners "... shall be elected by the qualified electors of said county . . ."

In *Ervin v. Richardson*, 70 So. 2d 585 the court held that §100.081, F. S., providing that county commissioners shall be nominated by the several districts instead of by the county at large, was constitutional for the reason that §5, Art. VIII provides the exclusive method by which county commissioners shall be elected.

We find no Florida cases touching upon the question. In opinion 051-265, dated Aug. 9, 1951, copy of which is enclosed, (AGO 1951-1952, p. 223) we were considering the situation where a county was redistricted according to the mandate of the constitution during the term of a county commissioner who, by reason of such redistricting no longer resided within the district from which elected. The problem was whether or not the office became vacant under the provisions of §114.01 (4), F. S. We held that the county commissioner might serve out the term for which elected so as to harmonize with the constitutional provision fixing his office at 4 years. However, the situation now before us is entirely different in that the act of the commissioner was a voluntary removal from the district.

In opinion 053-48, dated March 4, 1953, copy of which is enclosed, (AGO 1953-1954, p. 566) we call attention to question 2 thereof dealing with whether or not a supervisor of a soil conservation district is required to be a resident of such district. I quote the 2nd paragraph thereof as follows:

"With certain specific exceptions, neither the constitution nor the statutes directly require residence within the territorial jurisdiction served by public officers, and in some early cases our supreme court declined to hold residence a requisite. The court did say that by custom and long standing an officer should reside in, or be identified with, the community which he serves (Advisory opinion, 57 So. 351, and cases cited). §114.01 of the statutes provides that an office, including a district office, shall be vacant when an officer ceases to be an inhabitant of a district for which he shall have been elected or appointed. In that provision of the statute, there is at least a strong implication of legislative intent that an officer must be an inhabitant of the district which he serves. I construe the word 'inhabitant' as used in the statute, to mean resident. It is my opinion that a supervisor must be a resident of the district he serves."

While it is true that county commissioners are elected county-

wide, the constitution requires that there shall be 1 county commissioner in each district.

Until a court of competent jurisdiction says otherwise, and by reason of the foregoing, I believe residence in the county is not enough but that the constitution and the statute contemplate that the county commissioner must reside in the district in which he was elected. Accordingly, based upon the assumption that the commissioner has permanently changed his residence from district 5, the question is answered in the affirmative.

055-184—August 23, 1955

COUNTY ORGANIZATION

COUNTY COMMISSIONERS—POWERS—LEASE OF PORTION OF COUNTY HEALTH CLINIC—WAKULLA COUNTY

To: J. H. Hudson, Attorney, Board of County Commissioners, Wakulla County, Crawfordville

QUESTIONS:

1. Where there is no statute or special act permitting, may the board of county commissioners of Wakulla county submit upon the ballot of a general election the question of whether or not the electors desire the board to enter into a lease agreement covering county property?

2. May the board of county commissioners enter into a 10-year lease of a portion of the county health clinic to be occupied exclusively by a physician in the private practice of medicine?

3. May the board of county commissioners enter into a lease agreement as contemplated above for 10 years which extends beyond the terms of their respective offices?

AS TO QUESTION 1:

Enclosed is a copy of opinion 053-247, dated Sept. 17, 1953 (AGO 1953-1954, p. 69) dealing with the question of straw vote. The opinion points out that the words "straw vote" are those held in an election not directed or authorized by law "... but is a method determined to be used by the board of county commissioners to obtain an expression of the voters of the county with respect to the mentioned issue; ..." Since you did not call our attention to any special law which might empower the board of county commissioners to place the question upon the ballot, we assume there is none. The putting of the question in the form of a ballot would answer no county purpose and, hence, there is no authority for the expenditure of county funds for holding such election. In this connection, I call attention to the case of Free Enterprise Foundation, Inc. v. R. A. Gray, Secretary of State, decided in the second judicial circuit of the state by Hon. W. May Walker, circuit judge. A bill for declaratory decree was filed against the secretary of state with regard to his placing upon the ballot at the 1950 general election a ques-

tion included in Ch. 25098, 1949, relative to the directing of our representatives in congress to urge the president and the congress to take the initiative in calling for amendments to the U. N. charter leading into a limited world federal government. Judge Walker, in a memorandum opinion dated September 2, 1950, held that such amounted to no more than a "straw ballot". He pointed out that the inclusion of the question on the official ballot at the expense of the taxpayers violated §5, Art. IX, State Const., by which the expenditure of county funds is limited to county purposes.

By reason of the above, the question should be answered in the negative.

AS TO QUESTION 2:

We assume that the building designated the county health clinic is dedicated to the prevention of disease and the interest of the public health of the citizens of the county.

In a related question we, in opinion 055-101, dated May 11, 1955, copy of which is enclosed, held that the board of county commissioners was not authorized to furnish office space in the county courthouse where the user was engaged in business for profit and performed no service for the county. While this point was not covered by the opinion, there is authority to the effect that a county is without power, unless granted by constitutional provision or statute, to lease its property to private persons (14 Am. Jur., §36, p. 208). The text further points out that county buildings are held in trust for the public use and that county commissioners have no power to permit the property to be used for any but a public use. See also 20 C. J. S., §170, p. 1002 to the same effect.

There is no direct general authority for county commissioners to lease any county property. However, in opinion 052-155, dated May 15, 1952, copy of which is enclosed, (AGO 1951-1952, p. 228) we did hold that the power to sell and dispose of property *not needed for county purposes* under §§125.35-125.36, F. S., did include the authority to lease. I do not believe your situation is contemplated by the statute. Consequently, the question is answered in the negative.

In an effort to be helpful, we communicated with the Florida development commission, which agency by 1955 legislation absorbed the Florida improvement commission, to determine whether the plans and specifications indicated that a portion of the building, financed partially through federal funds, was to be used by a private physician. After some delay, we have received information from which it appears the general counsel for the regional office of the public health service in Atlanta informally indicated that in the event he is called upon to express an opinion relative to the use of a portion of the building by a private physician, purely for private gain, the opinion might be adverse. In other words, apparently, his interpretation would forbid the use of any part of the building for private purposes where federal funds are expended in such building under the Hill-Burton Act.

AS TO QUESTION 3:

The conclusion we have reached in answering question 2 makes it unnecessary to discuss this question.

Finally, I regret that a different conclusion could not be reached, particularly since you have informed us in a conference in this office of the splendid service being rendered by the physician now practicing in your county.

055-186—August 5, 1955

COURTS

JUVENILE COURTS—WITNESS FEES—§§39.19 (AM. CH. 29927, 1955) 90.14, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

What witness fees are "other witnesses" summoned before juvenile courts entitled to under §39.19, F. S., after effective date of Ch. 29927, 1955?

Section 39.19, F. S., which was derived from §1, Ch. 26880, 1951, provides that no witness fees shall be allowed in connection with proceedings in the juvenile courts "to any party to a petition or to any parent or legal custodian or child named in a summons" but provides that "*other witnesses shall be paid the witness fees fixed by law*, out of the funds of the county appropriated for that purpose and not out of the juvenile court fund." (Emphasis supplied.) We have examined the several statutes providing for witness fees and conclude that the reference to "witness fees fixed by law" was to §90.14, F. S. Whether or not the "witness fees fixed by law" mentioned in said §39.19, F. S., is limited to said §90.14, F. S., as of the date of the adoption of said §39.19 or includes amendments thereof, such as Ch. 29927, 1955, in turn depends upon whether the said reference in §39.19 is ambulatory or not.

The statute construed in *Williams v. State*, 100 Fla. 1570, 131 So. 864, provided that the "fees of constables shall be the same as are allowed sheriffs for like services," and the one construed in *State v. Harlee*, 100 Fla. 1562, 131 So. 866, provided that the "fees of a justice of the peace shall be the same as those of the clerk of the circuit court for similar services," which statutes were held not to be ambulatory. See also *McLeod v. Santa Rosa County*, 116 Fla. 838, 157 So. 37. The reference in the statutes involved in cases in 131 So. 864 and 866 were to specific statutes and not general references, as is the reference in said §39.19, so that they are not here controlling. We feel that the reference in said section is within that line of authorities reflected by the annotation in 168 A.L.R. 633-4, where references to a law generally is held to be ambulatory.

The witnesses referred to in §39.19, F. S., as "other witnesses" should be compensated as provided in §90.14, F. S., as amended by Ch. 29927, 1955. This answers the above question.

055-187—August 5, 1955

LEGISLATURE

EXTRAORDINARY SESSION—REAPPORTIONMENT—SINE DIE ADJOURNMENT—§3, ART. VII; §28, ART. III, STATE CONST.

To: *Thomas E. David, Speaker, House of Representatives, Tallahassee*

QUESTION:

May the state legislature, when convened and in session pursuant to §3, Art. VII, State Const., adjourn sine die before the legislation adopted by it has been acted on by the governor pursuant to §28, Art. III, State Const.?

The present session of the legislature was convened, by proclamation of the governor dated June 3, 1955, on June 6, 1955, pursuant to §3, Art. VII, State Const., to consider the reapportionment of representation in the legislature, and remains in session on this date. Sessions of the legislature convened pursuant to said §3, Art. VII, State Const., are mandatorily required to make the reapportionment required by said §3, Art. VII, before its adjournment, and during such session it "shall consider no business other than such reapportionment." The supreme court of this state, in its advisory opinion to the governor, of July 13, 1955 (not yet reported) clearly holds that §28, Art. III, State Const., is applicable to legislation adopted at sessions convened under §3, Art. VII, State Const.

Said §28, Art. III, State Const., provides that every act of the legislature shall, before it may become law, be laid before the governor for his consideration and should he approve it he shall sign it "but if not he shall return it with his objections to the house in which it originated" unless "the legislature, by its final adjournment prevent such action," in which case the said bill, together with the governor's objection (veto message) shall be filed in the office of the secretary of state "who shall lay the same before the legislature at its next session, and if the same shall receive $\frac{2}{3}$ of the votes present it shall become a law." The provisions of §28, Art. III, State Const., which were applied to bills enacted by the legislature at extraordinary sessions convened pursuant to §3, Art. VII, by the supreme court in its above mentioned advisory opinion to the governor, clearly contemplate and provide for vetoes by the governor after sine die adjournments of the legislature, including adjournment of sessions convened pursuant to said §3, Art. VII. The fact that the legislature submits a reapportionment bill to the governor must be taken as a determination by the legislature of its compliance with said §3, Art. VII, State Const., although the governor may disagree with this conclusion and veto that bill.

Should the legislature enact a reapportionment bill and, after each of the houses has officially determined that it has met the requirements of §3, Art. VII, State Const., in relation

to such subject, the legislature may adjourn sine die before the governor has considered and passed upon said bill by either signing it, vetoing it or permitting it to become a law without his signature. Should he veto it he will be required to file the same, together with his objections, with the secretary of state as above, where the said bill, still alive and subject to further consideration and action "before the legislature at its next session" continues on into the next session of the legislature.

We do not pass upon the power and authority of the governor to call another extraordinary session for the purpose of considering reapportionment prior to the final disposition of such bill should he veto it.

The above stated question is, therefore, answered in the affirmative.

055-189—August 8, 1955

CRIMES

GAMBLING—LOTTERY LAW VIOLATIONS—JIGSAW PUZZLE CONTEST—§849.14, F. S.

To: *Joseph A. Boyd, Jr., City Attorney, Hialeah*

QUESTION:

If conducted, would the contests outlined in the following proposal be violative of the state lottery laws: A Florida corporation plans to conduct a series of contests within the city of Hialeah. Each person entering the contest must pay a registration fee. Jigsaw puzzles will be used in the contest, being presented to the several contestants in assembled form. At the end of a 5-minute study period the puzzles will be broken apart and mixed, the contestants will return to their places and upon appropriate signal, will start to reassemble the puzzle. A prize or prizes will be awarded to those first completing the reassembling of the puzzle.

It is my opinion that the above described operation is a subterfuge for an illegal lottery. It is well established that there are 3 basic elements in a lottery, to wit: (1) a prize, (2) an award by chance, (3) a consideration (54 C.J.S. 845, Lottery #2, Little River Theatre Corporation v. State ex rel Hodge, 135 Fla. 854, 185 So. 855). It is well established that a scheme is not a lottery if winning depends dominantly on skill or judgment. The above described operation has 2 components necessary for a lottery, but the outlined plan of the operator emphasizes skill in place of mere chance. As such, it apparently becomes a bet on the result of a trial or contest of skill, thereby violating §849.14, F. S., prohibiting bets on contests of skill.

A trial or contest of skill is involved when the contestant, under pressure of time, attempts to piece together the various segments of the puzzle. The contestant comes within the prohibition of the statute by staking his registration fee upon the result of the contest in which he bases his speed, power and dexterity to rapidly reassemble the puzzle against the efforts

of all the other contestants, in the hope of winning a valuable prize. When the contestant pays his registration fee he, in fact, bets or wagers this fee against the prize offered by the operator. The bet meets the requirement of recognized definitions, such as appear in Black's Law Dictionary and Florida Decisions.

As stated by the supreme court of Florida in *Creash v. State*, 179 So. at p. 152:

"In gamblers' lingo, 'stake, bet or wager' are synonymous and refer to the money or other thing of value put up by the parties thereto with the understanding that one or the other gets the whole for nothing but on the turn of a card, the result of a race, or some trick of magic."

The transaction between the prospective operator of the puzzle contest and the contestants meets this definition and comes within the statutory prohibition. There are 2 contracting parties, viz., the operator of the contest and the contestant. The registration fee constitutes staking, betting or wagering any money or other thing of value upon the result of any trial or contest of skill, speed, power or endurance of man or beast, in the hopes of receiving a prize for the successful completion of the jigsaw puzzle. Within the contractual basis of the proposed arrangement, the operator and the contestant have mutual rights with respect to the money that is wagered, that is to say, the contestant receives the operator's prize if the contestant successfully completes reassembling his puzzle in priority of time; and the operator of the contest gets the contestant's registration fee with no return to the contestant if the contestant fails to win the contest. Each of them, in effect, is wagering on the result of a contest of skill, thereby violating §840.14, F. S.

The very purpose of the operator's offering of the prize is to induce people who otherwise would not be interested in so doing, to pay the registration fee to enter the contest. Most people would not think it worth the registration fee in order to sit at a table and assemble a jigsaw puzzle. In determining whether a given operation constitutes gambling, the courts look to substance rather than to form and when we look at the substance of this proposed operation, it is apparent that the contestant actually pays his registration fee as a bet or wager against the operator's prize, and the operator supplies the necessary tools to accomplish this purpose. The wager is, in fact, on the result of a contest of skill in which the contestant is attempting to match his ability, dexterity, speed and thought power against all other contestants for the purpose of obtaining an attractive prize.

Consequently, it is my belief that the transaction falls under the prohibition of said §849.14, F. S., as a wager upon the result of a contest of skill.

Further, I am of the opinion that the puzzle contest operator would be violating §849.01, F. S., which prohibits the keeping of gambling houses.

The purpose and intent of §849.01, F. S., was dealt with by

the supreme court of Florida in the early case of *McBride v. State*, 22 So. 711 (1897) at p. 713, to wit:

"... The consensus of the better opinions is that the wagering, betting, or laying of money or other thing of value upon the transpiring of any event whatsoever, whether it be upon the result of a game of chance or *upon a contest of skill*, strength, speed, or endurance, whereby one party gains and the other loses something for nothing, *whether the parties betting be the actors in the event upon which their wager is laid or not, is gaming or gambling, within the meaning of these acts.* . . ." (Emphasis supplied.)

and further in the same case the supreme court of Florida stated:

"... The purpose and intent of the section of the statute under discussion was to prohibit, not the gaming or gambling itself, but the keeping of a house or other place for any manner of gaming or gambling. If money or other thing of value is staked or wagered therein upon any result or event whatsoever, such house falls within the inhibition of this statute, whether the means adopted for the decision of the question as to who is the winner or loser of the amount wagered be a game prohibited by law or not. . . ."

In a more recent case, cited earlier, that of *Creash v. State*, 179 So. 149, a bingo game was declared violative of what is now §849.01, F. S. The bingo operation closely parallels the proposed puzzle contest presented in your letter. The language and holding of the *Creash* case would apparently void the proposed puzzle contest, as the court there stated, at p. 151:

"To constitute gambling, it is immaterial by what name it is called if the elements of gambling are present and it is condemned by statute in nothing more than the use of the generic term. . . ."

A closer look at the substance of the proposed puzzle contest would lead a reasonable man to believe that here exists an opportunity to win a valuable prize for a small outlay of cash.

As it was stated in *Creash v. State*, supra, at p. 152:

"Chance actuated by the hope of getting something for nothing is the controlling element in gambling. Any agreement or inducement by which one person risks his money or other thing of value with no prospect of return except to get for nothing the money or goods of another is gambling. *If the contest for a 'purse, prize, or premium' or a 'stake, bet or wager' has this element in it, it is gambling, regardless of the name by which it is called, the implements employed to accomplish the act, or the manner in which it is conducted.*" (Emphasis supplied.)

Therefore, in conclusion, I believe that the proposed puzzle contest, if basically a contest of skill as described in the cor-

poration's letter to the Hialeah city council, violates §849.14, F. S.; and, it would appear that the registration fee would constitute the laying of money upon the transpiring of a game of chance and, as such, violate §849.01, F. S., under the rule laid down in the McBride case, *supra*.

055-190—August 8, 1955

CRIMINAL PROCEDURE

SEXUAL PSYCHOPATHIC PERSON—COST OF DETERMINATION—PROOF—PAYMENT—§917.11, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

What information should be required by the state comptroller as a prerequisite to the payment of costs and expenses necessarily incurred by the state in the ascertainment of whether a person charged with a crime is a criminal sexual psychopathic person, pursuant to Ch. 29881, 1955 (§§917.04-917.11, F. S.)?

Section 8 of said Ch. 29881 (§917.11, F. S.) provides in part that "the state shall defray all cost and expenses necessarily incurred by the state in the ascertainment of whether or not such person (a person charged with crime) is a criminal sexual psychopathic person" There is nothing in the act which fixes the amount of such costs and expenses, such amount being left up to the general statutes upon the question.

Under the said 1955 act whenever the state attorney, or other person authorized by the statute, has reason to believe that a person charged with crime is a criminal sexual psychopathic person, he may file with the clerk of the court wherein the criminal proceeding is pending (at any time prior to the imposition of sentence) "a statement in writing setting forth the facts tending to show that such person is a criminal sexual psychopathic person . . .," which statement seems to constitute the initial pleading and forms the predicate for ascertaining the criminal sexual psychopathic status of the person charged with a crime. Although the circuit courts are, by the said 1955 act, vested with jurisdiction (evidently exclusive) to finally determine whether a person is or is not a criminal sexual psychopathic person, it also evidently vests the criminal courts with certain preliminary jurisdiction in this connection, in that such criminal courts are required, upon the filing of the aforesaid statement with the clerk of the criminal court, to "appoint 2 psychiatrists . . . to make a personal examination of the alleged criminal sexual psychopathic person" and to file a report of their examination with the court and furnish the state attorney with a copy. When the said report indicates that the person charged with crime is a criminal sexual psychopathic person it then becomes the duty of the circuit court to hold a hearing and finally determine the question. The state attorney is required to file a copy of the above report with the circuit court. This seems to indicate a transfer, where the said report is a positive

one, from the criminal court to the circuit court, for final determination and disposition of the proceeding. The circuit court does not seem to be bound by the report of the 2 psychiatrists and may receive other evidence and testimony relative to the criminal sexual psychopathic condition of the said person charged with crime.

Costs will be incurred as fees for the 2 psychiatrists appointed aforesaid by the criminal court (wherein the person in question is charged with a crime) and in the circuit court, which may include expert witnesses. Expert witnesses are provided for in civil cases by §§90.23 and 90.231, F. S., and in criminal felony cases by §932.30, F. S., which statutes require that the fees of such witnesses be determined in such reasonable amount as the trial judge may determine. The number of psychiatrists (expert witnesses) in the criminal court is by the statute limited to 2. There is no limit upon the number of such witnesses that may be used at the hearing before the circuit court, however, we feel that such number will be and should be controlled by the circuit judge. No witness may be paid expert witness fees unless such fees be determined and fixed by the presiding judge, and evidence of such determination and fixing of expert witness fees must be presented with the bill for payment to the paying officer. Approval of the bill for payment by the judge would seem to be a sufficient determination of the reasonableness of such fees, except where otherwise provided by statute.

055-191—August 10, 1955

PUBLIC HEALTH

MOSQUITO CONTROL DISTRICTS—COUNTY COMMISSIONERS—BUDGETING COUNTY CONTROL FUNDS— §§389.13-389.21, F. S.

To: Cecil A. Roundtree, County Attorney, Washington County, Chipley

QUESTION:

Is the board of county commissioners empowered by §§389.13-389.21, F. S., as amended by Ch. 29826, 1955, to appropriate county funds for mosquito control?

Said statutes as enacted by Ch. 28131, 1953 had as their purpose granting state aid to the counties and mosquito control districts for the control of arthropods as defined in the act. As amended by Ch. 29826, 1955, "county" was added to the definitions and "means a political subdivision of the state administered by a board of county commissioners." A portion of §2 of Ch. 28131, 1953 (§389.14, F. S.) prior to amendment, read:

"(1) Every district and county setting up an item in their annual budget for the control of arthropods ..."

should be eligible to receive state funds. As amended by §2 of said Ch. 29826, §389.14, F. S., now, in part, reads:

"(1) Every district and county budgeting local funds, derived either by special tax levy or funds appropriated

or otherwise made available for the control of arthropods . . ." (Emphasis supplied.)

shall receive state funds under certain conditions.

The language indicates the legislature contemplated several possible situations, namely: (1) district or county funds realized from special levy where authorized, or (2) county funds otherwise available and appropriated for the purpose of the law.

There are 2 separate and distinct sources of funds contemplated by the law; this is, those realized from the district and from the county. That the county as distinguished from the district was to participate is further borne out by language from §389.18 (1), F. S., which was not amended, viz:

"Any district or county may perform permanent eliminative control measures . . ."

Again, §389.20, F. S., (§8, Ch. 28131, 1953) indicates the broad powers granted the counties and districts by the following language:

"389.20 *Perform work necessary.*—The respective districts and counties of the state are hereby fully authorized to do and perform all things necessary to carry out the intent and purposes of this law and all laws or parts of laws in conflict herewith are hereby repealed."

To receive the benefits of the legislation necessitates the budgeting of funds realized from levy of county taxes or otherwise made available for that purpose. County commissioners have only those powers expressly granted or those which must necessarily be implied to carry out powers expressly given. (*Crandon v. Hazlett*, 157 Fla. 574, 26 So. 2d 638; *Gessner v. Del-Air Corp.*, 154 Fla. 829, 17 So. 2d 522, and others.) The counties have express authority to receive the benefits of the legislation under consideration, so they may appropriate funds for the purpose of the law.

The question is answered in the affirmative.

055-192—August 10, 1955

COUNTY ORGANIZATION

COUNTY COMMISSIONERS—POWERS—LOCATION OF COUNTY OFFICES—§4, ART. XVI, STATE CONST.

To: *W. Kenneth Barnes, County Attorney, Pasco County, Dade City*

QUESTION:

In the absence of authority by special act, may the county commissioners of Pasco county establish an annex in the county at another place than the county seat for use by the tax collector, tax assessor, county judge and other county officers in the discharge of their official duties in that part of the county?

Section 4, Art. XVI, Const., reads:

"All county officers shall hold their respective offices, and keep their official books and records, at the county seats of their counties; and the clerk and sheriff shall either reside or have a sworn deputy within two miles of the county seat."

It was held in *Motes v. Putnam County*, 143 Fla. 134, 196 So. 465, that under that section and applicable statutes it was intended that official meetings for transaction of business by boards of county commissioners and like boards should be publicly conducted at a known place in the county seat. See also *Mack v. Carter*, 133 Fla. 313, 183 So. 478, where Ch. 18786, Special Acts of 1937, providing for terms of circuit court to be held in St. Petersburg for trial of certain civil cases was held violative of that section.

Chapter 24819, Special Acts of 1947, authorizing the board of county commissioners to acquire, provide and maintain a site and offices outside the county seat, for use by such of the officers of the county and such justices of the peace and constables as the board of county commissioners determines to be necessary in the performance of their respective duties and functions was held, in *State v. Pinellas County*, 160 Fla. 549, 36 So. 2d 216, not violative of that section, since the act disclaims any purpose to remove county officers or records from the county seat in a manner to violate the constitution.

On that point, the opinion contains the following language: ". . . Its purpose is to provide a county building at St. Petersburg where certain county agencies now operating there and certain county officers may offer an auxiliary service to the people of the county where all these agencies and offices may be collected under the same roof in the interest of economy and efficiency. The nature of the service rendered is governmental and we find nothing in the constitution inhibiting the construction of a building by the county in the manner proposed. The mechanics, population and physical conditions of the county generally support the act."

There, the court was considering an *act of the legislature* authorizing the county to provide the building for the purposes named, and which act had been carefully drawn to avoid the objections raised to the 1937 act.

The general rule is that county commissioners have no powers other than those expressly vested in them by statute or that must be necessarily implied to carry into effect powers thus expressly vested (Const., §5, Art. VIII; *Crandon v. Hazlett*, 26 So. 2d 638; *State ex rel Landis v. Wheat*, 103 Fla. 1, 137 So. 277). Where there is doubt as to existence of such statutory authority, it should not be assumed (*Hopkins v. Special Road and Bridge District No. 4 in Brevard County*, 73 Fla. 829, 74 So. 310; *Gessner v. Del-Air Corporation*, 154 Fla. 829, 17 So. 2d 522).

The question is answered in the negative.

055-195—August 11, 1955

INSURANCE

TITLE INSURANCE—APPLICATION OF §§627.92 AND 643.04(10), F. S.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTION:

Does the practice by mortgagees in connection with the furnishing of title insurance by mortgagors, as described below, fall within the provisions of §627.92 or §643.04(10), F. S.?

The mentioned sections are identical, the former being a part of the 1953 "Insurance Agents and Solicitors License Law" (Ch. 28075, now appearing as §§627.71-627.98, F. S.), and the latter being added to original §643.04 by Ch. 28188, 1953.

Consequent upon the rendition of the opinion in *United States v. South Eastern Underwriters Association, et al.*, 322 U.S. 533, congress enacted *Public Law 15* of March 9, 1945 (15 U.S.C.A. 1011-1015), which law was sustained in *Prudential v. Benjamin*, 326 U.S. 408. The effect of that law was to declare the right in the several states to tax and regulate the business of insurance, but there was also the provision that "no act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance; provided, that after June 30, 1948 . . . the Sherman Act . . . Clayton Act, and . . . Federal Trade Commission Act, shall be applicable to the business of insurance to the extent that such business is not regulated by state law." Beginning with the 1945 legislative session, Florida enacted a number of laws to meet the regulatory requirements of the quoted provision. It is to be noted that this provision of federal law was related to monopolistic and unfair competitive practices and restraints of trade. Apparently the legislation here considered derived from those considerations.

In the correspondence attached to the request for opinion it is recited that in a certain county "an attorney who orders title insurance receives a commission of 25% of the premium for placing the order and about 15% more of the premium if he is the examining attorney. Mortgage lenders here require mortgage title insurance upon all real estate loans and this title insurance is paid for by the mortgagors"; and then the question is asked, "Is it lawful under the chapters mentioned for the mortgage lender and its attorneys to combine and require that the mortgagors order the title insurance through the lenders' attorneys and thereby deprive the attorney for the mortgagors of the commissions he would receive for ordering and examining this title insurance for his own clients?"

Sections 627.92 and 643.04(10) provide that in transactions as here contemplated, the lending of money shall not be conditioned upon the mortgagor furnishing a "policy of insurance or renewal thereof covering such property through a particular insurance company, agent, solicitor or broker." We have mentioned

that §627.92, F. S., is a part of the "Insurance Agents and Solicitors License Law"; and under the definitions of "insurance" and "insurer" set forth in §627.72, and the provisions of §627.98 it is aparent that a title insurer is not included in such definitions. "Agent", as used in §627.92, is a duly licensed agent of insurers contemplated by §§627.71-627.98, F. S. The term is not to be given the broader meaning to include an attorney at law as the agent of a title insurer he may represent. It is to be noted that Ch. 643, F. S., is entitled, "Regulation of Trade Practices in Insurance Business", and the terms used in said chapter, including said §643.04(10), are to be construed in the light of the context where found. Reasonably, "agent" as used in §643.04 (10) refers to a duly licensed agent of an insurer, and does not include within its meaning an attorney at law representing such an insurer. (Emphasis supplied.)

The above italicized quoted word "company" as used in §627.92 refers to a company included in those types of insurers contemplated by §§627.71-627.98; but said word as used in §643.04(10) includes any insurance company issuing insurance or property mortgaged in connection with a loan.

It is to be observed that the alleged "combination" here is between mortgagees and their attorneys, and the complaint concerning such "combination" is related to fees of attorneys. With the above explanations, it reasonably appears that such practices in and of themselves do not fall within the purview of §§627.92 or 643.04(10). It is recognized that in the construction of Title 15 U.S.C.A. §1 (Part of the Sherman Act), relating to combinations, etc., in restraint of trade, it has been held that an agreement whose direct and immediate effect is a restraint upon interstate commerce falls within the purview of the section; however, an agreement to promote legitimate business though it may indirectly or incidentally affect such commerce, is not prohibited by the section (*Apex Hosiery Company v. Leader*, 310 U.S. 469, 84 L. Ed. 1311; *Coronado Coal Co. v. U. M. Workers*, 268 U. S. 295, 69 L. Ed. 963; *U. S. v. Joint Traffic Association*, 171 U. S. 505, 43 L. Ed. 259). We cannot reasonably presume from the actual situation presented that the "combination" here directly affects competition or constitutes a restraint of trade in the field of title insurance. That would depend upon several factors; and in any event, unless and until that direct question deriving from a factual situation should be presented, we find no reason to now speculate upon whether the principles involved in the federal construction of the Sherman Act as noted should be applied in relation to these state statutes.

In view of the foregoing, in my opinion the question is answered as follows:

On the factual situation here presented, reasonably it cannot be said that the "combination" therein alleged is violative of §§627.92 or 643.04(10), F. S.; hence, the question is answered in the negative.

055-196—August 11, 1955

CLERKS OF CIRCUIT COURT

FEES—§28.241, F. S. AS AMENDED BY CH. 29749—EFFECT UPON LOCAL AND POPULATION LAWS RELATING TO CLERKS' FEES

To: *O. P. Herndon, Clerk of the Circuit Court, Seminole County,
Sanford*

QUESTION:

Does the amendment of sub §§(1), (2) and (5) of §28.241, F. S., by §3 of Ch. 29749, 1955 repeal a prior special or population act fixing the fees of the clerk of the circuit court for the services covered by said amendment?

We have had numerous inquiries concerning the effect of the enactment of Ch. 29749, 1955 upon local, special or population acts fixing the fees of various clerks of the circuit court. While this opinion deals only with legislation pertaining to the clerk of the circuit court of Seminole county, it is hoped that the same will be helpful to other clerks having similar situations. For the purpose of this discussion, it is *assumed* that all acts herein referred to are in all respects constitutional since it is the established policy of this office not to pass upon the constitutionality of any statute.

Chapter 19037, 1939 is an act relating to the compensation of clerks of the circuit court in suits or proceedings before the circuit court or county court in all counties having a population of not less than 22,000 and not more than 22,300, according to the official state census of 1935. The act, "... in lieu of all fees heretofore charged . . ." provides a filing fee in law actions in the circuit and county courts of \$7.50 (§§2 and 4); a fee of \$5.00 where a bond is estreated, a plea of guilty or nolle prosequi is entered in a criminal action, or \$7.50 for a jury trial (§3); a fee of \$8.50 in chancery cases, except mortgage and lien foreclosures or cases involving "... any interest of title in real estate . . .", where the fee is \$12.50 (§5). These fees "... shall be considered as full and complete compensation for the particular services rendered . . ." (§10).

It is clear, then, that the legislature intended said act to be the exclusive and complete compensation for the specified services, "... in lieu of all fees heretofore charged."

Ch. 22952, 1945 is an act applicable to counties having a population of not less than 22,000 nor more than 23,000, according to the 1940 federal census and having a county court. It provides that the clerk of such court in criminal cases where there is more than one defendant shall receive the same fees for each defendant as "... are now fixed by law in cases where there is only one defendant."

Section 28.241, F. S., as amended by §3 of Ch. 29749, 1955 had its origin in Ch. 26931, 1951.

Section 28.241, F. S., as amended by §3 of Ch. 29749, 1955

also had its origin in Ch. 26931, 1951. The 1955 amendments relate to sub §(1), governing the filing fees in civil actions; sub §(2), the filing fee in criminal actions and sub §(5), relating to the preparation and verifying of transcript of records in appellate proceedings. Hence, the provisions of sub §§(3), (4), (6) and (7) of said §28.241, F. S., were not amended.

Sub §(4) of said §28.241, F. S., insofar as here pertinent, reads: "This section shall not be construed to repeal any special or local act, or any general act of local application fixing or regulating fees of clerks of the circuit court for services above specified; . . ."

Where the intent of a statute is clear on its face, and when, standing alone, it is susceptible to but one construction, that construction must be given. (*Ervin v. Peninsular Tel. Co.*, 53 So. 2d 647.) The plain intent of the legislature controls. (*Overman v. St. Bd. of Control*, 71 So. 2d 262, and other cases.) Applying these principles to Ch. 26931, 1951, it is clear that any provisions of said law conflicting with those of Ch. 19037, 1939, and Ch. 22952, 1945, did not affect the latter designated acts.

It remains only to be considered what effect, if any, the 1955 amendment may have. Where a section of a statute is amended, the substituted amendment becomes for all purposes in the future the section of the original act. (*Miami Bridge Co. v. RR. Com.*, 155 Fla. 366, 20 So. 2d 356, cert. den. 65 S. Ct. 1405, 325 U. S. 867, 89 L. Ed. 1987; *Singleton v. Larson*, 46 So. 2d 186.)

Therefore, when we read sub §(4) of said §28.241, F. S., together with the 1955 amendment, the only conclusion we can reach is that where the services for which compensation is provided by §28.241, F. S., is included in the local or population act, the general act does not supersede, amend or repeal the local or population act.

In view of the foregoing, your question is answered in the negative.

It should be emphasized that we are here considering only one factual situation in the present opinion. Each particular local or population act must be considered in light of the principles set forth in this opinion.

055-200—August 17, 1955

EDUCATION

COUNTY SCHOOL BOARD—SCHOOL BUS CHASSIS AND EQUIPMENT—PURCHASE—BIDS—§§237.02(2), 236.07(4), 125.081, 228.041(1) AND CH. 287, F. S.

To: *Thomas D. Bailey, Superintendent, Department of Education, Tallahassee*

QUESTIONS:

1. Can county school board A, under the provisions of Florida Statutes, especially of §§228.041(1), 229.23, 236.07(4), and 125.081, and Ch. 287, after receiving bids

on school bus chassis or equipment and determining that the bids are too high, reject the bids and purchase at a lower price by negotiating with suppliers who have submitted bids on school bus chassis or equipment meeting the same or higher specifications to county school board B? In case of school bus chassis, variations in cost of delivery would not be a factor as all counties receive bids on chassis f.o.b. body plant.

2. If the answer to 1. above is in the affirmative, would county school board A be obligated to purchase at the lowest bid received by county school board B or could county school board A negotiate to purchase at other than the low bids, except as provided by §236.07(4), F. S., when such bid was lower than the lowest of the bids received by county school board A?

Section 237.02(2) is still applicable and that section requires bids from 3 or more sources for any purchase costing more than \$300, and requires that if a bid is accepted it must be the lowest and best bid.

Section 236.07(4) prohibits use of foundation program funds to purchase buses, chassis, or other transportation equipment at prices exceeding those found by the state department of education to be the lowest, provision for which has been made in §229.23, F. S. This section must be complied with in all events.

The school board may make purchase of buses, equipment, etc., by participating in a pool bid for such purchase in the manner authorized by §229.23, F. S.

Chapter 287 of the statutes establishes the state purchasing council. If the council shall have made arrangement for purchase of the required transportation facilities and equipment, the school board may make its purchase through that agency on complying with the requirements of that statute and the regulations of the council.

Under §125.081 a school board having rejected bids may purchase school bus chassis or equipment under any state contract if the contract permits, when the state contract price is lower and better than any bid received.

Your question refers to §228.041(1). That section seems to have no relevancy to your problem.

The foregoing are the several statutory methods of purchasing the equipment described in your question. Neither those statutes nor any other authorizes purchase by negotiations as distinguished from bids. Since the foregoing requires a negative answer to your 1st question, your 2nd question needs no answer.

055-201—August 17, 1955

CITIES AND TOWNS

MUNICIPAL OFFICERS—CONTRACTS WITH CITY—PROHIBITIONS—CITY OF HOMESTEAD

To: *Turner and Hodson, Attorneys, City of Homestead, Homestead*
QUESTIONS:

Does §13, charter of city of Homestead (Ch. 11520, Special Acts, Extraordinary Session, 1925) prohibit an officer of the city:

(a) Being interested as a stockholder in a transportation company having, among others, a franchise from the city;

(b) Individually contracting with the city for the locating and placing of bench advertisements?

It is noted that the 1st clause of the opening sentence of §13, *supra*, reads:

"No officer of said city shall be directly or indirectly interested in *any contract* with said city . . ." (Emphasis added.)

Section 13, of Ch. 11520, *supra*, applying in express terms to "any contract" is similar to but broader in its prohibitions than §§839.07, 839.08, 839.09 and 839.10, F. S., the application of each of which to various factual situations has been considered by our courts. See *City of Miami v. Benson*, 63 So. 2d 916; *City of Stuart v. Green*, 23 So. 2d 831, where an analagous provision of the city charter was also involved; *City of Leesburg v. Ware*, 113 Fla. 760, 153 So. 87; *Lainhart v. Burr*, 49 Fla. 315, 38 So. 711, all of which held the contracts involved invalid either as against public policy or violative of the statutes.

In *City of Miami v. Benson*, *supra*, at p. 921, occurs the following significant language: "A statute is merely declaratory of the public policy. The author of the article on Public Policy, 63 C. J. S., *Municipal Corporations*, §1258, p. 988, states that at common law contracts in which officers or employees of a city have a personal interest are void and statutes are merely declaratory of the common law."

In *City of Stuart v. Green*, *supra*, at p. 834, referring to the case of *Town of Boca Raton v. Raulerson*, 108 Fla. 376, 146 So. 576, it was said: "It was there decided point blank that sale to the city of property owned by a city commissioner was denounced by §7470, C. G. L., *supra*, and was void. So far as the principle is concerned, we have not been advised what distinction exists between a sale by an owner and a sale by a corporation, where the former and a stockholder in the latter are officers of a city grantee. The essential facts in the two cases seem to correspond."

Those statements are in accord with general law. A contract entered into by a board with one of its own members is

void, or at least voidable, even in the absence of a statutory prohibition. 43 Am. Jur. p. 106, Public Officers, §299. The general rule is to the effect that the interest of a public officer as a stockholder in a corporation entering into a contractual relation with the public is a prohibited interest in the transaction within the meaning of statutory provisions in substance prohibiting a public officer from being interested directly or indirectly in any contract with the public, and of the common law principle against such interest, based on public policy, of which such statutory provisions are the concrete expression. 43 Am. Jur. p. 107, Public Officers, §300.

This office has at several times considered the general question as affected by various factual situations. See Biennial Reports of the Attorney General at pages enumerated as follows: 1907—194; 1927—325; 1931—593; 1935—233, 462; 1946—731; 1949—50—575, 578; 1951—52—226, 254, 383, 385, 728, 729, 730; 1953—54—655. See also opinions 055-15, dated Jan. 28, 1955, and 055-76, copies of which are enclosed. We continue to adhere to those opinions.

The general law, the Florida decisions and the opinions of this office indicate that the contracts in both the situations you name would be illegal.

055-202—August 17, 1955

CRIMES

EXPLOSIVES—DEFINITIONS OF "DEALER" AND "USER"— SALE OF BLACK POWDER TO HANDLOADERS— CH. 552, F. S. (CH. 29944, 1955)

To: *J. Edwin Larson, State Fire Marshal, Tallahassee*

QUESTIONS:

1. Are those persons engaged in the sale of black powder to handloaders of ammunition (apparently substantially confined to members of rifle clubs) "dealers" in explosives within the intent of Ch. 29944, 1955?
2. Are such handloaders "users" of explosives within the intent of said chapter?

Certain definitions in §1 of said Ch. 29944, 1955, are mentioned. "Explosive" is, "Any mixture, compound or material capable of producing an explosion and commonly used for that purpose, including but not limited to dynamite, nitroglycerin, trinitrotoluene, blasting caps and detonators; but not including cartridges for firearms, and not including fireworks as defined in §791.01, F. S." "Dealer" is, "A person engaged in the wholesale or retail business of buying and selling explosives; provided, that should a manufacturer-distributor make sales to users and farmers, such manufacturer shall not be required to obtain also an additional license as a dealer." "User" is, "The person who, as the ultimate consumer of an explosive, purchases same from a dealer or manufacturer-distributor."

Black powder is gunpowder, which latter term is defined

in Webster's Collegiate Dictionary, 5th Ed., as "An explosive mixture of saltpeter, charcoal and sulphur, used in gunnery and blasting." It seems that black powder is an "explosive" as defined in §1 of Ch. 29944, 1955.

It is assumed that a person making sales of black powder to handloaders, as contemplated by the questions, reasonably might carry in stock sufficient quantity thereof as to be hazardous to the public safety and welfare unless handled with care and as contemplated by Ch. 29944. On the other hand, the quantity of powder required to meet the demands of such a handloader might be so small as not reasonably to endanger the public under any circumstances. Respectable argument might be urged that in view of the purpose of Ch. 29944 and the premises for its validity, the possession of gunpowder in such limited quantities would not involve public welfare or safety and, hence, such possession would not be within the purview of the act. However, the act comprehensively operates in a regulatory field vitally needed; and to accomplish the control required, any such act may result in minor inequities. Further, the knowing violation of Ch. 29944 is a felony; and the question of a violation of the criminal provisions of the act will be decided by local prosecuting authorities and not this office.

Attention is directed to Ch. 29711, 1955. That act amends §633.05, F. S., which section prior to amendment was a provision of the original act relating to the fire marshal and his general powers. Ch. 29711 amended §633.05 by substituting for the word "dynamite" therein with the word "explosives," furnishing a definition for "explosives" to coincide with the definition in Ch. 29944, and fixing standards in relation to rule making powers of the fire marshal. Section 2 of Ch. 29711 provides that the provisions thereof "are cumulative and shall not be construed as repealing or affecting any other law of this state particularly relating to the regulation of any of the materials or products described in said amended §633.05." Chapter 29711 was filed in the office of the secretary of state May 30, 1955, and by its terms became effective on that date. Section 12 of Ch. 29944 provides that the provisions of the act "are cumulative and shall not be construed as repealing or affecting any powers and duties or authority of the state fire marshal under any other law of this state; provided, that with respect to the regulation of explosives as herein provided, in instances where the provisions of this act may conflict with any other such law, the provisions of this act shall control." Ch. 29944 was filed in the office of the secretary of state on June 18, 1955, and becomes effective October 1, 1955. Hence, it will be observed that Ch. 29711 in no way affects the operation of Ch. 29944; and even though "gunpowder" and "explosives" are separately named in the former chapter, that fact does not remove gunpowder as an explosive under the latter chapter.

In view of the foregoing, in my opinion the questions are answered as follows:

1. Beginning Oct. 1, 1955, such persons making sales of black powder to handloaders are "dealers" within the intent of

said Ch. 29944, and must be licensed as such and pay the annual license tax of \$25 required by §2 of the act.

2. In absence of a court ruling upon the question, ordinary caution dictates that beginning October 1, 1955, purchasers of black powder for use in the handloading of ammunition shall be deemed "users" of explosives within the intent of said Ch. 29944, and must be licensed as such and pay the annual license tax of \$1, required by §2 of the act.

055-203—August 18, 1955

COURTS

COUNTY COURTS—CLERK'S FEES—CRIMINAL CASES— §§34.041 AND 28.24, F. S.

To: *Lloyd M. Hicks, Clerk of the Circuit Court, Manatee County, Bradenton*

QUESTION:

Does the amendment of §28.24, F. S., by Ch. 29749, 1955, amend, supersede or repeal the provisions of §34.041, F. S., insofar as the same relates to clerk's fees in criminal cases in county courts?

Section 2, Ch. 29749, F. S., 1955 amends §28.24, F. S. The pertinent portion of the amendment reads: "The compensation of the clerk of the circuit court, as clerk or recorder, shall be entirely by fees and, unless otherwise provided, shall be as follows: . . ." It should be noted that certain items formerly appearing in the statute have been deleted, among these being "arraignment of prisoner."

The clerk of the circuit court in counties where there is no criminal court of record is clerk of the county court. (§34.03, F. S.). It will be seen from examining the legislative history of §34.041, F. S., that the same had its origin in Ch. 26931, 1951 which is also the origin of §28.241, F. S., relating to services of the clerk of the circuit court in the circuit court.

Sections 1 and 2 of said Ch. 26931, 1951, relate specifically to the compensation of the clerk of the circuit court for services rendered in the county court, as distinguished from his compensation in the circuit court. Sections 3, 4 and 5 of said Ch. 26931 pertain to the fees of the clerk of the circuit court. Consequently, said Ch. 26931 covers services rendered by the clerk of the circuit court in the circuit court as well as in the county court. Hence, there was no amendment of the provisions of §34.041, F. S., by the 1955 act.

The qualifying language ". . . unless otherwise provided . . ." in §28.24, F. S., as amended, is to be noted. At the time of enactment of said Ch. 29749, 1955 the filing and appellate fees of the clerk of the circuit court as clerk of the county court were otherwise provided by §34.041, F. S.

Also, §34.041 (1) and (2) contains the language ". . . in lieu of all fees heretofore charged, except as hereinafter pro-

vided . . ." At the time of the enactment of said statute (1951), the criminal fees of the clerk were provided by §28.24, which had its origin in Ch. 11893, 1927. In opinion 052-17, dated Jan. 24, 1952 (AGO 1951-1952, p. 38) we held that general charges such as issuance of jury venire, clerk's per diem, and issuance of subpoena not directly connected with a particular case, were not charges "heretofore" made to the defendant in criminal cases and thus were not included in the flat fee provided by §4, Ch. 26931, 1951. (§28.241 (2), F. S.)

The legislature in enacting a statute is presumed to act with full knowledge of all statutes pertaining to the same subject matter (*Tamiami Trail Tours v. Lee*, 142 Fla. 68, 194 So. 305). "But the mere fact that a later statute relates to matters covered in whole or in part by a prior statute does not cause a repeal of the older statute" (*American Bakeries Co. v. Haines City*, 131 Fla. 790, 180 So. 524, 529). See also *Stewart v. DeLand-Lake Helen S. R. & B. Dist.* 71 Fla. 158, 71 So. 42. Statutes must be construed in pari materia with all other laws on the same or similar subjects (*State ex rel McClure v. Sullivan*, 43 So. 2d 438). If statutes may operate without positive repugnancy in their practical effect, they should each be given the effect intended for them (*American Bakeries Co. v. Haines City*, supra).

In view of the foregoing authority we feel it is entirely possible for both §28.24, F. S., as amended by the 1955 legislature, and §34.041, F. S., which was not amended, to be construed together without doing violence to legislative intent and governing law.

The question is properly answered in the negative.

055-204—August 18, 1955

TAXATION

HOMESTEAD TAX EXEMPTION—RELATIVES—FURNISHING FORMS FOR TAX RETURNS—§7, ART. X, STATE CONST.

To: Alice E. Hall, Municipal Tax Assessor, LaBelle

QUESTIONS:

1. May a person, not residing in a taxing unit but owning real property therein, claim such property as tax exempt under §7, Art. X, State Const., because his father-in-law resides thereon and makes the same his permanent home with the owner's consent?
2. May a person, not residing in a taxing unit but owning real property therein, claim such property as tax exempt under said §7, Art. X, State Const., because his daughter and her family reside thereon and make the same their permanent home with the owner's consent?
3. Are municipal tax assessors required to furnish forms to taxpayers upon which to make tax returns of their taxable property?

Under §7, Art. X, State Const., any person "who has the legal or beneficial title in equity to real property in this state and in good faith makes the same . . . the permanent home of another or others *legally or naturally dependent* upon such person, shall be entitled to an exemption from taxation . . ." Before a homestead tax exemption may be granted a landowner under the above provision of the state constitution he must satisfy the tax assessor that he claims no other homestead tax exemption in this state for himself or for others legally or naturally dependent upon him for support. Only one homestead tax exemption may be granted to a landowner; the state constitution only provides for one homestead tax exemption, which may be for the owner or for any person legally or naturally dependent upon him for support. If the owner claims and is granted homestead tax exemption for himself anywhere in the state no exemption may be granted for persons dependent upon him. For the purposes of the 1st and 2nd above questions we must presume that no other homestead tax exemption is claimed or granted to the owner anywhere else in the state.

Homestead tax exemption for a home furnished others may be granted only when such other persons are "legally or naturally dependent upon" the owner for support and maintenance. The constitutional exemption is designed to furnish a permanent home for "another or others legally or naturally dependent upon" the landowner; not those related to him by blood or marriage. The duty of children to support their parents and grandparents is purely statutory and did not exist at common law (67 C. J. S. 727, §24), although the children may voluntarily support their parents in case of need. If a child was under no common law duty to support his parents it naturally follows that he was not legally required to support his parents-in-law. Unless otherwise provided by statutory regulation a parent is not ordinarily under a legal duty to support his adult children (67 C. J. S. 704, §§17 and 18), or the husband or wife of an adult child (67 C. J. S. 705, §18). In the absence of statute grandparents are under no duty to support their grandchildren (67 C. J. S. 705, §19). The owners of the lands mentioned in the 1st and 2nd questions are not *legally* obligated to support the father-in-law or the daughter and her family. Although not *legally* required to support the father-in-law and the daughter and family, there remains the further question of whether the father-in-law and the daughter and her family may be naturally dependent upon the landowner.

The mere fact that a person is the parent-in-law or the daughter (including grandchildren) of a landowner, not otherwise claiming homestead tax exemption, does not, as a matter of law, make such persons natural dependents of the landowner so as to entitle him to tax exemption. However, circumstances may have so arranged matters as to make a parent morally obligated to support an adult child or even grandchildren. Although a parent is under no legal obligation to support a feeble, defective or crippled adult child, he may have a moral obligation to care for and support such a child. Likewise a parent may and often does support or contribute to the support of a widowed daughter and her family or when her hus-

band is in a feeble or crippled condition. Likewise where a parent of either the husband or wife is in a feeble, defective or crippled condition it may fall to the lot of such husband and wife to support such parent and parent-in-law. Only when a parent, adult child, or other relative is entirely or largely dependent upon a landowner for support and maintenance may it be said that they are naturally dependent upon such landowner within the purview of §7, Art. X, State Const. Whether or not "another or others" are naturally dependent upon a landowner, as will entitle such landowner to homestead tax exemption, is a question which must be determined as fact from all the facts and circumstances surrounding the same.

The above observations answer the 1st and 2nd questions above stated as well as the same may be here answered, by furnishing the formula from which the questions may be answered in particular cases.

The 3rd question relates largely to your municipal charter and not to general statutory law and can only be answered by a study of your municipal charter. It is, therefore, suggested that the 3rd question be taken up with your city attorney.

055-205—August 18, 1955

HIGHWAYS, BRIDGES AND FERRIES

CONTRACTS FOR MAINTENANCE AND CONSTRUCTION OF
ROADS—BIDDERS—GUARANTY REQUIRED—FLOR-
IDA HIGHWAY CODE—§337.17, F. S. (§96, CH.
29965, 1955)

To: George C. Tapper, State Senator, Port St. Joe

QUESTION:

What is the correct construction of §96, Ch. 29965, 1955, with respect to the form of guaranty required to be furnished with bids submitted?

Section 96 of the Florida highway code of 1955 reads as follows:

"Section 96. *Bid guaranty.*—

"The board shall require guaranty with each bid in an amount to be specified by the board which shall not exceed 10% of the preliminary estimate of the cost of the work. The guaranty may be in the form of a surety bond, or certified check, payable to the governor and his successor in office. The surety on such bond shall be a surety company authorized to do business in Florida."

The only construction and interpretation which may be applied to the legislative language is:

Any and all contractor or contractors, when submitting a bid for the construction or maintenance of the subject public improvements, are required to furnish with the bid, a guaranty in 1 of 2 alternative forms, i.e. either a surety bond executed

by a surety company authorized to transact business in the state, or a certified check, either of which must be payable to the governor and his successors in office, in the amount to be specified by the road board, and which shall not exceed 10% of the preliminary estimate of the cost of the work. The type or form of the guaranty furnished is a matter for the determination of the bidder, in his discretion.

055-206—August 22, 1955

LEGISLATURE

INTERIM COMMITTEE ON PROBLEMS OF MENTAL HEALTH —PER DIEM AND MILEAGE AUTHORIZED FOR MEMBERS—§11.13, F. S. (AM. §2, CH. 29627, 1955)

To: *Committee on Problems of Mental Health, Tallahassee*

QUESTION:

Are the members of the joint interim committee on problems of mental health, appointed and existing pursuant to senate concurrent resolution No. 1272, of the 1955 regular session, entitled to subsistence and mileage while traveling on the official business of the said committee?

Section 11.13, F. S., as amended by §2, Ch. 29627, 1955, provides in part that "members of interim committees, authorized by law, of either branch of the legislature shall be paid per diem or mileage or per diem and mileage incurred while on official business within the state as provided for *state employees* unless otherwise provided by joint or concurrent resolution" When on official business without the state the mileage and/or per diem shall be that "provided for the governor and the members of the state cabinet under general law." The reference to the per diem and mileage "provided for state employees" in §11.13 as amended is to §112.061, F. S., as amended by §1, Ch. 29628, 1955, which provides a per diem of \$9 per day and mileage at the rate of 7½ cents per mile for "*state officers and employees, . . .*" although the per diem of the governor and members of the state cabinet is fixed at \$15 per day. It is noted that a distinction is made by §11.13, F. S., as amended in 1955, between the per diem of members when attending legislative sessions and when attending interim committee hearings.

Finding no "joint or concurrent resolution" providing otherwise (see paragraph (a), sub §(3), §11.13, F. S., as amended in 1955) the provisions of §11.13, F. S., as amended in 1955, appear to be the controlling statute, and the above stated question should be answered in the affirmative, such per diem and/or mileage to be paid as provided by paragraph (a), sub §(3), of said §11.13, as amended in 1955, from the legislative expense appropriation (paragraph (b), sub §(3) of said §11.13 as amended in 1955.)

055-208—August 22, 1955

PROFESSIONS AND VOCATIONS

DENTISTRY AND DENTAL HYGIENISTS—EXAMINATION FEES—HOLDOVER APPLICANTS—\$466.20, F. S. (AM. §§20 and 37, CH. 29882, 1955)

To: A. W. Kellner, Secretary-Treasurer, Florida State Board of
Dental Examiners, Hollywood

QUESTION:

I have been informed that Ch. 466 F. S. has been amended. In §20, the application fee for dentists has been raised from \$30 to \$50. In §37, the application fee for dental hygienists has been raised from \$10 to \$25.

I have had quite a number of applicants for the 1955 examination write and request that their applications be held over for the 1956 examination. The board has previously allowed them to do this, provided they make the request at least 10 days prior to the date of the examination to which the application was filed. However, the board has not strictly held to the 10 day time limit, if the applicant has made any effort to notify the board prior to the examination.

What I wish to know is, will these holdovers have to pay an additional fee—\$20 for dentists and \$15 for dental hygienists—to have their applications considered for the 1956 examination.

Section 466.20, F. S., as amended by the 1955 legislature (Ch. 29882) provides:

"Examination fees; compensation of board.—The board shall charge each person applying to it for a license to practice dentistry in the state, an examination fee of \$50. The members of said board shall be compensated for their services as follows:"

Section 466.37, F. S., as amended by the same act, provides:

"No person shall practice as a dental hygienist in this state until such person has passed an examination by the board under such rules and regulations as it may deem fit and proper to formulate. The fee for such examination shall be \$25"

The fee charged by these two sections is related to the examination itself. I assume that the legislature intended these fees to cover the cost incurred by the dental board in giving the examinations.

This act as now amended became effective on Aug. 2, 1955. It therefore follows that the fees charged for taking dental examinations or examinations for dental hygienists subsequent to Aug. 2, 1955, would be \$50 and \$25, respectively, as provided in the 1955 act, regardless of the date of filing of the applications. Your question is therefore answered in the affirmative.

055-209—August 22, 1955

EDUCATION

THE SCHOOL PLANT—TRANSFER OF REAL PROPERTY —PROCEDURE, §235.04, F. S.—BROWARD COUNTY SCHOOL BOARD

To: *Donald W. Hulmes, Attorney, Board of Public Instruction,
Broward County, Hollywood*

QUESTION:

This office, as attorneys for Broward county school board, is presently negotiating for the transfer of a 10-acre tract presently held by the school board for a 10-acre tract which is more desirable. There is no consideration other than one tract of land being conveyed in return for the other; no money involved. I would like to know whether or not in such a transaction the board has to comply with F.S.A. §235.04 as amended.

Section 235.04, F. S., was amended by Ch. 29797, 1955, to provide as follows:

"Disposal of school property.—The county board may dispose of any school land or property which is by a resolution of such county board determined to be unsuited for school purposes either because of location, condition or other cause. The county board shall take diligent measures to dispose of school property only on the most advantageous terms by public or private sale and to that end shall not accept a price less than the appraised value placed on such land or property by 3 qualified appraisers. The official minutes of the school board shall set forth the name of the purchaser, the sale price, the appraised value and the identity of the 3 appraisers in each such transaction.

"Each deed conveying any school land under the provisions of this law shall have a certificate attached thereto signed by the county superintendent of public instruction of such county that all the provisions of this law have been complied with. Such certificate shall be proof of the validity of such deeds."

In my opinion, an exchange of property such as you have described would constitute a sale of school property as contemplated by §235.04, F. S., as amended by the 1955 legislature.

It would therefore appear advisable to designate 3 qualified appraisers to determine the value of both tracts of land involved in order to ascertain whether they comply with that portion of §235.04 which prohibits the board from accepting "a price less than the appraised value of the school property."

Your question is answered in the affirmative.

055-210—August 22, 1955

INSURANCE

CREDIT LIFE INSURANCE—LIMIT OF COVERAGE—§§635.24
(2) AND 646.05(1), F. S., (§5(a), CH. 29856, 1955)

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTION:

Under the provisions of §635.24(2)(d), F. S., and Ch. 29856, 1955, under a policy of group credit life insurance, what is the limit of coverage on the life of any debtor under such a policy?

Section 635.24(2), F. S., sets forth the conditions under which a group credit life policy may be issued. Paragraph (d) thereof is quoted: "The amount of insurance on the life of any debtor shall at no time exceed the amount owed by him which is payable in installments to the creditor, or \$5000, whichever is less." The entire §635.24(2) was originally a part of Ch. 25189, 1949.

Chapter 29856, 1955, deals with credit life and credit accident and health insurance. "Credit life insurance" is defined in §1 (1) of the act as "that form of term life insurance which precludes debtor selection as to beneficiary or assignee under which the life of a borrower of money or a purchaser of goods is insured in connection with a specific loan or credit transaction." There are further conditions in that definition, followed by: "There are 3 recognized forms: (a) Group credit life insurance is that form of insurance which is subject to the provisions of sub §(2) of §635.24, F. S. (b) Franchise credit life insurance is that form of insurance by which a master policy is issued to and in favor of a creditor and under which debtors are insured at the option of the creditor. (c) Individual credit life insurance is individual insurance upon the life of an individual debtor in favor of a creditor."

Sub §5 (a) of Ch. 29856 sets forth the limits of amounts of credit life insurance coverage in relation to debtors.

It is apparent that above-quoted sub §1 (1)(a) of Ch. 29856 provides in effect that "group credit life insurance" is subject to the provisions of sub §(2) of §635.24. As above stated, §635.24 (2)(d), fixed the limits of insurance as to debtors. Obviously, above mentioned sub §5 (a) of Ch. 29856 sets forth provisions with respect to such limits of coverage different from those prescribed in §635.24(2)(d). Ch. 29856 has no repealer clause; and by its terms became effective on June 16, 1955, the date it was filed in the office of the secretary of state. Implied repeals of laws by subsequently enacted statutes are not favored (*Dade County v. City of Miami, Florida*, 82 So. 354; *State v. Sarasota County, Florida*, 74 So. 2d 542); but if there is positive repugnancy between legislative acts, the most recent act must prevail (*Sparkman v. State, Fla.*, 71 So. 34; *Tamiami Trail Tours v. Lee, Fla.*, 194 So. 305). Further, where it is conceded there has been a repeal by implication, such may involve the entire of a prior act or only a part thereof (*In re Wade, Fla.*, 7 So. 2d 797).

In view of the foregoing, in my opinion the question is answered as follows:

The limits of insurance coverage in relation to debtors under credit life insurance policies (group credit life insurance, franchise credit life insurance, individual credit life insurance) are fixed in and by the provisions of sub §5 (a) of Ch. 29856, 1955.

Group credit life insurance shall be issued in pursuance of the provisions of §635.26 (2), F. S., with the exception that sub §5 (a) of Ch. 29856 shall control with respect to limits of coverage.

055-211—August 22, 1955

CIVIL PRACTICE AND PROCEDURE

UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT —PROCEDURE—COSTS—INSOLVENT PETITIONERS— §88.151(1),(2), F. S. (§15(a),(b), CH. 29901, 1955)

To: *John S. Lloyd, Adele Segall Faske, Assistant State Attorneys, Miami*

QUESTIONS:

1. Does sub §(a) of §15 of the uniform reciprocal enforcement of support act (Ch. 29901, 1955) refer only to a situation where a state files a petition on behalf of a person who is incapable of filing his or her own petition by reason of incompetency or otherwise?

2. If the answer to question 1. is "no," does sub §(a) of §15 refer to every petitioner or only to petitioners who are represented by the state through the office of the state attorney in situations where these petitioners do not employ private counsel?

3. If the answer to question 1. is "no," then where under the provisions of sub §(a) of §15 no clerk's fee has been charged must a petitioner, in order to receive the additional service of the sheriff and a court reporter as provided by sub §(b), where necessary, file an affidavit of insolvency or is it necessary to file an affidavit of insolvency in all situations?

Section 15(a) of Ch. 29901, 1955, reads as follows:

"Where the action is brought by or through the state, or an agency thereof, no clerk's fees shall be required of it, but if an order be entered under sub §(c) of this section requiring the defendant to pay the costs, such order shall be deemed to include the clerk's fees for services rendered in an action brought by or through the state or an agency thereof."

The purpose of said statutory provision is to eliminate the necessity of the payment of clerk's fees in actions brought by or through the state, or an agency thereof, to enforce the remedies provided by §9 of said Ch. 29901, reading as follows:

"Section 9. Remedies of a state or political subdivision thereof furnishing support.—Whenever the state or a political subdivision thereof furnishes support to an obligee, it has the same right to invoke the provisions hereof as the obligee to whom the support was furnished for the purpose of securing reimbursement of expenditures so made and of obtaining continuing support."

I do not find anything in Ch. 29901 to indicate that §15(a) applies to any actions except those brought by or through the state or its agency under authority of the above quoted §9. Section 15(a) pertains to no petitioner except the state or its agency when proceeding under §9. It has no application to individual petitioners.

Except as authorized by said §9, I find no authority in said chapter for the filing of a petition by the state or its agency on behalf of any person whomsoever, even though such person be incapable of filing his own petition by reason of incompetency or otherwise.

Under §15 it is necessary that every insolvent person who wishes to proceed without the payment of costs file the affidavit and certificate required by §15(b). Where the action is brought by or through the state or its agency under §9, it is, of course, not necessary that any affidavit or certificate be filed in order to entitle the plaintiff to avail itself of the benefits of §15(a).

055-212—August 22, 1955

CRIMES

SPECIAL 1955 FEDERAL CENSUS—BROWARD AND PALM BEACH COUNTIES—APPLICATION TO FORMER POPULATION ACT REQUIRING REGISTRATION OF FELONS—CHS. 18107, 1937; 29633, 1955

To: *Emerson Allsworth, County Solicitor, Ft. Lauderdale*

QUESTION:

Is the county of Broward covered by Ch. 18107, 1937 relating to the registration of felons in view of the recent census approved by the 1955 state legislature in which said county had a population in excess of 159,000?

It appears from your letter of July 27, 1955, that you have reference to a 1955 federal census taken especially for Broward county which disclosed that said county had a population in excess of 159,000, and that you have further reference to Ch. 29633, 1955.

Chapter 18107, 1937, requires that in all counties of the state having more than 150,000 population "according to the next preceding state or federal census," persons convicted of certain crimes must register, and it provides that any person violating said law shall be deemed guilty of a misdemeanor and shall be subject to fine or imprisonment or both.

Chapter 29633, 1955, contains the following provisions:

"Section 1. The official count of the population of the counties of Broward and Palm Beach as made and taken in the year 1955, or subsequent years thereto, whichever census is the last, by the federal bureau of the census, or the commissioner of agriculture of the state, as certified to the respective boards of county commissioners of said counties, is hereby provided for and shall be the official census of the inhabitants of each county.

"Section 2. The aforesaid census of each county shall be combined and the aggregate total population of said counties shall be recognized and is hereby declared to be the official census of the inhabitants of the 15th judicial circuit of the state.

"Section 3. The aforesaid census population as to said counties and said 15th judicial circuit, shall entitle said 15th judicial circuit to the benefits of the provisions of §45, Art. V of the constitution of Florida and of §26.16, F. S. 1953."

It is apparent that the purpose of Ch. 29633, 1955, was to provide a means whereby an additional circuit judge could be appointed for the 15th judicial circuit of Florida, in which Broward county is situated.

The vital question is as to whether Broward county, which had a population of 83,933, according to the last regular census, viz., the federal census of 1950, is brought under the operation of Ch. 18107, 1937, by the fact that a special 1955 federal census for Broward and Palm Beach counties, taken for the purpose aforesaid, shows that Broward county has a population of more than 150,000.

Although it is quite true that the said special 1955 federal census is now the "next preceding . . . federal census" in one sense of the word, I do not think that it is such within the contemplation of Ch. 18107, 1937.

Although the case of *Sproul v. State ex rel Smith*, 16 So. 2d 109, (decided in 1944), is not strictly in point, I think that the reasoning of the supreme court of Florida in that case supports my position here. The beverage law required a total of \$1,500 to be paid for the beverage license desired by Smith to enable him to operate in Palm Beach county if that county had a population of over 100,000 "according to the latest state or federal census," and required a lesser amount if the population was not over 100,000 according to the latest state or federal census. The 1940 federal census showed that Palm Beach county had a population of 79,895 but, according to a special 1943 state census (taken pursuant to statutory authorization to determine whether the 15th judicial circuit was entitled to an additional circuit judge), the population of said county was 100,469. In holding that the 1940 federal census was applicable and that it governed the amount to be paid by Smith for his beverage license, the supreme court said in part:

"... When the legislature in the Beverage Act decided to determine and graduate the amount of the licenses to be paid in each and every county in the state according to population within certain brackets and according to 'the latest state or federal census' the legislature must certainly have had in mind these fixed and regular state-wide censuses above referred to, which, one or the other, is taken every 5 years. This gives state-wide uniformity to the operation of this state-wide act and prevents the act from having a discriminatory effect.

"For instance, this special census which was taken only for Palm Beach and Broward counties under this special act, Ch. 22205, 1943, did show an increase in population in those counties, but it is quite certain that in a number of counties in the state, during the period from 1940 to 1943, there had likewise been a considerable increase in population. *Therefore the only way to prevent the Beverage Act of 1935 from having a discriminatory effect is to give to that statute the construction hereinabove placed upon it.*" (Emphasis supplied.)

Likewise, I think that when the legislature enacted Ch. 18107 in 1937 and used the words "according to the next preceding state or federal census," it had in mind, so far as federal censuses are concerned, the regular statewide federal census taken every 10 years and did not intend that special federal censuses of one or more counties taken between times should govern.

It is true that the special 1955 census did show an increase in population in Broward county from the 83,933 it had in 1950 to over 150,000 in 1955, but it is equally certain that in a number of other counties there had likewise been a considerable increase in population from 1950 to 1955. Therefore, the only way to be certain that Ch. 18107, 1937, does not have a discriminatory effect is to give to it the construction which I place upon it. To illustrate, Orange, Polk and Escambia counties each had a considerably larger population than Broward county according to the 1950 federal census, and it is certain that these 3 counties have grown considerably in population since 1950. It is highly probable that a special census in these counties would show a population of over 150,000 for one or more of them. I am informed by the director of the federal census bureau that no special 1955 federal census has been taken for either of them; also, the office of the commissioner of agriculture of Florida, advises that no special state census has been taken. Therefore, I think it would be highly discriminatory to say that Ch. 18107 applies in Broward county by reason of the 1955 special census but that it does not apply in either Polk, Orange or Escambia counties, even though one or more of them probably now have an actual population in excess of 150,000.

Therefore, it is my opinion that your question is properly answered in the negative.

055-213—August 23, 1955

TAXATION

EXEMPTIONS—HOUSEHOLD GOODS AND PERSONAL EFFECTS—§11, ART. IX, STATE CONST., §192.201, F. S. (CH. 29743, 1955)

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Does Ch. 29743, 1955, grant exemption for household goods and personal effects of residents of this state generally or is such exemption limited to the household goods and personal effects used in connection with the permanent residence of the taxpayer?

The said chapter provides that "there shall be exempt from taxation to every person residing and making his or her permanent home in this state household goods and personal effects to the assessed value of \$1000. Title to such household goods and personal effects may be held individually, by the entireties, jointly or in common with others." There is a similarity between certain language of this statute and that used in §7, Art. X, State Const., relating to homestead tax exemption of real property. The following portion of §11, Art. IX, State Const., to wit, "and there shall be exempt from taxation to the head of the family residing in this state, household goods and personal effects to the value of \$500." This provision was added to the state constitution at the general election in 1924.

When the above statutes and constitutional provisions are read and construed together, and in the light of the rule that statutes providing for tax exemptions are strictly construed against the taxpayer and in favor of the public (*Overstreet v. Tubin*, Fla., 53 So. 2d 913), we are of the opinion that both the constitutional provision in §11, Art. IX, State Const., and the 1955 enactment, relate to the household goods and personal effects of the taxpayer used in the maintenance of his or her permanent home in this state, and may not be extended to other property of the taxpayer although of the same type and kind.

055-215—August 24, 1955

INSURANCE

BURIAL INSURANCE CONTRACTS—CH. 639, F. S.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTION:

Where an agreement is entered into between a funeral director and a person for the former to furnish "casket and burial services" for the latter, and the agreed consideration therefor is deposited in a "Federal Savings and Loan Account" in the joint names of such director and person, with provisions that such person can "withdraw the account but that the funeral direc-

tor (cannot) withdraw the account until after the death of the person making the deposit," is such agreement a "pre-need burial contract" within the purview of §§639.07-639.17, F. S.?

The mentioned statutory sections derived from Ch. 28211, Laws of Florida, 1953.

Section 639.07(2) defines "pre-need burial contract" as "any contract, other than a contract of insurance, under which, for a specified consideration paid in advance in a lump sum or by installments, a person promises, upon the death of a beneficiary named or implied in the contract, to furnish funeral services or burial supplies or equipment." Section 639.09 provides that after June 14, 1953, "No person shall receive, hold or manage any funds tendered as payment on any pre-need burial contract until such person is possessed of a certificate of authority, or renewal thereof, issued by the (insurance) commissioner under the circumstances hereinafter stated . . ."

Section 639.12 provides that an application for such an original certificate of authority shall be accompanied by a deposit with the insurance commissioner "of bonds of the U. S., of any of the states of the U. S., of the District of Columbia, or of the cities or counties of Florida, in the aggregate market value of \$50,000"; that, "Such bonds so deposited shall be held by the commissioner solely for the purpose of satisfying judgments obtained against the person making the deposit for his failure to perform a pre-need burial contract into which such person may have entered for the furnishing of burial services and equipment to the holders of pre-need burial contracts."

Section 639.13 provides for return to any person, who has procured such a contract, of "the entire amount actually paid on such contract" on 5 days' notice; and §639.14 provides that on death of a beneficiary named in such a contract, the person issuing the contract shall "immediately release to the person who made the payments on the contract, or to the legal representative of the beneficiary . . . the entire amount, in cash, of the funds actually paid on the contract." Section 639.17 makes it a felony for violation of §§639.07-639.16 in particulars set forth, and fixes penalties for conviction of a fine not in excess of \$10,000 or imprisonment not exceeding 5 years.

The right of the person depositing the consideration for the agreement described in the question to withdraw such deposit at any time during his life would not appear to remove such agreement from the effects of §§639.07-639.16. Indeed, as indicated above, under §639.13, one who has procured a pre-need burial contract may demand return of the consideration paid on 5 days' notice. Further, upon death of a person entering into the agreement contemplated by the question, leaving the deposit undisturbed, title thereto immediately vests in the funeral director and reasonably constitutes "consideration paid in advance," within the meaning of §639.07(2), and when such a person dies leaving such deposit undisturbed, the funeral director is "a person" who shall "receive, hold, control or manage

... funds tendered as payment" on such a contract, within the intent of §639.09, F. S.

In the light of the foregoing, in my opinion the question is answered as follows:

Admittedly, the question is controversial. Attention has been directed to the rather drastic penalties provided by §639.17, F. S. In the absence of a court construction to the contrary, ordinary caution dictates the position that the agreement described in the question is a "pre-need burial contract" within the purview of §§639.07-639.17, F. S. Hence, the question is answered in the affirmative.

055-216—August 26, 1955

ELECTORS AND ELECTIONS

SUPERVISORS OF REGISTRATION—ABSENT VOTER'S BALLOT, AUTHORITY OF DEPUTY SUPERVISOR— CONSTRUCTIVE RESIDENCE—§§98.041-98.151, 98.181(3), 101.62-101.64, F. S.

To: *Easter L. Gates, Supervisor of Registration, Broward County, Ft. Lauderdale*

QUESTIONS:

1. Under the provisions of sub §(3), which was added to §98.181, F. S., by §6, Ch. 29934, 1955, what authority is vested in the deputy of the supervisor of registration in charge of an office established in pursuance of said subsection in a city of over 25,000, not the county seat, to issue absent voters' ballots?

2. Is constructive residence (i.e. residence by operation of law) residence for voting purposes?

The questions are answered as follows:

1. Sub §(3) of amended §98.181, F. S., is quoted, in part, as follows:

"A set of such indexes or records as the supervisor may direct shall be kept in all cities of over 25,000 population, when such city shall not be the county seat, as will enable the supervisor, or the supervisor's deputy, *to provide all services to the electors in such city as are provided by the supervisor at the supervisor's office at the county seat.* Such set of indexes or records may be limited to cover those persons residing in such city and its environs . . ." (Emphasis supplied)

We are here dealing with election laws, particularly registrations and voting. The italicized "may" above literally interpreted is permissive; but to carry out legislative intent in the light of the context where used and the purposes of a statute, "may" is sometimes construed as "shall." Webster's Collegiate Dictionary, 5th Ed., defines "environs" as, "The suburbs or districts round about a place; hence surroundings."

A part of §101.64, F. S., as amended, is quoted: "The supervisor shall, after the printer delivers the ballots for a precinct in which applications from absentee electors have been received, prepare the first numbered ballot for the first applicant, the second ballot for the second applicant, and so on. The supervisor shall then detach the ballot and stub No. 2 from No. 1 and forward to each applicant from his county as shown by the list provided by §101.63, F. S., provided such applicant is properly registered. *In counties under the permanent registration system where the supervisor maintains deputies in municipalities other than the county seat and such municipalities shall have a population in excess of 90,000, blocks of numbered ballots shall be made available as required and as the supervisor may direct in order to comply with the provisions of §98.181; all ballots made available in municipalities where deputies are maintained shall be fully accounted for to the supervisor . . .*" (Emphasis supplied.)

The italicized part of said quoted matter was added by the 1955 session of the legislature. Since the permanent registration system prescribed in our general laws is found in §§98.041-98.151, the words in the above quotation, "the permanent registration system," are construed to mean such a system other than a system deriving from our said statutes beginning with §98.041.

Section 101.62, F. S., relating to application for absentee ballot heretofore required to be made to the supervisor, was amended at the recent session by insertion of the words, "or his deputies at any registration office maintained by the supervisor for the purpose of registering electors."

The newly added words in amended §101.64 respecting delivery of blocks of numbered ballots "in order to comply with the provisions of §98.181," and the words in the latter section, "to provide all the services to the electors in such city as are provided by the supervisor at the supervisor's office at the county seat," lead to the reasonable conclusion that a deputy in charge of a supervisor's office in a city of more than 25,000, as contemplated by §98.181(3), shall be prepared to accept applications for and issue absent voters' ballots.

Prior to 1955, our absent voting statutes contemplated that applications and issuance of ballots in pursuance thereof for absentee voting should be handled only at the supervisor's office. Certain of the statutes relating to the issuing, accounting for handling, etc., of absent voters' ballots by the supervisor were not amended at the recent session. In connection with the issuance of absentee ballots by deputies in offices other than the office of the supervisor at the county seat, extreme care must be exercised in construing the mentioned amendatory features in relation to provisions of the absent voting statutes not amended at the recent session. No attempt is made here to anticipate a number of questions which might arise in that connection. It should be borne in mind, however, that absent voting laws are strictly construed.

2. "Constructive residence," as used in the question is to be understood as meaning residence (i.e. habitation, domicile, home and place of permanent abode) fixed by a husband for a

wife or by a father for a minor child or child non compos mentis of any age, where the wife or child does not actually go to and live at such residence so fixed by law. The actual question propounded at said supervisors' meeting involved the following: Some years ago a resident of another state established domicile in a Florida county. At that time he had a minor son who was in military service. After the son became of age, he presented himself to the supervisor of registration of said Florida county and requested the right to register, which request was granted. Did the supervisor err in granting the request?

When the father established his domicile in said county, that became the domicile of the minor son, and that point is too well established to labor. However, we held in opinion 052-132 (1951-1952 Biennial Report 107) that the fact that a "woman may have been the wife of a man residing in a county for the required length of time will not qualify her as an elector unless she shall have actually resided in the county for the required length of time," citing *Dorsey v. Brigham*, Ill., 25 N. E. 303, 42 L. R. A. 809, text 812. Domicile is always at rest, never in suspense. When the son in military service became of age, his domicile had theretofore been established for him by his father in said Florida county. The first time he physically appeared at that place of domicile, his constructive residence theretofore obtaining was superseded by his actual residence there; and actual residence began at that time. The fact that thereafter he may have left that domicile by returning to military service or for business or any other reason not connected with change of domicile, would not disturb his actual residence at such place of domicile (See *Dennis v. State*, 17 Fla. 389, holding in effect that if a person, because of employment or other reasons, temporarily must leave his home and move into another county or state with no intention of abandoning such home as his domicile, even though his absence from that domicile may continue for days, months, or years, it remains his home in the sense of legal residence).

In view of the foregoing, in my opinion the question is answered as follows:

Where by operation of law the constructive domicile of a person has been established in a Florida county, the required residence of 1 year in the state and 6 months in the county for voting purposes does not begin to run until such person shall physically appear at said established domicile. Once that actual residence is thus established, absence thereafter of said person from said domicile for any necessitous or fortuitous reason not connected with change of domicile, will not disturb such actual residence at said established domicile or interfere with the running of said time for voting purposes. The stating of these conclusions afford obvious answer to the specific question involved, and confirms the answer given by this office at said supervisors' meeting.

055-217—August 29, 1955

EDUCATION

BOARDS OF PUBLIC INSTRUCTION—TRANSPORTATION
OF PUBLIC SCHOOL PUPILS—COUNTY EXPENSE—
§234.10(6), F. S.To: *Thomas D. Bailey, State Superintendent of Public Instruction,
Tallahassee*

QUESTION:

Would a board of public instruction be legally entitled to transport public school pupils at county expense, using therefor funds derived from county sources to enable students to attend a junior college in another county?

Section 234.10(6), F. S., provides:

"Where it is practicable to extend a school bus route to serve any territory which lies in more than one county so that pupils living in the extended area to be served by the bus may have improved educational facilities, county boards of the respective counties shall cooperate and make such mutual plans and agreements as necessary to make these improved facilities available to the pupils. Pupils shall not be transported at public expense from one county to or from the schools of another county, unless a valid agreement exists between the respective county boards. This agreement shall state the responsibility of each county board for operation of the bus and maintenance of the daily schedule. Whenever a bus crosses a county line, all rules and regulations of the county in which it is traveling shall be observed, unless otherwise provided in the agreement between the county boards."

Your question is therefore answered in the affirmative, subject to the requirements of the above quoted act, including the execution of a valid agreement between the respective county school boards involved.

Your attention is also directed to the provisions and requirements of state board regulation adopted March 21, 1950, relating to fees charged non-resident students of junior colleges.

055-218—August 29, 1955

EDUCATION

COUNTY SCHOOL SYSTEM—BOARD MEMBERS—
COMPENSATION—§230.201, F. S. (FORMERLY §242.02, F. S.)To: *Thomas D. Bailey, Superintendent, State Department of Education, Tallahassee*

QUESTIONS:

1. A school board operating under a special act for board members' compensation providing for a flat monthly salary had its act declared invalid by the courts as of

March 21, 1955, which placed the board under §242.02, F. S.

If the board was paid on the basis of the special act through March 21, 1955, to how many meetings would its members be entitled on a per diem basis under §242.02, F. S., between March 21, and June 30, 1955?

2. Could a county board of public instruction operating under the general laws which allow for compensation a per diem of \$10 per day and 7½¢ per mile, (§242.02, F. S.) exceed the legally allotted quota of meetings by declaring its meetings continuous and in recess rather than adjournment, thus claiming a payment of \$10 per day for every day in session?

Section 242.02, F. S., as amended by the 1955 legislature and reenacted as §230.201, provides:

"Compensation of members of county board.—Each member of a county board shall be allowed from the county school fund of his county for his expenses \$10 per day and 7½¢ per mile for every mile actually traveled in going to and from the county courthouse by the nearest practicable route, for participation in each regular and special meeting of the board; provided, such allowance shall not be made for more than 9 meetings in the first half and 9 meetings in the second half of any 1 fiscal year in counties having a population of less than 80,000 according to the last preceding state or federal census, nor for more than 12 meetings in the 1st half and 12 meetings in the 2nd half of any 1 fiscal year in any other county; and provided, further, that this section shall not apply until Jan. 1, 1951, to counties in which compensation is prescribed by special or local law, or by general law with stated population application."

This act provided that it was to take effect July 1, 1955, and therefore does not apply to the situation described in your letter since the question relates to a period of time extending from March 21 to June 30, 1955.

Section 242.02, F. S., prior to the 1955 amendment provided:

"Compensation of members of county board.—Each member of a county board shall be allowed from the county school fund of his county for his expenses \$10 per day and 7½¢ per mile for every mile actually traveled in going to and from the county courthouse by the nearest practicable route, for participation in each regular and special meeting of the board; provided, such allowance shall not be made for more than 18 meetings in any one fiscal year in counties having a population of less than 80,000 according to the last preceding state or federal census, nor for more than 24 meetings in any other county; and provided, further, that this section shall not apply until Jan. 1, 1951, to counties in which compensation is prescribed by special or local law, or by

general law with stated population application." (Emphasis supplied.)

To some extent your first question has been considered in attorney general's opinion 049-604, in which I stated:

"It would certainly be logical and advisable for the members of a school board to try to apportion their meetings at regular intervals throughout the year, in so far as possible. This must of necessity be a voluntary action on the part of the school board, however, since no specific method of prorating the meetings throughout the year is provided by law.

"It is possible that under certain circumstances it would be necessary for a school board to meet an unusual number of times during the first few months of a fiscal year and in doing so reach the limit of meetings for which compensation is provided, long before the end of the year. In that event, if a vacancy occurs on the board and said vacancy is filled, the new member could not be compensated under this act for attending meetings during the remainder of this fiscal year.

"In answering your question, therefore, I am of the opinion that school boards, although not legally required to do so, should as a matter of policy voluntarily attempt to either apportion their meetings as evenly as possible throughout the year or to voluntarily prorate the amount of compensation they are to receive by limiting the amount each member shall requisition each month for his compensation regardless of the number of meetings held during the month."

No specific statutory directions are given which would provide a method to be followed by the school board in the circumstances set forth in your question.

In my opinion, however, the board in question should try to abide by the intent of the law under which it was operating during the period of time involved. This law was §242.02, F. S., according to your letter.

Section 242.02, F. S., provided compensation for board members for not more than 18 meetings in any one fiscal year in counties having a population of less than 80,000—or for not more than 24 meetings in other counties.

Assuming that the county contemplated in your question is a county of less than 80,000 population, the school board members in said county could be compensated for not more than 18 meetings during the entire year.

Operating under the special act until it was declared invalid on March 21, 1955, the board members were paid a monthly salary until that date regardless of the number of meetings attended.

This being the case, it would appear to be logical and in accord with the intent of the legislature for the board to pro-

rate the 18 compensable meetings permitted by §242.02 for the year 1955 on a monthly basis and to allow its members compensation for such number of meetings held between March 21, 1955, and June 30, 1955, as would be equal to a proportionate share for this period of the total number of compensable meetings for the entire year.

For example, if the board prorated its meetings on a monthly basis, this would mean that the board could be compensated for $1\frac{1}{2}$ meetings during each monthly period. Using this formula the board could compensate its members for 6 meetings during the months of March, April, May and June, 1955.

As stated previously, there is no specific statutory procedure to follow in answering this question. The above suggestion, however, would appear to be a common-sense solution within the intent of the law.

As to question 2, it is answered in the negative. The law (§242.02, F. S.) provides for compensation "for participation in each regular and special meeting."

The word participation is not consistent with the circumstances described in your question.

055-219—August 30, 1955

CLERK OF CIRCUIT COURT

FEES—RECORDS OF PERSONS CONVICTED OF CRIMES—
§§28.241, 28.26, 34.041(1), 34.05(3), F. S.

To: *C. Burton Marsh, President, Florida Association of County Clerks, Bushnell*

QUESTION:

May the clerk of the circuit court collect a separate fee for keeping the record, required by §28.26, F. S., of names of all persons convicted of crimes in any of the courts of the county having criminal jurisdiction?

You cite the opinions of my predecessor in office found at p. 307 AGO 1929-30, and p. 251 AGO 1933-34.

Following is an extract from the opinion dated Nov. 21, 1933, found at p. 251, AGO 1933-34.

"It is my opinion that for rendering the services above enumerated, the Clerk of the Circuit Court, under §4867, Compiled General Laws of Florida, 1927, is entitled to the following fees:

"Entering other matters required in the record of the Court, for the first 100 words or less—25¢;

"Each additional 100 words or less— $12\frac{1}{2}$ ¢."

NOTE: Ch. 29749, 1955, changed the fee for "each additional 100 words or less . . ." to 15¢.

I adhere to the quoted part of that opinion (subject to the

change made by Ch. 29749, supra) insofar as it relates to courts (other than the circuit court and county court) in the county having criminal jurisdiction. (See p. 52, Clerk's Manual.)

The fee for recording the names of those convicted in the circuit courts is, in my opinion, however, included in the fee authorized by §28.241(2), F. S., as amended by Ch. 29749, 1955, which expressly provides that such fee is "... for all services to be performed by him in any criminal action or proceeding in said court in lieu of all other fees heretofore charged, . . ."

The fee for the same record of persons convicted of criminal offenses in the county court is included in the fee authorized by §34.041(1) or that authorized by §34.05(3), F. S.

055-220—August 29, 1955

MOTOR VEHICLES

FINANCIAL RESPONSIBILITY LAW—NEGLIGENCE OF OPERATORS—CH. 324, F. S. (CH. 29963, 1955)

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTIONS:

1. A and B are involved in an accident within the meaning of §324.04(2). A is obviously at fault. Neither has liability insurance. The question therefore is: Must both exchange releases or deposit securities with the state treasurer, in addition to obtaining liability insurance, or is only A required to obtain a release?

2. A is traveling in his proper lane of traffic and stops for a red signal light. B strikes him from the rear while he is waiting for the light to change. Question: Is he legally parked within the meaning of §324.04(2)(b), F. S.?

Chapter 29963, 1955, constitutes a revision of entire Ch. 324, F. S., our financial responsibility law, and takes effect October 1, 1955.

Under present §324.04(2) the insurance commissioner is required, in event of an accident involving a motor vehicle, under described circumstances and within prescribed time, to suspend the license of the operator of such a motor vehicle unless such operator shall be found to be exempt by reason of facts or circumstances detailed in paragraphs (a) to (g) of said subsection, paragraph (b) of which is quoted: "Such operator clearly did not cause or contribute to the cause of said accident."

Under the new law mentioned, amended §324.04(2), in setting forth facts and circumstances which will exempt the operator of a motor vehicle involved in an accident from the suspension and other provisions of the law, has no provision similar to present §324.04(2)(b) above-quoted. Hence, it appears that in relation to imposition of the provisions of the new law, negligence or lack of negligence on the part of such an operator, is of no significance.

This characteristic of the new law is not novel. One of the points raised in *Ballou v. Reeves*, Ky., 238 S. W. 2d 141, was that the Kentucky financial responsibility law was unconstitutional because it failed to provide for hearing before the department or by judicial review, to settle the question of appellant's negligence in connection with an accident involving motor vehicles. The court replied to the contention as follows:

"The question of negligence has nothing to do with the matter. The requirement of financial responsibility does not in any sense predetermine the question of liability, which could only be decided in a judicial proceeding. It simply furnishes an added protection to the public and better assures the safety of our highways, and it is not dependent upon the operator's skill or lack of it. The statute is not unreasonable in failing to require a showing of negligence prior to suspension of the license. . . ."

And see also *Rosenblum v. Griffin*, N. H., 197 Atl. 701; *State v. Stehlek*, Wis., 56 N. W. 2d 514.

Reference is made in the question to the obtaining of release or the posting of security with the commissioner by a person involved in an accident in relation to such accident. With respect to such security, amended §324.041 provides that the security shall be in the sum and amount "determined by the commissioner which, in his judgment, will be sufficient to compensate for all injuries arising out of such accident but in no case shall the amount exceed the limits as specified in §324.01(7)."

A part of the Wisconsin law involved in the above *Stehlek* case is mentioned. Under such law, within 60 days after an accident resulting in injury or death or property damage in excess of \$50, the commissioner of motor vehicles shall suspend the license and registration of each operator involved in such accident, unless the operator shall deposit with the commissioner security in a sum which shall be sufficient in the judgment of the commissioner to satisfy any judgment or judgments for damages resulting from such accident.

It has come to our attention that very responsible persons construe amended §324.041 to the effect that the commissioner in the event of an accident has the discretion, should he determine that one of the participants is without negligence, to waive the requirements for posting security or to require only a nominal amount to be deposited with respect to an accident. The undersigned assistant has talked on the telephone with the commissioner of motor vehicles of Wisconsin and with his legal adviser, and has been advised that in the application of the Wisconsin law the factor of negligence cuts no figure. This is in accord with the above *Stehlek*, *Rosenblum* and *Ballou* cases. Further the language of §324.041 would seem to indicate legislative intent that this is a modern security type law as discussed in the 3 cases mentioned.

The words "legally parked," as used in amended §324.04

(2) (b), are to be given their ordinary and generally accepted meaning. Attention is directed to rather numerous authorities discussing the meaning of the words "Park" and "Parking" in Vol. 31, Words & Phrases. It appears from these authorities that the necessary temporary or momentary stopping of an automobile in line of traffic without abandoning the same does not constitute a "parking" of such automobile.

In view of the foregoing, in my opinion the questions are answered as follows:

1. If either A or B, under circumstances of this question, occasions damages to the other in an amount to bring him under the amended law, and he is not otherwise exempt under the law, in order to prevent suspension of license, he must not only evidence financial responsibility as to future operation of a motor vehicle, as provided by the law, but also must obtain from the other the release required by amended §324.04(2) (e) or deposit securities with the commissioner, as contemplated by §324.041. Under the revised law, it appears that the factor of negligence in relation to an accident is of no significance.

2. When an automobile is temporarily or momentarily stopped in line of traffic on a highway or other public thoroughfare as result of the operator's observance of a red traffic light, during such temporary or momentary halt until the light changes, the automobile is not "legally parked," as such words are used in §324.04(2) (b).

055-221—August 30, 1955

CONSERVATION

GAME AND FRESH WATER FISH—FRESH WATER FISH DEALERS—LICENSES—§372.65, F. S.

To: A. D. Aldrich, Director, Game and Fresh Water Fish Commission, Tallahassee

QUESTION:

You state that you place the following persons in the category of a wholesale dealer, and inquire whether or not your interpretation is correct:

1. Anyone actually wholesaling fish either for food fish or bait.
2. A jobber who purchases fish wholesale and re-sells them to fishing camps.
3. Anyone that catches minnows and sells them to fishing camps.
4. Anyone dealing in the sale of "tropical" fish on a wholesale basis.

Section 372.65, F. S., provides, among other things, as follows:

" . . . A wholesale dealer shall be considered one who

sells or ships fish by the barrel or half barrel, or in bulk, and shall be required to pay a license fee of \$50 per annum . . ."

In the light of the foregoing statute defining a wholesale fresh water fish dealer, I desire to comment on each of the 4 classes of dealers listed above.

1. I agree with you that anyone who actually sells fresh water fish wholesale (except exclusively to the consumer or another wholesaler) is required to purchase a wholesale dealers license. The question is when is a person selling fish wholesale? We must then apply the language of the statute "that a wholesale dealer shall be considered *one who sells or ships fish by the barrel or half barrel, or in bulk . . .*" (Emphasis supplied.)

2. In commenting on the 2nd classification, I would like to point out that no license, either wholesale or retail, is required to purchase fresh water fish, but a license is required in order to sell fresh water fish. Therefore, any person, whether he be called "jobber" or otherwise, who sells fish *by the barrel, half barrel, or in bulk* to a fishing camp may be classed as a wholesale dealer.

3. It is my opinion that anyone who sells fresh water minnows by the barrel, half barrel, or in bulk to fishing camps may be classed as a wholesale dealer.

4. If the "tropical" fish you refer to are in fact fresh water fish and the person dealing in such fish sells same by the barrel, half barrel, or in bulk, he shall be subject to the wholesale fresh water fish dealers license.

I believe the foregoing advises you as to any interpretation of the law as applied to the factual situations you presented relative to wholesale fresh water fish dealers.

You give 2 situations in which you classify the person as a retail fresh water fish dealer and request my comments thereon.

1. A fishing camp which buys direct from the producer but sells to fishermen.

2. A person who catches minnows and sells them to a wholesale dealer.

Section 372.65, F. S., defines a fresh water fish retail dealer as "anyone who sells fish or supplies *in any manner* direct to the consumer or wholesale dealer." (Emphasis supplied.)

1. If the fishermen to whom the fishing camp sells the fresh water fish are either wholesale dealers or consumers of the fish purchased, your interpretation is correct. From whom the camp purchases the fish is immaterial.

2. A person selling fresh water minnows directly to only a wholesaler or to the consumer *in any manner* is properly classified as a retail dealer. How the person acquires the fish that he sells is again immaterial.

It appears that in determining who is a wholesale dealer, the *quantity or manner of selling or shipping* is the controlling

point. Whereas, in determining who is a retail dealer, the classification of the person to whom it is sold controls.

055-222—August 30, 1955

CONSERVATION

GAME AND FRESH WATER FISH COMMISSION— RULES AND REGULATIONS— FILING REQUIREMENTS— §§372.021, 120.10-120.17 (CH. 29777, 1955), F. S.

To: A. D. Aldrich, Director, Game and Fresh Water Fish Commission, Tallahassee

QUESTIONS:

1. Is the game and fresh water fish commission required to adopt and promulgate rules and regulations under Ch. 29777, 1955, or may it continue to operate under §372.021, F. S.?

2. If Ch. 29777, 1955, does apply, would emergency orders become effective immediately as prescribed by rules of the commission or would they become effective within 5 days as provided in the said Ch. 29777, 1955?

Chapter 29777, 1955, applies to every office, board, commission, department or other agency of the state government and, among other things, requires the filing of all rules and regulations with the secretary of state within a specified time. Said act took effect June 3, 1955, but contains no provision repealing conflicting laws.

Section 2 of the said Ch. 29777 provides that no rule or regulation adopted before Jan. 1, 1956, shall be effective or enforceable after Jan. 1, 1956, unless it is filed with the secretary of state. Said § 2, Ch. 29777, further provides that rules or regulations adopted on or after Jan. 1, 1956, shall not take effect or be enforceable until 15 days after the filing of same in office of the secretary of state (unless otherwise provided for in the act). This provides a means of getting all rules and regulations on file in the office of the secretary of state.

Section 372.021, F. S., was enacted as Ch. 21945, 1943. The said section implements §30, Art. IV, State Const., which creates the game and fresh water fish commission by setting up a procedure by which the game and fresh water fish commission may exercise its constitutional powers and duties by the adoption of rules and regulations. The manner in which said rules may be promulgated is prescribed. Section 372.021 specifically applies to the game and fresh water fish commission and to no other state agency or branch of government.

Section 372.021, F. S., provides for the filing of rules of state-wide application in the office of the secretary of state, office of every county judge, and for the publication one time of such rules in a newspaper of general circulation in every congressional district. Such rules take effect 30 days after filing a certified copy in the office of the secretary of state. It is further provided that rules of less than state-wide application take effect

20 days after being filed with the secretary of state; publication in a newspaper of general circulation in the area affected.

It is further provided by said §372.021, F. S., that all rules of the commission whether state-wide or limited application shall be filed with the secretary of state and each county judge of the state within "10" days after adoption thereof.

I believe the foregoing states the pertinent parts of Ch. 29777 and §372.021, F. S., that are to be taken into consideration in answering question 1. It appears that §372.021 not only embraces the requirement that rules and regulations be recorded with the secretary of state, but goes further and requires the filing of such rules in the office of the county judge of the state and requires the publication thereof. I think it is well to point out that most of the violations of such rules and regulations of the commission are tried in either the county judges court or county court, both of which are presided over by the county judge of the county.

Under §372.021, F. S., a rule of state-wide application would take effect 30 days after filing in the office of the secretary of state, whereas, under Ch. 29777, supra, it would take effect 15 days after such filing. A rule of less than state-wide application would take effect 20 days after filing with the office of the secretary of state instead of 15 days as provided in said Ch. 29777, 1955.

It is my opinion that the conflict in the two laws is not such as to adversely effect the rights of the public, regardless of which one is followed. However, I believe that where there is a general statute applying to all boards and departments of government alike, and there is also a specific statute applying to a single agency and the two are in conflict, that the agency should follow the statute specifically applying and enacted for it unless it can be shown that there was an intent on the part of the legislature to replace same by the latter general law or that to do so would adversely effect the citizens of the state. Your 1st question is answered accordingly.

Your 2nd question presents somewhat of a different problem. Ch. 29777, 1955, in §5 thereof provides for the promulgation of emergency rules that are necessary to protect the health, safety, and welfare of the citizens of the state. The section provides that such rules shall be filed with the secretary of state within 5 days from the date of adoption and shall not be enforceable during such period of 5 days upon any party without actual notice of such rule or regulation.

I do not find any statute providing for adoption of emergency rules and regulations by the commission, therefore, there is no statute in conflict with §4 of Ch. 29777, 1955. I do however find a rule of the commission, being Rule 5.01 which provides:

"The Commission shall have the power to close or open any lake or part of a lake, any stream or part of a stream, any county or part of a county, to the taking of game, non-game birds, fresh water fish, fur-bearing animals, reptiles and amphibians when it is found or believed

that an emergency exists which, without such action on the part of the commission would or might bring harm or disaster to the wildlife or fish population within the area under consideration, or would interfere with the most effective management of the fish and wildlife resources of Florida.

"Such closing or opening action shall become effective by Order of the Director with the approval of the Commissioner within whose District the emergency exists, and 2 other Commissioners, and notice of such action on the part of the Director shall be published in one issue of a newspaper having general circulation within such District."

Due to the language "such order shall become effective by order of the director," I am assuming that the practice is to place the effective date of the rule in the order issued by the director. Reasonable notice to the public, either by the intervening time before the rule takes effect and/or proper and sufficient publication, should be given. In other words, I do not feel that it would be reasonable or fair to arrest a person today for violation of a rule made yesterday, unless he had been given personal notice of the rule prior to the violation.

Section 30, Art. IV, State Const., places the management, restoration, conservation and regulation of birds, game, fur-bearing animals and fresh water fish of the state in the game and fresh water fish commission. Among the further powers granted the commission by the constitution in its regulation and control of the wildlife and fresh water fish is the power to open season on a state-wide, regional and local basis.

Therefore, replying to question 2, it is my opinion that the commission has authority to make a rule closing or opening areas during what it deems an emergency in order to avoid harm or disaster to the wildlife or fish population of our state. Such rule may be promulgated in accordance with reasonable procedure prescribed by the commission for the carrying out of its powers and responsibilities under the constitution. I do not think the commission would be wrong in following the provisions of said Ch. 29777, 1955 in adopting "emergency" regulations. Your 2nd question is answered accordingly.

055-223—August 31, 1955

ELECTORS AND ELECTIONS

CANDIDATES—QUALIFYING DATES—POLK COUNTY—
CHS. 27252, 1951; 30233, 1955; §99.061, F. S. (AM. CH. 29936, 1955)

To: D. H. Sloan, Jr., Clerk Circuit Court, Polk County, Bartow

QUESTION:

In view of the provisions of Ch. 30233, 1955, and amended section 99.061(1), (2) and (3), F. S., what are the qualifying dates for county candidates in Polk county?

Chapter 27252, 1951, provided, in effect, that candidates for nomination for county offices in counties in the 113,000-123,000 population bracket, according to the last official census, should qualify not later than noon Feb. 1 in a primary election year. It has a preamble quite similar to the preamble to Ch. 30233, 1955, herein described.

Said Chapter 30233, 1955, has recitations in its preamble substantially as follows: Certain described state candidates are required by the primary laws of the state to qualify by Feb. 1; that candidates for nomination to county office in counties having a population in the 113,000-150,000 bracket require sufficient time between the qualifying date and the primary election to "canvass the electors within such counties"; and that it is deemed desirable that candidates for nomination for county offices in such counties should qualify by a certain date in the same manner as candidates for state-wide and other offices described above. Thereupon, §1 of the act provides: "Candidates for nomination to a county office in those counties having a population of not less than 113,000 nor more than 150,000 persons according to the last official census, shall file their sworn statement and receipt for party assessment, if any has been levied, with and pay their filing fee to the clerk of the circuit court of the county, who shall receive same in his capacity as clerk of the board of county commissioners of said county not later than noon Feb. 1 of the year in which any primary is held." Section 2 of the act repealed said Ch. 27252. Section 3 of the act provided it should take effect immediately upon becoming a law. It was filed in the office of the secretary of state, without the governor's approval, on May 28, 1955. The act originated in the senate and passed that body on May 10, and passed the house on May 13.

The above question arises by reason of §99.061(1), (2) and (3), F. S., amended at the 1955 session. Said sub §§(1) and (2) provide the dates prior to the primary within which candidates for nomination to state offices must qualify. Sub §(3) fixes such dates for candidates for county offices to qualify, and concludes with the following sentence: "Counties having the same filing dates for state and county candidates according to acts which so provide for such counties by population classification or local law shall continue to have the same filing date for all candidates as provided for candidates for state offices." Such amendments were effected by §4 of Ch. 29936, 1955, which chapter was originally introduced in the senate on May 24, 1955, passed the senate on June 2, passed the house on June 3, was approved by the governor and filed in the office of the secretary of state June 20. In absence of an acceleration clause, this act became effective the 60th day after adjournment of the 1955 regular session.

The official census of 1950 gave Polk county a population of 123,997. Hence it is apparent that at the time of the introduction in the senate of Ch. 29936, the law controlling in Polk county with respect to qualifying of candidates for county office was Ch. 27252; but at the time of passage of Ch. 29936 in the senate (June 2) and in the house (June 3) the mentioned 1951 act had

been repealed and the provision for county candidates in said county had theretofore been fixed by said Ch. 30233, 1955.

It is elementary that repeals by implication are not favored; that acts, if possible, should be construed in *pari materia*; and that such principles are particularly applicable in relation to statutes, passed at the same session. On the other hand, if there is irreconcilable conflict between two statutes, the more recent act must prevail; and the prior act may be repealed in part or in whole by implication by such a subsequent act. *Tamiami Trail Tours v. Lee*, Fla., 199 So. 313; *In re Wade*, Fla., 7 So. 2d 797. It is quite clear that from the standpoint of introduction, passage in house and senate, consideration by the governor, filing in office of secretary of state, and effective date, Ch. 30233 was the earlier act and Ch. 29936 the later one.

By reason of the foregoing, it appears that under Chs. 27252, 1951 and 30233, 1955, continuously from date of introduction of Ch. 29936, 1955 until its filing in the office of the secretary of state, there existed law requiring candidates for county offices in Polk county to qualify by noon Feb. 1, the deadline fixed by law existing at the effective dates of Ch. 27252 and Ch. 30233 for the qualifying by candidates for state office.

Hence, the question is answered as follows:

Chapter 30233, 1955, applicable in Polk county, fixed the deadline for qualifying of candidates for nomination for county office at noon, Feb. 1, the deadline then existing for qualifying for nomination to state office; and said chapter is within the meaning and intent of the above-quoted last sentence of amended §99.061(3), F. S. It follows that by virtue of said chapter and amended §99.061(1), (2) and (3), F. S., candidates for nomination to county offices in Polk county shall qualify, as required, at any time after noon of the 1st filing date which shall be the 77th day prior to the date of the 1st primary, but not later than noon of the 63rd day prior to the date of the 1st primary in the year in which any primary is held.

The mentioned population acts are assumed to be valid; and this opinion is conditioned upon such assumption.

In the cases of *State ex rel Vining v. Gray*, Fla., 17 So. 2d 228, and *State ex rel Taylor v. Gray*, Fla., 25 So. 2d 492, our supreme court has rather definitely indicated that candidates are charged with knowledge of the laws relating to qualifying for nomination to office, including the time prescribed by law for qualifying. This opinion is given with the cautionary warning that if a court in proper proceedings should hold adversely to the above conclusions, this opinion would not necessarily protect a candidate or candidates involved. Hence, should any public officer charged with duties in relation to elections or should any candidate be in doubt concerning this subject matter, he might desire the advice and protection of a judicial decree construing the involved statutes.

055-224—August 31, 1955

ELECTORS AND ELECTIONS

CANDIDATES—QUALIFYING DATES—INDIAN RIVER COUNTY—CH. 29158, 1953, §99.061, F. S.

To: *Douglas Baker, Clerk Circuit Court, Indian River County,
Vero Beach*

QUESTION:

In view of the provisions of Ch. 29158, 1953, and amended §99.061(1), (2) and (3), F. S., what are the filing dates for county candidates in Indian River county?

Chapter 29158 provided: "Candidates for nomination to a county office in Indian River county shall file their sworn statement and receipt for party assessment, if any has been levied, with and pay their filing fee to the clerk of the circuit court of Indian River county who shall receive same in his capacity as clerk of the board of county commissioners of said county not later than noon Feb. 1 of the year in which any primary is held." Said special act is assumed to be valid; and this opinion is conditioned on said assumption.

Section 99.061, F. S., was amended by §4 of Ch. 29936, 1955 (senate bill 1133), and, in absence of an expressed effective date, became effective on the 60th day subsequent to the adjournment on June 3, 1955, of the 1955 regular session of the legislature.

Amended §99.061(1) and (2) provide in effect that candidates for nomination for the offices of secretary of state, attorney general, state comptroller, state treasurer, state superintendent of public instruction, commissioner of agriculture, state senator, member of the house of representatives, supreme court judge, circuit judge, state attorney, representative to congress, U. S. senator, governor "and all other candidates for state offices" shall qualify, as required "at any time after noon of the 1st filing date, which shall be the 77th day prior to the 1st primary, but not later than noon of the 63rd day prior to the date of the 1st primary in the year in which any primary is held."

Amended §99.061(3) provides that candidates for nomination to a county office shall qualify, as required, "at any time after noon of the 1st filing date, which shall be the 63rd day prior to the 1st primary, but not later than noon of the 49th day prior to the date of the 1st primary in the year in which any primary is held. *Counties having the same filing dates for state and county candidates according to acts which so provide for such counties by population classification or local law shall continue to have the same filing date for all candidates as provided for candidates for state offices.*" (Emphasis supplied.)

Prior to the amendment in 1955 of §99.061, and as such section was effective at the adoption of Ch. 29158, certain state candidates were required to qualify by noon Feb. 1 of the year in

which any primary was held (former §99.061(1), and certain other state candidates were required to qualify by noon March 15 (§99.061(1)); while county candidates were required to qualify by noon March 15 (§99.061(3)). Despite these two dates representing the deadlines formerly provided for qualifying by candidates for nomination for different state offices, the italicized words quoted from amended §99.061(3) are construed as including within their meaning mentioned Ch. 29158, 1953.

In view of the foregoing, in my opinion the question is answered as follows:

Candidates for nomination for state offices, as specified in amended §99.061(1) and (2), shall qualify at any time after noon of the 77th day and not later than noon of the 63rd day prior to the date of the 1st primary. By reason of the wording and intent of the above italicized provisions of amended §99.061(3) and the provisions of Ch. 29158, 1953, candidates for nomination for county offices in Indian River county shall qualify during said period of time provided by §99.061(1) and (2) for nomination for state offices.

In the cases of *State ex rel Vining v. Gray*, Fla., 17 So. 2d 228, and *State ex rel Taylor v. Gray*, Fla., 25 So. 2d 492, our supreme court has rather definitely indicated that candidates are charged with knowledge of the laws relating to qualifying for nomination to office, including the time prescribed by law for qualifying. This opinion is given with the cautionary warning that if a court in proper proceedings should hold adversely to the above conclusions, this opinion would not necessarily protect a candidate or candidates involved. Hence, should any public officer charged with duties in relation to elections or should any candidate be in doubt concerning this subject matter, he might desire the advice and protection of a judicial decree construing the involved statutes.

055-225—August 31, 1955

INSURANCE

BUSINESS OF INSURANCE—ASSOCIATION OF PHYSICIANS TO CONTRACT TO FURNISH MEDICAL CARE—§§625.01, 642.09, F. S.

To: *William R. Neblett, State Senator, Key West*

QUESTION:

Would an unincorporated association composed of a number of physicians who contract with persons to furnish the latter medical services and medicine, as detailed below, be engaged in the business of insurance in Florida:

In a Florida community, 2 or 3 physicians (less than the full number of licensed physicians in the community), propose to form an association or society for the purpose of entering into contracts with individuals to provide the following: (1) Medical attention and consultation, either at a physician's office or home of the

patient; (2) limited surgical services; (3) medical laboratory facilities and tests; (4) medicines (this would not include the higher priced drugs, for which there would be additional but reasonable charges); (5) as consideration therefor, a fixed sum or consideration to be paid by the individual (and, if he has a family, including his family) by the week or month, such payments on contracts to be divided equally among the participating physicians after deduction of expenses.

Appleman, *Ins. Law & Prac.*, Vol. 1, §19, states: "Closely akin to policies of health and accident insurance are other medical and hospital plans. This has come to be of particular importance when talk of socialized medicine, public health service and the like have occupied much public attention. The question comes to the attention of the court particularly when associations offer physician's services" etc. A discussion of these plans by this authority is confined to the section mentioned; and it is frankly stated that "from the few decisions now on record pertinent to the matter" it is difficult to lay down fixed lines which the courts in the future are likely to follow. The discussions and decisions cited by this authority are not directly in point. Hence, we are driven to law relating to principles of insurance and statutory definitions.

Opinion 052-294 (1951-52 Biennial Report 651) held that an agreement sought to be issued by an organization to television set owners, whereby for stated consideration, it was provided that upon failure by ordinary use of a picture tube in such a set, same would be replaced or repaired, was a contract of insurance. Opinion 052-222 (1951-52 Biennial Report 680) dealt with an agreement issued by a cemetery company, wherein it was provided that on death of the purchaser before completion of payments, a named beneficiary would be furnished not only the cemetery lot and other items, but reimbursement of sums paid on said lot; and such agreement was held to be a contract of insurance. We consider that opinion 053-107 (1953-54 Biennial Report 628) in principle comes close to the situation here found; that opinion held that a plan which had for its purpose the furnishing, for stated considerations, to cardholding members, of sick and accident and hospitalization benefits by a corporate medical association, as described, constituted the business of insurance. Again, opinion 055-109 held that an "automobile warranty" against defect in any warranted parts (as per the agreement) not resulting *solely* from wear, was a contract of insurance.

These previous holdings involving the various mentioned hazards are illustrative of the proposition that the question is not particularly the nature of the risk but whether with respect to an insurable risk some one is indemnified upon the happening of a contingency. Our Court dealt with what constituted an insurance contract in *State v. DeWitt C. Jones Co., Fla.*, 147 So. 230, wherein the following definition of such a contract was quoted with approval from *Bouvier's Law Dictionary*: that an insurance contract was one "whereby for an agreed premium one party undertakes to compensate another for loss on a specified subject by

specified perils." It was held in said case that a "funeral service contract" calling for annual dues and assessments, was a sick and funeral insurance contract within the definition and meaning of regulatory statutes. Before considering the definition of "sick and funeral benefit insurance," certain other words appearing in said definition, are referred to.

Section 625.01(5), F. S., defines "insured" as "any person, firm, partnership, association, corporation or other organization or group, who obtain insurance, indemnity or surety from another who is called the insurer." Section 625.01(6), F. S., defines "insurer" as "any person, firm, partnership, association, corporation or other organization or group who issues, or enters into, contracts or policies of insurance, indemnity or surety with another who is called the insured." Now let us turn to the above definition of this type of insurance.

Section 625.01(8), F. S., defines "sick and funeral benefit insurance" as "any policy, contract or agreement whereby an insurer (i.e. any person, firm, partnership, *association*, corporation, or other organization or group) stipulates to provide for the insured (i.e. a person) *either medical attention, medicine, care during disability caused by sickness or injury, expenses of funeral in case of death or the money necessary for any of the aforesaid purposes in lieu of such services.*" A part of the definition of "insurer" appearing in §642.09, F. S., relating to accident and sickness insurance, is quoted: "The term 'insurer' as used herein shall be construed to include any person, firm, *association*, or other form of organization, including benevolent mutual benefit associations and fraternal societies, engaged in writing or issuing the type or kind of insurance contemplated by the foregoing provisions of this chapter"

In the Jones case the court differentiated between the business therein discussed and certain philanthropic and charitable organizations, such as employees' relief departments and organizations. For distinctive characteristics of such organizations, see Couch on Insurance, Vol. 1, §23; and also our opinions 053-49, dated March 5, 1953, and 054-48 (1953-54 Biennial Report 578, 579).

The plan here deals with an "association" or "society" entering into contracts with persons to furnish, for stated considerations, either "medical attention, medicine, care during disability caused by sickness or injury." It is obvious that the hazards involved are the subjects of insurance. Further, such a proposed contract would be subject to suit if breached.

In view of the foregoing, in my opinion the question is answered as follows:

While the question presents certain controversial aspects, we are constrained to adopt the position that the plan proposed herein as contemplated by the question, if put into operation, would constitute the business of insurance and be subject to relevant statutes relating thereto.

055-226—September 1, 1955

CLERK OF CIRCUIT COURT

FILING FEES—UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT PROCEEDINGS—CH. 88, F. S., §28.241(1), F. S.

To: *W. A. Wynne, Clerk of the Circuit Court, Sarasota County, Sarasota*

QUESTION:

Where proceedings are had under Ch. 29901, 1955, (Uniform Reciprocal Enforcement of Support Act) how is the clerk's filing fee to be paid under the following circumstances:

- (a) The state of Florida is the "initiating state" and the action is brought by it or an agency thereof?
- (b) The state of Florida is the "responding state" and the action is brought by a state other than Florida?
- (c) An insolvent plaintiff initiates the proceeding?
- (d) A solvent plaintiff initiates the proceeding?

The definitions found in §3 of said Ch. 29901, 1955, contain the following:

"(1) 'State' includes any state, territory or possession of the U. S. and the District of Columbia in which this or a substantially similar reciprocal law has been enacted.

"(2) 'Initiating state' means any state in which a proceeding pursuant to this or a substantially similar reciprocal law is commenced.

"(3) 'Responding state' means any state in which any proceeding pursuant to the proceeding in the initiating state is or may be commenced."

The action may be instituted by the state or a political subdivision (§9) or by an individual plaintiff.

Section 15 of the act relates to fees and costs in these proceedings and is quoted:

"Section 15. *Costs and fees.*—

"(a) Where the action is brought by or through the state, or an agency thereof, no clerk's fees shall be required of it, but if an order be entered under sub §(c) of this section requiring the defendant to pay the costs, *such order shall be deemed to include the clerk's fees for services rendered in an action brought by or through the state or an agency thereof.*

"(b) If the plaintiff files with the clerk of the court of this state an affidavit that he or she is insolvent and unable to pay the costs, charges or fees otherwise payable by law, accompanied and supported by a written certificate signed by a state or local public welfare official or em-

ployee of the initiating state or by the attorney who by the laws of the initiating state may be required to represent the plaintiff, or by the judge of the court of the initiating state, to the effect that he or she has made an investigation to ascertain the truth of the plaintiff's affidavit and that he believes the same to be true, and that he or she has investigated the plaintiff's claim and that he or she believes it to be meritorious, then, *upon the filing of such affidavit and certificate, regardless of whether this state is the initiating state or the responding state, the plaintiff shall be entitled to have performed in this state the necessary services of the clerk, sheriff, and court reporter in any proceedings under this act, including contempt proceedings, without cost to the plaintiff.*

"(c) If this state be the responding state and if the court enters an order requiring the defendant to furnish support or reimbursement therefor, the court may also by order or orders require that the defendant pay all costs, charges and fees in the proceedings incurred in this state, including costs, charges and fees incurred in contempt proceedings. *If no order requiring the payment of the costs by the defendant is made under this subsection, or if such an order is made and the court thereafter finds that compliance therewith cannot or should not be compelled, the court may in its discretion order that the costs, charges and fees, except clerk's fees incurred in an action brought by or through the state or an agency thereof, be paid by the county.*

"(d) If this state be the initiating state, and if the plaintiff files an insolvency affidavit and certificate as permitted by sub §(b) of this section, then the court may in its discretion order that the costs, charges and fees incurred in this state be paid by the county." (Emphasis supplied.)

As indicated above, there are four possible situations which may occur under this law, viz:

(1) Where the state of Florida or one of its agencies brings the proceeding in this state.

(2) Where another state as defined by act initiates the proceeding elsewhere than the state of Florida, and thereafter Florida is the "responding state".

(3) Where an insolvent plaintiff brings the proceeding and Florida is either the responding or initiating state.

(4) Where a solvent plaintiff institutes the proceeding.

When an action is brought by a state or an agency thereof, the statute is clear that no order can be made requiring the county to pay the clerk's fee in the event the same is not paid by defendant (sub §(c)). That construction must be given where

the intent of the statute is clear on its face (*Ervin v. Peninsular Tel. Co., Fla.*, 53 So. 2d 647).

However, in *all other cases*, regardless of whether Florida is the initiating or responding state, the court may, under circumstances where the plaintiff is shown to be insolvent within the meaning of the act and the defendant is not compelled to pay the clerk's costs, order the clerk's fee to be paid by the county (sub §§(c) and (d)).

Where a solvent plaintiff files the proceeding in this state which is either the initiating state or responding state, the clerk is entitled to demand the flat filing fee permitted by §28.241(1), F. S., or the appropriate fee allowed by special or population act, as the case may be.

055-227—September 2, 1955

PROFESSIONS AND VOCATIONS

PHYSICIANS—STATE BOARD OF MEDICAL EXAMINERS— PARTICIPATION IN COOPERATIVE PLAN FOR EVALUATION OF GRADUATES OF FOREIGN MEDICAL SCHOOLS—CH. 458, F. S.

To: *Homer L. Pearson, Secretary-Treasurer, State Board of
Medical Examiners, Miami*

QUESTION:

May the board of medical examiners of Florida participate in a plan or proposed program for the evaluation of graduates of foreign medical schools which has been submitted by the cooperating committee on graduates of foreign medical schools under date of June 28, 1955?

It is my understanding that the said committee represents the council on medical education and hospitals of the American Medical Ass'n, the trustees of the American Hospital Ass'n, the executive council of the Ass'n of American Medical colleges and the federation of state medical boards.

This office has reviewed the proposed program and we will not attempt to evaluate it or comment on its merits or demerits in any manner. My comments shall be strictly confined to the authority of the Florida state board of medical examiners to participate in or recognize such a plan for the evaluation of foreign medical schools and the graduates therefrom for the purpose of carrying out the provisions of Ch. 458, F. S.

Chapter 458, F. S., creates the state board of medical examiners and vests in the said board such powers relative to the protection of the public health and the control and regulation of the practice of medicine in the state as is prescribed and conferred upon it in said chapter.

Among the powers vested in the said board is the authority to pass upon the good standing and reputability of medical

schools or colleges whose graduates will be accepted for examination by the board. Section 458.05(2) provides:

"The board shall admit to examination any candidate who pays the fee provided for in this chapter and submits evidence verified by oath, satisfactory to the board, that such applicant:

"(a) Is more than 21 years of age and a citizen of the U. S.;

"(b) Is of good moral character;

"(c) Is a graduate of a medical school or college maintaining a standard and reputability approved by the board pursuant to §458.08, F. S."

Section 458.08 F. S., referred to in the preceding quoted section provides:

"(1) The board of medical examiners may pass upon the good standing and reputability of any medical school or college and determine those which maintain a standard of training sufficient to admit their graduates to the medical examinations given by the said board.

"(2) The said board may also pass upon the good standing and reputability of any hospital and determine those which maintain a standard of training sufficient to be recognized by the board when considering medical examinations given by the said board.

"(3) In determining the good standing and reputation of medical schools and colleges, and of hospitals, as aforesaid, the board may investigate and make a personal inspection thereof, or delegate to one or more of its members or any duly qualified person or persons, the power and authority to make such investigation for the board and report their conclusions to the board. The board may, if satisfied of the correctness of the same upon investigation, adopt inspections of medical schools and colleges and hospitals made by, or under the authority of, the American medical association or other nationwide groups."

Subsection(3) of §458.08, F. S., supra, appears to be broad enough to permit the board to accept the facilities of the American Medical Ass'n or other nationwide groups such as are included on the committee submitting the proposed program to assist the board in passing on the good standing and reputability of foreign medical schools and hospitals when considering the application of graduates of such schools for examination and license to practice medicine in Florida.

055-228—September 2, 1955

COURTS

COUNTY JUDGE'S COURT—AUTHORITY OF CLERK TO
TAKE AFFIDAVIT FOR WARRANT OF ARREST—§§36.04
AND 901.01, F. S.

To: J. E. Pridgeon, County Judge, Gulf County, Wewahitchka

QUESTION:

May the clerk of a county judge examine a complaining witness under oath and take the affidavit of such person to be used as the basis for a warrant for arrest of one against whom a complaint is made?

In opinion 049-112, dated March 21, 1949 (AGO 1949-1950, p. 597), I held that the chief clerk of a county judge is not empowered to sign warrants for arrest issued in criminal matters.

Section 36.04, F. S., as amended by Ch. 29922, 1955, reads:

"36.04 *Clerks.*—Every county judge shall have power to appoint a clerk of his court, and as many additional clerks of his court deemed necessary by the judge for the proper execution of the duties of that office, and the said clerk or clerks so appointed shall be paid by the said judge, and each may exercise all nonjudicial functions which the judge may perform, and shall serve as such clerk or clerks at the pleasure of the county judge making such appointment." (Emphasis supplied.)

The italicized language is to be given particular attention, inasmuch as it is the crux of the problem. The affidavit forms the basis for the issuance of a warrant for arrest of an accused. §901.01, F. S., provides that where a complaint is made to a magistrate "... he shall examine on oath the complainant and any witnesses he may produce." §901.02, F. S., provides that a warrant may issue "... if the magistrate, from the examination of the complainant and the other witnesses, if any, has reasonable ground to believe that any offense was committed within his jurisdiction and that the person against whom the complaint was made committed it; ..."

It will be seen from the above that the issuance of a warrant is not a ministerial act, but is, in its nature, judicial, for it requires examination, discretion and sound judgment to conclude that there is reasonable ground to believe an offense was committed. The affidavit forms an integral part of the criminal proceeding. I believe it to be a judicial act. In this connection, 4 Am. Jur., p. 12, §14 points out that the taking of an affidavit in a criminal proceeding imposes a duty of a judicial nature. The statute authorizes the clerk to perform only "nonjudicial functions".

Accordingly, the question is answered in the negative.

055-229—September 6, 1955

COUNTY ORGANIZATION AND OFFICERS

COUNTY COMMISSIONERS—POWERS—CONTRACTS—
VALIDITY—VOTING

To: G. W. Roberts, Clerk of Circuit Court, Columbia County,
Lake City

QUESTION:

May a valid county contract be awarded under the following circumstances? At a meeting of the board of county commissioners, with all members present, after consideration of bids received and upon motion to award the contract, 2 commissioners voted favorably and 3 refused to vote.

Probably the numerical weight of authority is that, where a quorum of a municipal governing body is present, a majority of the legal votes cast carry a proposition. See 37 Am. Jur., p. 673, Municipal Corporations, §61.

In 67 C. J. S., p. 874, Parliamentary Law, §5, Conduct of Business, d. Voting (2) Number of votes required, (a) In general, occurs the following:

"Members present declining to vote. Where a quorum is present, a proposition is carried by a majority of the votes cast, although some of the members present refuse to vote."

NOTE: The same statement occurs in 46 C. J., p. 1381.

In support of that proposition are cited Rushville Gas Co. v. Rushville, 23 N. E. 72, 121 Ind. 206, 16 Am. S. R. 388, 6 L.R.A. 315, and 46 C. J., p. 1381, note 96.

Note 96, p. 1381 of 46 C. J. cites U. S. v. Ballin, 144 U. S. 1, 12 S. Ct. 507, 36 L. Ed. 321; Launtz v. People, 113 Ill. 137; Attorney General v. Shepard, 62 N. H. 383; State v. Green, 37 Ohio St. 222; State v. Parker, 32 N. J. L. 341, and others.

Study of the cases cited indicates that the quoted statement may be too broad.

For instance, in the Rushville Gas Company case, *supra*, 3 of the 6 members of a city council voted in favor of a resolution. Three other members, although present, declined to vote. It was held that the resolution was adopted; that the rule is that if a quorum is present and a majority of the quorum vote in favor of a measure it will prevail, *although an equal number should refrain from voting*.

In U. S. v. Ballin, *supra*, the question pertinent here was whether the Act of May 6, 1890, was legally passed. The argument was that it had not received a majority of the votes of the house. The court said:

"The facts, then, as appearing from this journal, are that at the time of the roll-call there were present 212

members of the House, more than a quorum; and that 138 voted in favor of the bill, *which was a majority of those present.*" (Italics added.)

The court held the bill legally passed.

In *Launtz v. People*, supra, the city council was composed of the mayor and 8 aldermen, all of whom were present when the roll was called for confirmation of a nomination. Four aldermen voted for confirmation and the others refused to vote. The mayor, who presided, was entitled to vote in case of a tie only, and he treated the refusals to vote as negative votes, and cast his own for confirmation. It was held that treating the refusals as negative votes was giving them the greatest effect possible; that the mayor was entitled to vote as in case of a tie, and that the resolution was duly carried.

In *Attorney General v. Shepard*, supra,

"There were 7 aldermen. 4 were a quorum. 6 were present. 3 voted for adoption of the amendment, and the refusal of the other 3 was inoperative. In the absence of express regulation, a proposition is carried in a town meeting or other legislative assembly, by a majority of the votes cast.—The statute requiring the presence of 4 aldermen does not mean that in the presence of 4 a majority of the votes cast may not be enough."

In *State v. Green*, 37 Ohio St. 227, supra, the city council consisted of 18 members duly qualified, all of whom, with the mayor were legally assembled, proceeded to organize. The mayor acted as president. A motion was made to elect S clerk. An objection made to election by motion was overruled by the mayor. 9 members protested against his ruling. On a roll call on the motion to elect S, the 9 protesting members refused to vote, and the vote as taken stood 9 yeas and no nays. One of the non-voting members objected on the ground that no quorum voted, but the objection was overruled, and S declared elected. The 9 members not voting protested. It was held that, as there was only one nomination, it was competent to elect by motion; that the members present could not, by refusal to vote, defeat the election or divest the body of its power to act.

In *State v. Parker*, supra, of the 6 members present 3 voted in favor of a motion, 2 voted against it, and 1 refused to vote. It was held that the motion was carried.

From the foregoing analysis, it is clear that, in the case of *U.S. v. Ballin*, the Act of May 6, 1890, was passed by the affirmative vote of a majority of the members present, and that in none of the other cases was the proportion of abstentions greater than $\frac{1}{2}$ of the number of members present. In no case did a majority of those present refuse to vote.

Beginning at p. 851 of 2 Dillon, *Municipal Corporations*, 5th edition, §527, this situation is discussed, the opening statement of which is:

"Minorities of councils and other deliberative bodies sometimes resort to *obstructive tactics to defeat measures* which

they have reason to believe a majority favor. One of such methods is *by a refusal to vote*, by reason whereof a measure may be deprived of a majority of the council present. But the courts have steadfastly adhered to the rule that when members are present at a meeting, a mere refusal to vote on the part of some of the members cannot defeat the action of the majority of those actually voting. . . ." (Emphasis in the text.)

It is to be noted that Judge Dillon is there referring to refusal of minorities to vote.

In the instant situation all members of the board were present and a majority refused to vote.

A Florida case bearing on this question as it relates to elections by municipal councils is *State v. Marshall*, 135 Fla. 214, 184 So. 870, Rehearing denied, 185 So. 428. There, the relator had been appointed city attorney by the city commission, subject to approval by the affirmative vote of $\frac{2}{3}$ of the members of the city council, consisting of 23 members. The vote in the council was 14 for approval, 7 against, with two abstentions. It was held that his appointment was approved. In the opinion, the court said:

"The weight of authority in the country appears to support the common law rule as enunciated by Lord Mansfield in *Oldknow v. Wainwright*, 2 Burr. 1017, (English Reports, Full Print, Vol. 97, p. 683) to the effect that whenever electors are present and do not vote at all, they virtually acquiesce in the election made by those who do. The common law of England is in force in Florida . . ."

Oldknow v. Wainwright, supra, was a feigned action under a rule by consent to try the right of election to the office of town-clerk of Nottingham. The election was by the mayor, aldermen and common council, the entire number of electors being 25; 21 assembled, one candidate was named; 9 voted for the candidate, but 12 did not vote at all. Lord Mansfield said, "Whenever electors are present and do not vote at all (as they have done here) they virtually acquiesce in the election made by those who do."

The rule as stated by Lord Mansfield applies to elections. *State v. Marshall*, supra, makes it clear that Florida follows that rule in regard to elections.

No case has been found concerning the validity of a contract where a majority of those present refused to vote.

Two other Florida cases that shed light on the attitude our supreme court might assume if and when confronted with your precise question have been found.

In *Williamson v. State*, 112 Fla. 840, 151 So. 51, the court said:

"Section 17 of Ch. 5368, Acts of 1903 (the charter of White Springs), provides for a city council of 6 members elected for a term of 2 years. The proposition of

law sought to be presented by this writ of error is whether or not a town council, consisting of 6 members, can change the status quo of any matter or thing within the council's jurisdiction, except by a majority vote of its members, or, in other words, whether an act of the council, concurred in by only 3 of its total of 6 members, can be given effect as a lawful act of the council, although declared by the president of the council to have been carried by reason of the failure by a tie vote to reject a committee report which, if adopted, would amount to the council's affirmative act.

"Our conclusion is that the real question in issue in the council's proceedings was the ultimate discontinuance of a street light which has once been lawfully established by the council's affirmative act. . . .

"Our further conclusion is that the vote of 3 members of the total of 6 members of the city council of White Springs in favor of leaving the status quo of the street light undisturbed left the matter voted on a matter of unfinished business before the city council, which the court below properly required to be reinstated as such by its pre-emptory writ of mandamus . . ."

In *Kirkland v. State*, 86 Fla. 64, 97 So. 502, the court, at p. 508, said:

" . . . The people, for whom the county commission as a board are vested with the power to manage and control the property of the county, have the right to the combined information, experience, and judgment of all the members of the board, or a majority of them, in legal session, *when a majority of them*, and at no other time, can act with any binding effect on the county. . ."
(Emphasis added.)

While it is impossible to predict with certainty what our supreme court would decide in a proper case presenting the precise situation posed in your question, it is my opinion, until there is such a decision, that, with 5 members of a board of county commissioners present, action to bind the county by contract can not be taken by a vote of less than a majority of those present.

055-230—September 8, 1955

REGULATION OF TRADE, COMMERCE AND INVESTMENTS

MILK COMMISSION—POWERS—PRICE FIXING OF MILK— §§501.01, 501.04 AND 501.13, F. S.

To: *LeRoy Collins, Governor, State of Florida, Tallahassee*

QUESTION:

May the milk commission, after proper hearing and investigation, find that the fixing of minimum and maximum retail prices of milk in the state is unnecessary?

The milk commission of Florida is created by Ch. 501, F. S. Section 501.01, F. S., is a rather extensive and comprehensive declaration of legislative findings and policy in connection with the regulation of the milk industry. Section 501.04, F. S., is a grant of power to the milk commission as an instrumentality of the state and the commission is thereby given *permissive* authority to regulate the milk industry, including the fixing of prices at which the commodity is to be sold. See *Milk Commission v. Dade County Dairies*, 145 Fla. 579, 200 So. 83.

The provisions of §501.13 appear to be *mandatory* in the matter of the price fixing powers of the commission and, accordingly, are thereby at variance with the provisions of §501.04, which are *permissive*. But, it is to be noted that §501.04 (11) provides:

"(11) The operation and effect of any provision of this chapter conferring a general power upon the commission shall not be impaired or qualified by the granting to the commission by this chapter of a specific power or powers."

The present attitude of the supreme court of Florida towards price fixing statutes is found in the recent fair trade cases, and particularly *Liquor Store, Inc. v. Continental Distilling Corporation*, Fla., 40 So. 2d 371 and *Seagram-Distillers Corp. v. Ben Greene, Inc.*, Fla., 54 So. 2d 235. The opinion of the court in the earlier case, delivered by Chief Justice Adams, points out that such a statute "... cannot be the means of leveling unequal fortunes, neither can it favor one segment of the people at the expense of another." He further points out that all the decisions of the court recognize as basic that for such a statute to be upheld "... there must be some resemblance of a public necessity for the act and it must have some relation to the public health, morals or safety." The chief justice further stated that it is contemplated the prices fixed "... must have some regard to reason besides having a public concern."

In the later case of *Seagram-Distillers Corp. v. Ben Greene, Inc.*, *supra*, the court held that while the general rule is that findings made by the legislature are presumed to be correct, it is well recognized that such findings must actually be findings of *fact* and they are not entitled to the presumption of correctness if nothing more than recitations amounting only to conclusions. Further, they are always subject to judicial inquiry and the presumption of correctness does not follow if the finding is "obviously contrary to proven and firmly established truths of which courts may take judicial notice."

It should be noted that even the exercise of the *mandatory* provisions found in §501.13, F. S., is predicated upon investigation and proof of an emergency. In other words, the commission must, in fact, find that an emergency exists. Again, we point out that the provisions of §501.04, F. S., grant only *permissive* powers to the commission.

All considered, I feel that there is sufficient authority and power in the commission to now determine upon proper hearing

and investigation whether an emergency within the contemplation of the act does or does not exist and whether it is necessary in the interest of the public health and welfare and for the protection of the milk industry for it to exercise its price fixing powers in the retail field.

In other words, we believe a proper construction of the milk control act in the light of the decisions of our supreme court places in the milk commission the discretionary power to determine upon proper hearing and investigation whether there exists public necessity at the present time for retail price fixing of milk in the state.

The question is answered in the affirmative.

055-231—September 8, 1955

TAXATION

RETAIL GASOLINE DEALERS—GASOLINE TAX REFUND—
INVOICES ATTACHED TO APPLICATIONS—§§208.181-
208.186, F. S. (CH. 29699, 1955)

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. May carbon copies of invoices, prepared simultaneously with the original, be treated as originals and accepted under Sec. 3, Ch. 29699, 1955?
2. Will it be permissible under the above cited chapter to punch the invoice submitted in a manner that will prevent its being submitted again and then return said invoice to the applicant at the time refund is made?

It appears from the request for opinion that the state comptroller has ruled that original invoices must be attached to applications for gasoline tax refunds, filed pursuant to Ch. 29699, 1955, §3 of which act provides that "invoices for each refund of gasoline made during the period for which refund is claimed shall be attached to said application." We have examined the file handed us with the request for opinion, which includes letters of explanation and copies of invoices used by most of the gasoline and oil distributors doing business in this state. From these copies it appears that the the distributors usually make out sales tickets in triplicate, quadruplicate, or other multiple number of copies, using carbons to duplicate whatever may be written on the 1st copy with pen or pencil. The entries on the 2nd and subsequent copies are identical with that on the 1st copy, except they are made from a carbon instead of with a pencil or pen. It also appears that the purchaser receipts for the goods on each of the several duplicate copies by writing his name with pen or pencil on the 1st page, which name is duplicated on subsequent pages by use of the carbons. Where payment is made, receipt is likewise signed by the driver or person making delivery. In other words, the 1st copy, as well as subsequent copies, are identical even to the signatures above mentioned, except the 1st page is written with pen or pencil and

subsequent pages are duplicated by use of carbons. In some instances, either the original or one of the copies is marked and indicated as the customer's copy, although this is not done in all cases. The customer's copy is the pen or pencil copy in some instances; in other instances, it is one of the carbon duplicates. "Where several copies of a writing are made at the same time by the same mechanical operation, each is regarded as an original and is admissible as such, without the necessity of accounting for the original, The most usual application of this rule is found in the case of carbon copies, which are usually admitted as duplicate originals, although carbon copies have been held not to be duplicate originals, but the rule is also applicable to impression copies, printing press copies, and to copies made with manifold paper. A distinction has been drawn with respect to instruments requiring signatures, such as contracts, it being considered that where several carbon copies are made all the copies are originals until signed, and when one is signed the other become copies with the signatures missing. Such unsigned copies are inadmissible in the absence of proof that the original is not obtainable" (32 C.J.S. 749, §821.)

Attention is directed to the opinion of the court in *Lockwood v. L. & L. Freight Lines, Inc.*, 126 Fla. 474, 171 So. 236, with special reference to the following language: "Where a writer desiring to preserve a copy of a letter writes at the same time 2 copies exactly alike, one a primary typewritten copy, and one a carbon copy, made simultaneously with the primary copy, through the same writing action of the typewriter, *it is a matter of indifference, so far as the law of the evidence is concerned, which copy is signed and forwarded to the addressee and which is kept by the sender.* The one sent becomes the original and the one kept is a mere copy, no matter by what force of evidence it is shown to be an absolutely accurate copy. *McDonald v. Hanks*, 52 Tex. Civ. App. 140, 113 S. W. 604." (Emphasis supplied.)

In the light of the above authorities we are of the opinion that each of the copies of the invoices are duplicate originals, one of which is intended for the customer, and others intended for other specific purposes. The mere fact that one of the instruments may have been written with a pencil and the others reproduced by carbons is immaterial, as each of them bears the signatures of the purchaser and driver. It has been held that where a carbon copy of a letter is signed instead of the ribbon copy, that the carbon is the original and the ribbon one a copy.

The above observation and authorities answer the 1st question in the affirmative.

We see no reason why the state comptroller, when auditing applications for refund, may not stamp or punch the invoices in such a way as to indicate their use for purposes of refund under Ch. 29699, 1955, so long as the same are not rendered illegible or unfit for use as records of the purchaser. We see no reason why the comptroller might not use a punch similar to that used by banks in indicating payment of checks by the bank. This answers the 2nd question in the affirmative.

055-232—September 8, 1955

LEGISLATURE

MEMBERS—PER DIEM AND TRAVEL EXPENSE DURING
ADJOURNMENT—§13, ART. III, STATE CONST.,
§11.13 AND 112.061, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

When the state legislature, or either house thereof, has adjourned, pursuant to §13, Art. III, State Const., for a period of time in excess of 3 days, are the members of such legislature or house entitled to per diem and travel expenses during such adjournment?

Although your said request for opinion poses 3 questions relative to per diem and travel expenses during the current recess of the legislature (the legislature having recessed under said §13, Art. III, State Const., from Aug. 10, 1955 to September 26, 1955), we feel that a discussion of the above stated question will substantially answer each of the questions posed by you.

Per diem and travel expenses of the members of the legislature arise pursuant to §4, Art. III, State Const., as amended by the 1954 general election, which provides that "the compensation of legislators shall be \$1200 each year, and shall be paid in monthly installments of \$100 each. *During the time the legislature is in session each legislator shall receive per diem and travel expenses as provided by law, but such may not exceed the allowances for such expenses provided for other state officers under general law.*" This constitutional provision authorizes the legislature to provide by law for the per diem and travel expenses of its members; provided, however, such per diem and travel expenses may not exceed the per diem and travel expenses provided by general law for other state officers. This last mentioned limitation is constitutional and must be complied with when the legislature makes provision for the per diem and travel expenses of its members.

Subsistence per diem and travel expenses of members of the legislature is provided by §11.13, F. S., as amended by §2, Ch. 29627, 1955, which section as amended provides, in so far as here material, that "during the time the legislature is in session, each legislator shall be paid for subsistence the per diem and mileage provided for the governor and members of the state cabinet under general law," with certain limitation upon the said mileage which may be paid to each member. During special or extraordinary sessions the said mileage must be "approved by the president of the senate and the speaker of the house." Both the constitution and statutory provisions above mentioned limit the payments to members of the legislature for per diem and mileage to that paid state cabinet officers and the governor; that is, to the per diem and travel expenses provided by §112.061, F. S., as amended by §1, Ch. 29628, 1955. In order to determine the meaning and intent of said §112.061, F. S., as amended, we must read said section as a whole and in connec-

tion with prior statutes and laws upon the same subject matter, and when so read and considered we are led to the conclusion that the subsistence per diem and travel allowances provided by the said section is and was never intended as additional compensation to the state officers and employees within its purview, but is and always has been intended to reimburse such officers and employees their expenses incurred when traveling on state business away from their official residence or place of business. Section 112.06, F. S., and prior statutes and laws were designed to provide for the reimbursement of the actual expenses, not to exceed the amounts mentioned in the statutes. Present statutes provide for a stipulated per diem and mileage for such officers and employees, when away from their official residences or places of business, not as additional compensation but as a reimbursement of expenses incurred by such officer or employee. However, when a state officer or employee travels by the use of transportation requests (see sub §(1)), §112.061, F. S., he travels at state expense and not at his own expense and no travel expense may be paid him. Under present statutes when it is made to appear that per diem expenses and mileage expenses have been incurred by a state officer or employee the amounts provided by statute is allowed, without proof of the actual expenses incurred, unless controlled by a specific statute providing otherwise. No state officer or employee may be paid per diem and travel expenses while remaining at his official residence or place of business, and no travel expenses may be allowed a state officer or employee when no such expenses have been incurred by him. Where several state officers or employees travel on official business in a single motor vehicle only the owner of such motor vehicle may receive mileage; in other words, when 5 state officers or employees travel in a single motor vehicle only one of such persons may be paid mileage, not all 5 of them.

The above observations lead to the conclusion that the per diem and travel expenses provided for members of the legislature by §4, Art. III, State Const., and §11.13, F. S., as amended, when read in the light of §112.061, F. S., and prior statutes and laws, is designed to reimburse such members of the additional expenses incurred by them while serving as members of the Florida legislature; such per diem and mileage were never intended, either by the constitution or the statutes, as additional compensation to the \$1200 per annum provided by §4, Art. III, State Constitution. When members of the legislature are away from their residences and places of business in attendance at a session of the legislature it may well be presumed that they are put to additional expenses while in such attendance away from their places of residence and places of business. They also incur additional expenses when traveling to and from the seat of government where the legislative sessions are held. The journals of the legislature reveal when members are in such attendance and when excused from attendance. These observations lead us to the presumption that when the legislature is in extended recess or adjournment, pursuant to §13, Art. III, State Const., that members are not away from their places of residence and places of business on legislative business and that they are incurring no per diem and travel expenses, except when returning home

from such extended adjournment and returning to the capitol at the end of such adjournment for the purposes of reconvening pursuant to the order of adjournment. This presumption may be overcome only by clear and convincing evidence that notwithstanding such extended adjournment the member has incurred per diem and travel expenses by reason of the legislative session although in such extended adjournment. Any per diem and travel expense paid to a member when no per diem and travel expenses have been incurred would be an illegal payment. Any committee member or officer of the legislature charged with the duty of approving requisitions for the payment of per diem and travel expenses should not approve same unless and until satisfied that such per diem and travel expenses are proper; and in this connection we feel that the state comptroller will be justified in accepting such approval as a certificate that such payments are proper and due.

Any member of the legislature in regular attendance at its sessions, including recesses for not more than 3 days (see §13, Art. III, State Const.), making application for the payment of per diem allowed by §11.13, F. S., may be presumed to have incurred such per diem without further proof; however, this presumption does not extend to extended adjournments pursuant to said §13, Art. III, State Const., and before such per diem may be paid actual proof of the member having incurred such expenses must be furnished to the committee members or officers of the legislature before his requisition for such payment may be approved. Travel expenses may be paid only to reimburse the member for expenses actually incurred, although proof of the use of one's own motor vehicle would seem to entitle him to the mileage provided by law.

The above question should be answered in the negative unless and until actual proof of per diem and travel expenses have been submitted to the committee members or officers of the legislature approving requisitions for such payment sufficient to convince them that such payments have been legally incurred. It should be presumed that during such extended adjournment no such per diem and travel expenses will be incurred, in the absence of convincing proof.

As your questions related to waiver of per diem and travel expenses during an extended adjournment of the legislature, pursuant to §13, Art. III, State Const., we do not think that such questions are material unless and until it is shown that such per diem and travel expenses have been incurred and are due and payable in the light of the above opinion.

055-233—September 8, 1955

(See amendatory opinion 055-287.)

TAXATION

EXCISE TAX ON DOCUMENTS—EXEMPTIONS—WHOLE-SALE WAREHOUSE MORTGAGE AGREEMENT— §201.21, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

What is an "agreement commonly known as a wholesale warehouse mortgage agreement" within the purview of §201.21, F. S.?

Said §201.21, F. S., was added by §1, Ch. 29981, 1955. This section of the statute provides tax exemption from certain written obligations "when the maker thereof shall pledge or deposit with the payee or holder thereof, *pursuant to any agreement commonly known as a wholesale warehouse mortgage agreement*, as collateral security for the payment thereof, any collateral obligation or obligations" The above italicized language was not a part of the bill as originally introduced into the legislature, but was added as a floor amendment. When the bill was introduced it seems that an "explanation of the proposed act" was furnished the legislature, which contained the following:

"After closing the permanent mortgage, there is a delay of up to several months before the mortgage papers (including title insurance policy, etc.) can be actually delivered to the institutional investor and before the latter can accordingly forward its \$10,000 pursuant to its original commitment. During this shortened interim period, the mortgage papers are warehoused (that is, assigned to and deposited) with a Florida bank under an arrangement where the bank advances to the Florida mortgage company the amount of the mortgage, that is, the \$10,000; at the end of the interim period the mortgage papers are delivered out of the bank to the institutional investor against disbursement by the latter of the \$10,000 on its commitment, thereby completing the original integrated mortgage borrowing transaction by the Florida resident."

In connection with the question of what is a "wholesale warehouse mortgage agreement," we have sought the assistance of officers and agents of the Federal Reserve Bank of Atlanta and of several of the banks and bankers in Florida, from which it is made to appear that it is common practice for loan brokers or agents, insurance companies and mortgage companies to enter into agreements with commercial banks, designed to obtain a given amount of credit upon the security of their mortgages and liens, under which agreements such mortgages and liens are either sold to the bank, with the right in the bank to sell them back after a stipulated time, or they are simply pledged or pawned, for the purpose of securing advances made by the bank. The credit extended by the bank may be for a few days or it may be for several months, the exact time often depending upon the time necessary to complete a mortgage or lien file and make delivery of the mortgage or lien to the ultimate purchaser. In instances it is the practice for warehoused mortgages or liens to remain in the interim financing state until sizable blocks of them have been accumulated, after which delivery to the ultimate purchaser is made. The use of the term "wholesale" indicates the use of several mortgages or liens as collateral and not a single mortgage or lien, although such mortgages and liens may be pledged one at a time. The term contemplates an agreement

anticipating the pledging of numerous mortgages or liens and not merely one. The term "wholesale warehousing of mortgages" does not seem to apply to the pledging of a single mortgage or lien as a single transaction, but to mortgages or liens in wholesale lots, although one mortgage or lien may be pledged as a part of a multiple transaction. The term "warehousing" seems to carry with it the idea of pledging, pawning or warehousing of mortgages and liens for purposes of security for loans made by the bank, such loans usually being temporary in nature. Such practices usually are confined to those engaged in originating loans designed for sale to permanent investors. Such financing is designed to restore working capital to mortgage brokers, builders and others similarly engaged, and permits them to operate during the time necessary to assemble permanent documents supporting the loan in complete form so they may be shipped or delivered to the permanent investor.

The exemption provided by said §201.21, F. S., is to the note and mortgage executed by the mortgage broker, builder or other person warehousing the mortgages or liens in wholesale quantities as aforesaid, and does not exempt from taxation the notes, mortgages and liens so pledged, pawned or warehoused. We find nothing in said §201.21 limiting the exemption to those cases wherein real estate mortgages or liens are pledged, pawned or warehoused, and finding nothing in the said statute preventing its application to the wholesale pledging of mortgages or liens encumbering personal property, we deem such mortgages and liens are included. Obligations for the payment of money, to be used as collateral security under the provisions of said section, must be "secured by mortgage, deed of trust or other lien upon real or personal property," unsecured notes, bonds or other written obligations to pay money are not within the purview of the said section.

Where the note, bond or other written obligation to pay money is "secured by mortgage, deed of trust or other lien on real or personal property" there is no doubt but that it is within the said statute; however, where a purchase of personal property is upon conditional sale, sometimes referred to as a retention of title agreement, we are confronted with the question of whether such an agreement is a lien within the purview of said §201.21, F. S. "Although a mortgage and a conditional sale are, in important respects, governed by the same principles, and the relationship between the parties, under the two forms of contract, are in many respects similar, there is a difference between a conditional sale and a mortgage which cannot be ignored by the courts." (14 C.J.S. 588, §7). The usual remedies of a seller under a conditional sales contract is to recover the possession of the property, including an action in replevin, or by an action at law to recover the unpaid purchase price (78 C.J.S. 344, §597) and in some states the conditional sales contract may be foreclosed in the nature of a lien (78 C.J.S. 403, §614; *Malone v. Meres*, 91 Fla. 709, 109 So. 677, text 694). Under §697.01, F. S., "all conveyances, obligations conditioned or defeasible, bills of sale or other instruments of writing conveying or selling property, either real or personal, for the purpose or with the intention of securing the payment of money . . . shall be deemed

and held mortgages . . . ,” under which the seller may elect to treat the retained title as a mortgage securing the purchase price (*Malone v. Meres*, *supra*) and foreclose the same; however, after obtaining the possession of the property by replevin the seller may not treat the retained title contract as a mortgage. We are inclined to the view that the seller has the election of treating the conditional sales agreement as a mortgage under said §697.01, but until he so elects the instrument is not to be considered as a mortgage.

We feel that the above observations furnish a formula from which the above question may be answered when the facts and circumstances of each particular case are considered; however, we doubt that a general answer may be formulated applicable in all cases. With regard to the questions posed by Ward and Ward, in their letter to you under date of July 22, 1955, which was handed us with the request for opinion, we feel that the questions designated as (a) and (b) are within the statute, when the mortgages are in wholesale quantities; however, we doubt that question numbered (c) should be so answered unless the mortgagee elects to treat the conditional sales contract as a mortgage under §697.01, F. S. Our answer to said question (c) is tentative upon the facts before us.

055-236—September 9, 1955

REAL PROPERTY

RECORD OF CONVEYANCES—INSTRUMENT GRANTING EASEMENT—POST OFFICE ADDRESS OF GRANTEE— §§695.21, 695.22, F. S.

To: *Hiram Faver, Clerk of the Circuit Court, St. Johns County,
St. Augustine*

QUESTION:

Where an instrument grants an easement for roads, drainage, etc., does such instrument come within the purview of §695.21, F. S., so as to require the post office address of the grantee to appear therein and the furnishing of a schedule to the tax collector pursuant to §695.22, F. S.?

Section 695.21, F. S., reads:

“695.21 *Instruments relating to real estate to contain post office address of grantee; exceptions.*—After October 1, 1945, it shall be the duty of the several clerks of the circuit courts to ascertain of all persons presenting for public record any instrument other than mortgages conveying or purporting to convey any interest in real estate the correct post office address of the grantee or grantees named in such instrument, and it shall be the duty of the person presenting such instrument for recordation to furnish such information to said official.” (Laws of 1945, Ch. 23114, §1).

In addition, §695.22, F. S., requires the clerk to keep and fur-

nish a daily schedule of such deeds and conveyances filed for recordation to the tax assessor.

The question actually turns upon whether or not an instrument granting an easement is one "... conveying or purporting to convey any interest in real estate ..." The supreme court of Florida is definitely committed to the principle that an easement is an interest in land which can be created by express grant, by implication or by prescription. See *Burdine v. Sewell*, 92 Fla. 375, 109 So. 648; *J. C. Vereen & Sons v. Houser*, 123 Fla. 641, 167 So. 45 and *Winthrop v. Wadsworth*, Fla., 42 So. 2d 541. We are here, of course, concerned only with easements created by express grant. Since an easement is an interest in land, the instrument creating it is an instrument "conveying or purporting to convey ..." an interest in real estate within the meaning of §695.21, F. S.

The question is answered in the affirmative.

055-238—September 20, 1955

TAXATION

DOCUMENTARY STAMP TAXES—SHARES OF STOCK BEQUEATHED BY WILL—§§201.04, 731.05, 731.21, 732.26, 733.01, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where, by last will and testament, a decedent bequeaths to a named beneficiary shares of corporate stock owned by him, is such transfer of corporate stock subject to documentary taxes under and pursuant to §201.04, F. S.?

Under said §201.04, F. S., documentary stamp taxes are levied and assessed "on all sales, agreements to sell, or memoranda of sales or deliveries of, *transfers of legal title to shares*, or certificates of stock . . . whether made upon or shown by the books of the corporation, or by any assignment in blank, or by delivery, or by any paper, agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock interests rights or not, *on each \$100 of face value or fraction thereof the tax shall be 10¢*; and where such shares are without par or face value, *the tax shall be 10¢ on the transfer of or sale or agreement to sell on each share. . .*" This section must be distinguished from §201.02, F. S., where the tax is placed upon "each \$100 of the consideration therefor" and not upon the value of the property sold (*Culbreath v. Reid*, Fla., 65 So. 2d 556). Under said §201.04, the tax is based upon the face value of the corporate stock, when it has a par or face value, and upon the number of shares of no par stock with certain additions when the no par stock is valued in excess of \$100 per share. The consideration paid for par value stock is immaterial, as the tax is based upon its face value, and with no par stock the tax is 10¢ per share, except where valued in excess of \$100 per share.

Chapter 201, F. S., was first enacted as Ch. 15787, 1931, and was patterned on, and largely derived from, Title 26, §§901, et seq., U. S. Code (now appearing as Title 26, §§4321-4362, U. S. Code) so that due consideration should be given to the construction placed upon the federal statutes when construing the Florida Statutes (State v. Cook, 108 Fla. 157, 146 So. 223). Under current federal tax regulations (and evidently under prior regulations) transfers of shares of corporate stock by operation of law "from a decedent to the administrator or executor of the estate" has been deemed not to be subject to documentary stamp taxes (Regulation 113.34) while the transfer of such stock from "an administrator or executor to a distributee or legatee" has been held subject to documentary stamp taxes (Regulation 113.33). It is indicated by the authorities (see Welch, Collector v. Kerckoff, CCA 9th, 84 Fed. 2d 295, 106 A. L. R. 143; and the Annotation in 106 A. L. R. 1442-3) that the transfer of shares of corporate stock, pursuant to a last will and testament, to the devisee, is subject to taxation under the federal statutes. The opinions of the attorney general of this state (1931-2 Reports 1053, and 1935-6 Reports 26) are not contrary to this position.

The probate statutes of this state (see §§731.05, 731.21 and 732.26, F. S.,) indicate that a will, properly probated according to law, *transmits* the property therein devised or bequeathed to the devisee, although the personal representative is by statute (§733.01, F. S.,) entitled to the possession of such property (for the purpose of paying the debts of the estate and expenses of probate) during the pendency of the administration (§733.01, F. S.). In Redfern's work on "Wills and Administration of Estates in Florida, Second Edition," p. 148, §104, the author states that a "will breaks the descent of property from the testator to his next of kin. It may be considered, therefore, as a conveyance; yet, before it becomes evidence of a conveyance, it must be proven and probated after the death of the testator" in the manner provided by law. "As stated by modern authority, a will is in the nature of a conveyance by way of appointment, and a devisee takes by purchase and not by descent" (57 Am. Jur. 43, §4). A will has been said to be in the nature of a conveyance (Bell v. Couch, 132 N. C. 346, 43 S. E. 911, text 912; Canada v. Ihmsen, 33 Wyo. 439, 240 P. 927) or a muniment of title (Hanley v. Kraficzky, 119 Wis. 352, 96 N. W. 820, text 821).

The above observations and authorities indicate that real and personal property pass under a last will and testament duly probated in the nature of a conveyance or a muniment of title and not by operation of law as in descent and distribution. The above question is answered in the affirmative. The tax imposed by §201.04, F. S., is based upon the par value of the corporate stock, or the number of shares of no par value stock with an additional tax where the actual value of no par value stock is in excess of \$100 per share. The taxes imposed by this section are to be distinguished from the taxes imposed by §201.02, F. S., which is based upon the consideration paid for real property or an interest therein, without regard to its actual value.

055-239—September 20, 1955

CITIES AND TOWNS

ELECTIONS—MUNICIPAL CHARTER AND AMENDMENTS —NOTICE BY PUBLICATION—§166.11, F. S.

To: *John L. Graham, Attorney, City of Ormond Beach, DeLand*

QUESTION:

Where a municipal charter, or amendments thereto, are proposed to be submitted in a charter election under Ch. 166, F. S., does §166.11, F. S., which requires such proposed charter or amendments thereto be published "... for 4 successive weeks next preceding said election, the 1st publication thereof to be not less than 25 days prior thereto ...", contemplate 5 publications thereof?

If we consider the language "once each week for 4 successive weeks next preceding said election" standing alone, several cases in Florida are to be considered. In *Myakka Co. v. Edwards*, 68 Fla. 372, 67 So. 217 the court had before it a constructive service statute requiring publication once a week for 4 consecutive weeks, which it construed in connection with the order of publication requiring appearance not less than 30 nor more than 50 days from the time of the making of the order. The court held that the statute was not complied with "... when the publication is made once in each week, where the beginning of the publication period or the 1st publication is less than 4 weeks or 28 days from the appearance day ...". In *Guaranty Trust & Safe Deposit Co. v. Buddington*, 27 Fla. 215, 9 So. 246 the court construed the term "months", used in an act providing for publication, to mean calendar months.

Finally, a federal case from Florida, *Guaranty Trust & Safety Deposit Co. v. Green Cove Springs & Melrose R. Co.*, 11 S. Ct. 512, 139 U. S. 137, 35 L. Ed. 116, holding that a statute requiring publication "once a week for 4 months" means calendar months where there is no legislative definition.

In this connection see 42 Am. Jur., §100, p. 87, pointing out the conflict of authority, some cases holding that once a week for 4 consecutive weeks contemplates 4 full weeks publication and not 4 times in 4 different weeks, while other courts have held that such does not mean 4 weeks of 7 days each. See, also, 72 C. J. S., p. 1103, § 70 to the same effect.

If we consider the above language quoted from §166.11, F. S., along with the words "the 1st publication thereof to be not less than 25 days prior thereto", it would be difficult, if not impossible, to construe the legislative intent as requiring 4 full weeks or 5 publications. In this connection the case of *Crawford v. School TP. of Beaver*, (Iowa, 1918), 166 N. W. 702 is enlightening. There the court had before it an election called for the purpose of consolidating school districts. As well as can be gathered from the opinion, the Iowa statute required that

notices be posted "not less than 10 days next preceding" the day of election. The contention was made that posting of the notices of the election 15 days preceding the day of election did not comply with the statute. The court, at p. 703, said:

"... In the second place, the objection on which counsel relies with most apparent confidence, that the posting of notices for the first election 15 days next preceding the day named for said election is not a compliance with the statute which required them to be posted 'not less than 10 days next preceding' the appointed day, is clearly without merit. The provision for 'not less' than 10 days' notice so clearly implies that the posting for any reasonable period not less than 10 days immediately preceding the day named will be regarded as sufficient that it is difficult to conceive how any other meaning can be read into the legislative language. The evident intent of the statute in this respect is to give the voters reasonable opportunity to become advised of the time and place of the election and of the purpose for which it is called, and to that end, and to prevent undue haste, 10 days next preceding such election is fixed as the minimum period. No maximum period is fixed or suggested. It may be true that the date for an election may be postponed so far in the future as to defeat its statutory purpose, and that in such case the courts would hold it equivalent to no notice at all (*District v. Martin*, 170 Iowa, 262, 152 N. W. 623), but it would be the extreme of unreason to say that the provision for notice of not less than 10 days next preceding a given date is not satisfied by giving a notice of 15 days next preceding it. As well might it be said that the statute which provides that an original notice in an action brought for a given term of court must be served not less than 10 days between the day of service and the first day of the term is not complied with by a notice which leaves more than 10 intervening days; a construction of the statute for which we think no one will stand sponsor. Nothing said in the *Martin Case*, supra, suggests any other conclusion."

See definitions of "not less than" in 28 Words and Phrases, permanent edition.

If the minimum of 25 days prior to election was selected as the 1st day of publication, 5 publications would not be possible. Consequently, to give any effect to the legislative intent, we must conclude that 4 publications are sufficient.

The words "not less than" 25 days are construed to be the minimum time within which publication may be commenced. There is no maximum number of days fixed by the statute and the purpose of the notice is to advise the qualified voters of what will appear on the ballot.

We notice that you propose to hold the election on October 27, 1955. Consequently, there is ample time to publish the notice 5 times and I suggest that out of an abundance of precaution,

such should be done. Certainly no harm can be done thereby.

The above answers the question as definitely as possible.

055-240—September 22, 1955

TAXATION

LICENSE TAXES—TRADING, ETC., IN TANGIBLE PERSONAL PROPERTY, AGENTS, SALESMEN, ETC., OF MANUFACTURING CORPORATION—LIABILITY—§205.59, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are the agents, salesmen and other employees of a manufacturing concern, which pays a license tax and obtains an occupational license in its home county in this state, required to pay a license tax and obtain an occupational license in those counties wherein they solicit orders, subject to acceptance only at the home office of the said concern, by reason of §205.59, F. S.?

The manufacturing concern in question is a foreign corporation, having its principal or home office in this state and operating a manufacturing plant in its home county in this state wherein tangible personal property is manufactured for sale in this and other states. The method of sale is for the company to send out agents, solicitors or salesmen who solicit orders for the products manufactured by the company which orders are forwarded to the home office of the company for acceptance, rejection or otherwise. The agents, solicitors, and salesmen have no authority to complete a sale by accepting an order for merchandise; only the home office accepts orders and completes the sale of merchandise. The agents, solicitors and salesmen merely solicit orders for the merchandise sold by the company and forward such orders to the home office of the corporation in this state for acceptance or rejection. The question is: Do the agents, solicitors and salesmen have to pay the license tax and obtain the licenses required by §205.59, F. S.?

Under said §205.59, F. S., "every person engaged in the business of trading, buying, bartering, serving or selling tangible personal property as owner, agent, broker or otherwise, shall pay a license tax" and obtain a license. For a person to be liable to the tax imposed by this section he must be engaged in the business of trading, buying, bartering, serving or selling tangible personal property. We do not think that the above mentioned agents, solicitors or salesmen are engaged in trading, buying, bartering or serving tangible personal property; this leaves for our consideration whether or not they are engaged in selling tangible personal property as owner, agent, broker or otherwise within the purview of said §205.59, F. S.

A "sale" has been said to be a transmutation of property from one person to another in consideration of some price or value; a transfer of the property in a chattel for a consideration; a transfer of the absolute or general property in a thing for a price in money; a contract to pass rights of property for

money which the buyer pays, or agrees to pay, to the seller. (Edwards v. Baldwin Piano Co., 79 Fla. 143, 83 So. 915.) To the same effect see also 46 Am. Jur. 194-5, §2 and 77 C. J. S. 575-7, §1; 38 W. & P. 55-148. In the instant cases the agents, salesmen and solicitors of the corporation in question merely take orders for the sale of the merchandise, they transmit to the corporation the offer of the persons contacted to purchase from the corporation the merchandise described in the order, which offer when transmitted to the corporation and accepted becomes a contract of sale and a completed sale when the merchandise is shipped. The agents, salesmen and solicitors have no power or authority to close or complete the sale. If they were given power and authority to accept the customer's order and close the deal so as to bind the corporation then there would be a sale through and by such agent, salesman or solicitor. Then there would be a sale of tangible personal property as agent within the purview of §205.59, F. S. Although such agent, salesman or solicitor is an agent of the corporation for certain purposes he is not an agent for the purpose of making and closing a sale.

License taxing statutes being penal in their nature should be strictly construed against the state and in favor of the taxpayer (Texas Company v. Amos, 77 Fla. 327, 81 So. 471; Lee v. Smith, Richardson and Conroy, 141 Fla. 535, 191 So. 767; Lee v. Walgreen Drug Stores Co., 151 Fla. 648, 10 So. 2d 314; State v. Nelson, 155 Fla. 399, 20 So. 2d 394). We are, therefore, of the opinion that §205.59, F. S., requires the payment of license taxes and the obtaining of licenses only of those agents, brokers or otherwise who are vested with the power of accepting a customer's order and closing the sale for their principal, or those persons, including brokers, who take orders for merchandise, representing no person in particular, and select the wholesaler or retailer to whom the said order is to be sent for filling, for example see Dorsett v. Overstreet, 154 Fla. 759, 18 So. 2d 759, 155 A. L. R. 228.

The above stated question is answered in the negative upon the information before us.

055-241—September 22, 1955

ELECTORS AND ELECTIONS

POLITICAL PARTIES—EXECUTIVE COMMITTEES—COUNTY MEMBERS—PRECINCTS—ADDITIONAL MEMBERS—

§103.111, F. S.

To: *Joe Oldmixon, Supervisor of Registration, Escambia County, Pensacola*

QUESTION:

Section 103.111(2), F. S., as amended by §4, Ch. 29935, 1955, (relating to county executive committees) provides among other things that "in precincts having a registration of more than 1,000 qualified electors an additional 2 members, a man and a woman, shall be authorized and their membership provided for as in other

precincts." When does this amended section become effective with respect to said additional county committee members?

Amended §103.111(2) provides that the county executive committee shall be composed of 2 members, a man and a woman, from each precinct within the county, "who shall be elected for 4 years at the 2nd primary held in the year 1958, and every 4 years thereafter; provided that in precincts having an official registration of more than 1,000 qualified electors an additional 2 members, a man and a woman, shall be authorized and their membership provided for as in other precincts."

Chapter 29935, of which said amended subsection is a part, has no specific effective date, was approved by the governor on June 20, 1955, and on the same date was filed in the office of the secretary of state. Hence, the act as a law became effective the 60th day after the final adjournment of the 1955 session of the legislature. It is to be noted that the act amended other sections of our election laws.

At the 1954 general election, in pursuance of the provisions of §103.111(2) prior to amendment, there were elected in the several counties executive committee members for 4 year terms, 1 man and 1 woman from each precinct. If the above proviso were construed as effective the 60th day after the final adjournment of the 1955 general session, in precincts with more than 1,000 qualified electors, vacancies would exist in party offices to be filled by the additional man and woman members in the mentioned precincts, to be filled in the manner provided by the further provisions of amended §103.111, F. S.

However, we are here dealing with a proviso. Our court has held that the office of a proviso in a statute is to restrain the enacting clause and to take away something otherwise within its terms, or to qualify it generally; and that a proviso should be construed with the enacting clause to give effect to each part of the act to carry out legislative intent. E.g., *Cragin v. Ocean Realty Co.*, Fla., 133 So. 569; *Therrell v. Smith*, Fla., 168 So. 389. The title of Ch. 29935 affords us no assistance here. It is to be noted, however, that the sentence of which the proviso is a part relates to the election of committee members at the 2nd primary in 1958; and by the rules of construction mentioned, reasonably it appears that the proviso contemplates that at such primary in 1958, the 2 additional members shall be elected in those precincts falling within the terms of the proviso.

Hence, in each of those precincts last mentioned, at the 1958 2nd primary there shall be elected 2 men and 2 women to the county executive committee; and prior to such time no vacancies exist with respect to these additional party offices.

055-242—September 22, 1955

MOTOR VEHICLES

REGISTRATION AND LICENSING—§§320.15 AND 320.74, F. S.

To: *Ina S. Thompson, Motor Vehicle Commissioner, Tallahassee*

QUESTION:

What is the application of §§320.15 and 320.74, F. S. relating to the registration and licensing of motor vehicles in instances where, owing to a change in conditions or circumstances, the issue of a new license plate becomes necessary?

Section 320.15 relates to conditions under which a motor vehicle previously registered and licensed for a license year, by reason of its destruction or permanent removal from the state, ceases to be subject to registration. In such instances the owner of the vehicle is entitled to a refund of a portion of the license fee previously paid by way of a deduction from the registration tax which may become payable by the owner of the vehicle during the same license year upon the registration of another vehicle; the amount of such deduction being computed upon the pro rata portion of the registration fee originally paid, based upon the period of the license year which elapsed prior to the destruction of the vehicle or its removal from the state. This deduction is authorized from the license tax or fee imposed upon another vehicle which the owner may desire to register during the current license year, regardless of its classification. For instance, if a motor vehicle, registered or licensed for a license year, is destroyed or removed from the state permanently during the month of March of the license year, the owner thereof is entitled to a deduction of 9/12 of the license fee paid for such vehicle, to be applied to the amount of license fee imposed upon any other vehicle which he may register during the same license year, regardless of its character or classification.

In cases where the vehicle destroyed or removed from the state is a vehicle previously registered as a "for hire" vehicle, the owner thereof is entitled to a credit with the motor vehicle commissioner upon the purchase of a license tag for any other vehicle, regardless of its classification, during such license year, based upon the proportionate unexpired portion of the license year, which, however, shall in no event be greater than $\frac{1}{2}$ of the "for hire" license fee previously paid.

Section 320.74 deals specifically with taxicabs. In cases where a vehicle has been registered and licensed as a taxicab under license plate series "E", if the owner desires to discontinue such use, he may within 10 days after such discontinuance surrender to the issuing agency of the motor vehicle commissioner the "E" license plate, and purchase a private use plate for the same vehicle, upon the payment of the issuing fee described by statute to be paid to the issuing agent. Whereupon the agency is required to immediately surrender to the motor vehicle commissioner the discarded "E" plate, whereupon it becomes the duty of the commissioner to issue to the agency a

credit slip in an amount representing the difference between the purchase price of the new tag and the proportionate part of the license fee paid for the "E" tag, represented by the portion of the license year during which the "E" tag is not used.

The owner of the vehicle is required to pay to the issuing agency for the private use tag the difference between the statutory license fee for the license year, less the amount of such credit, in addition to the statutory issuing fee. Under this section, the amount of the credit is not limited to $\frac{1}{2}$ of the amount of the "for hire" license fee.

055-243—September 23, 1955

BANKS AND BANKING

STATE BANKS—HOLDER OF OWN STOCK AS TRUSTEE FOR OTHERS—§§659.20 AND 660.01, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

1. May a banking corporation organized and existing under the statutes and laws of Florida with trust powers purchase and hold title to its own capital stock as trustee for another or others under the terms of a trust agreement?

2. Should such a banking institution hold title to its own stock as aforesaid, would it incur any liability by reason thereof?

No Florida bank or trust company may, directly or indirectly, invest any of its funds in the stock of any incorporated company, except the stock of the federal reserve bank of this district (§659.20, F. S.), although trust companies in this state may "transfer, register and countersign certificates of stock and act as agent of any corporation . . ." (§660.01(2), F. S.). We find nothing in the statutes authorizing it to invest trust funds in its hand in its own stock, in the absence of an express direction in a trust instrument (See §660.01(8), F. S.). It seems to be a general rule of law, in the absence of statute, that a bank may not purchase or deal in its own capital stock (9 C. J. S. 359, §166) or in the stock of other corporations (9 C. J. S. 359, §167) and the same general rule seems to be applicable to national banking associations (9 C. J. S. 1240-1243, §§686 and 687). Should a bank and trust company, when acting as trustee, be permitted to invest the trust funds in the capital stock and securities issued by the bank, there might be a temptation on the part of the trustee to favor the interests of the bank to the detriment of the cestui que trust (see 90 C. J. S. 248, et seq. §248). It is a general rule that a trustee cannot deal in property for the trust in which he has an interest, or in which he is jointly interested with another, or in which he is interested as a stockholder (90 C. J. S. 257 et seq., §248).

Courts have usually sustained surcharge actions against trustees, in case of loss, where the trustee has dealt in his own

obligations. "Self-dealing" is not permitted in the administration of a trust fund, such self-dealing is a breach of trust (*Continental Illinois National Bank and Trust Company v. Kelley*, 333 Ill. App. 119, 76 N. E. 2d 820).

"The question of a trustee's investment powers is solely one of the settlor's intentions manifested in the terms of the trust instrument. The creator of a trust may designate what kind of, and how, investments shall be made and the trustee will be bound by the directions, or the creator of the trust may leave the investment of the trust to the discretion of the trustee." (90 C. J. S. 521, §325, summary.) Under this rule it seems that the settlor might designate the subject of the investment, which might consist of shares of the capital stock of the trustee, in which case it seems that shares of the stock of the trustee to the extent authorized might be purchased for the account of the trust; however, in the absence of such a specific direction we do not think that the capital stock of the trustee would be subject to investment in the trust, and this rule does not seem to be changed by the prudent man rule.

We are, therefore, of the opinion that a banking corporation organized and existing under the statutes and laws of this state with trust powers may not purchase and hold title to its own capital stock as trustee for another or others under the terms of a trust agreement unless the said agreement specifically authorizes the same. In case such a banking and trust institution deals in its own stock with trust funds, without being specifically authorized by the settlor, such institution would be liable for any loss occurring by reason of such dealing.

055-245—September 23, 1955

STATE AND COUNTY OFFICERS AND EMPLOYEES

RETIREMENT—ELIGIBILITY OF EMPLOYEES OF COUNTY HOUSING AUTHORITIES—CHS. 421 AND 122, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are the employees of county housing authorities, organized under Ch. 421, F. S., covered by the state and county officers and employees retirement statute, or Ch. 29801, 1955?

Chapter 29801, 1955, embraces all "full time officers or employees, who receive compensation for services rendered from state or county funds, or from funds of drainage districts or mosquito control districts of a county or counties, or from funds of the state board of administration or from funds of closed bank receivership accounts or from funds of any state institution or who receive compensation for employment or service from any agency, branch, department, institution or board of the state, or any county of the state, for service rendered the state or county from funds from any source provided for their employment or service regardless of whether the same is paid by state or county warrant or not, provided that such compensation in

whatever form paid shall be specified in terms of fixed monthly salaries by the employing state or county agency or state or county official." The question presented seems to be whether or not a county housing authority, organized under Ch. 421, F. S., is an "agency, branch, department, institution or board of the state" or county within the purview of the above quoted portion of the statutes.

Section 421.27, F. S., (derived from §1, Ch. 20220, 1941) provides that "in each county of the state there is hereby created a public body corporate and politic to be known as the 'housing authority' of the county . . ."; however, such housing authority may not transact business until activated by a resolution of the board of county commissioners in the manner provided by law. "Upon notification of the adoption of such resolution the commissioners of a housing authority created for a county . . . shall be appointed by the governor in the same manner as the commissioners of a housing authority created for a city may be appointed by the mayor" Note the adoption of the statutes relating to municipal housing authorities by said §421.27, F. S. A county housing authority, like a municipal one, constitutes "a public body corporate and politic, exercising the public and essential governmental functions set forth" in Ch. 421, F. S., (§421.08, F. S.). It is noted that housing authorities are given powers of eminent domain (§421.12, F. S.).

Eminent domain is an attribute of state sovereignty (*Shavers v. Duval County, Fla.*, 73 So. 2d 684) and was not granted by the Constitution, although §12 of the Declaration of Rights and §§28 and 29 of Art. XVI State Const. limit that power. In *Marvin v. Housing Authority of Jacksonville*, 133 Fla. 590, 183 So. 145, the provision in said §421.12, F. S., was upheld. Although the housing authorities have authority to purchase lands for housing purposes under Ch. 421, F. S., they have no authority to turn such property over to private interests for development (*Lewis v. Peters, Fla.*, 66 So. 2d 480). Expenditures of public moneys for housing projects under Ch. 421, F. S., appear to be for a public purpose (*Lott v. Orlando*, 142 Fla. 338, 196 So. 313). Sections 423.01 and 423.02, F. S., were upheld on the ground that they constitute a municipal purpose within §1, Art. IX, State Const. (*State v. McDavid*, 145 Fla. 605, 200 So. 100, 133 A. L. R. 360; *State v. Cambell*, 146 Fla. 532, 1 So. 2d 483).

County housing authority commissioners are appointed by the governor (§421.27, F. S.), evidently as public officers under §27, Art. III, State Const. Municipal housing authority commissioners are appointed by the mayor of such municipality (§421.05, F. S.). Regional housing authority commissioners are appointed by the governor (§421.30, F. S.).

In the light of the above mentioned statutes, court opinions and authorities we are of the opinion that a county housing authority is an agency or institution of the county and within the purview of Ch. 29801, 1955, so that the above question should be answered in the affirmative.

055-247—September 26, 1955

STATE OFFICERS AND EMPLOYEES

RETIREMENT—CONSTRUCTION OF §112.05, F. S.—
EMPLOYEE PAID ON TEN MONTH BASIS INSTEAD
OF TWELVE MONTH BASIS

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where an employee of the University of Florida was on the state payroll on June 30, 1953, on the basis of 12 months employment, and is now or will in the future be eligible to retire under §112.05, F. S., will his right to retire be affected should the university change to the payment of the annual salaries of its teachers and professors to 10 monthly installments instead of the present 12?

Section 112.05, F. S., after providing for the retirement of persons 70 years of age or more who have been in the employment of the state for 20 consecutive years or an aggregate of 30 years, further provides that "this section shall apply only to persons retired or persons who are on a state payroll June 30, 1953, and remain *continuously* on a state payroll until *eligible to retire*." We note that the statute does not require that the employee remain continuously on a state payroll until he retires, but merely requires that the employee remain continuously on a state payroll until eligible to retire. We find nothing in the statute making it mandatory that all state employees who reach the age of 70 and who have been in state employment for 20 consecutive years or an aggregate of 30 years must retire at the time of the completion of the required number of years. We find nothing in the statute which prevents an employee remaining on the state payroll after he is eligible to retire under this statute and retiring at a later date. The file handed us with your said request for opinion indicates that the employee directly in question has been an employee of the University of Florida for 32 years, but does not indicate whether he has or has not reached the age of 70 years.

This brings us to the construction of the phrase "persons who are on a state payroll June 30, 1953, and remain *continuously* on a state payroll until eligible to retire." Although a majority of state employees are employed and paid on a 12 months basis, it does not follow as a matter of fact that all regular employees are employed and paid on that basis. Under the statutes the terms of public schools may be a minimum term of 9 months (§§228.16 and 236.02, F. S.) although §230.23(12), F. S., fixes a minimum of 8 months. Under §236.02(3), F. S., school personnel may be paid their annual salary in either 10 or 12 monthly installments. We note from the budgets of the several institutions of higher education that the pay scale of the university teachers and professors is stated on an annual basis (Budget commission's report to the 1955 legislature, pp. 512-536, 550-583, and 613-675). It is our impression that university teachers and professors are allowed their

salaries on an annual basis and would be allowed the same pay scale whether paid in 10 or in 12 monthly installments.

We are, therefore, of the opinion that should a state officer or employee be paid an annual salary in 10 monthly installments instead of the present 12 that he would remain continuously on the state payroll within the purview of §112.05, F. S. This answers the above question in negative.

055-248—September 26, 1955

CORPORATIONS AND BUSINESS TRUSTS

CHARITABLE, NOT-FOR-PROFIT CORPORATIONS—SOLICITATION OF FUNDS—ENTERTAINMENTS—CONSTRUCTION OF §§617.22-617.25, F. S. (CH. 29992, 1955)

To: *J. Alex Arnette, Clerk Circuit Court, West Palm Beach*

QUESTIONS:

1. Do non-profit corporations, associations or organizations selling admittance tickets to entertainments of any kind in which the net proceeds are devoted to charitable purposes come under the provisions of Ch. 29992, 1955?

2. Do non-profit corporations, associations or organizations selling advertising in programs or otherwise wherein all the net proceeds from this activity are devoted to charitable purposes come under the provisions of said chapter?

3. Do non-profit charitable organizations or associations soliciting funds for building purposes come under provisions of said chapter?

4. Do Elk lodges or other benevolent organizations come under provisions of said chapter when the solicitation is confined entirely or almost entirely to their own members?

We note from the request for opinion that "the Harry-Anna Home for Crippled Children located at Umatilla is owned and operated by the Florida State Elks Assn., Inc., but is supported by all the Elks lodges in the state and practically all the funds raised by these lodges are derived from staging special events to which tickets are sold or advertising in programs are contributed by their own members. However, no donations from non-members are refused and they do have many persons in making their wills name the Harry-Anna Crippled Children's Home as the beneficiary."

Section 1, Ch. 29992, 1955, provides that "no nonprofit corporation, organization or association shall solicit funds or anything of value for charitable purposes in any county in this state unless a permit shall have been secured from the clerk of circuit court where such solicitation is made; provided, this act shall not apply to any nationally recognized organization or

association except those who retain locally 50% or better of funds solicited, or any church organization."

Section 5 of the act provides a criminal penalty for the solicitation of funds or anything of value for charitable purposes in violation of the said act. Being penal in its nature the act is probably subject to a strict construction against the state (*Lollie v. General American Tank Storage Terminals*, 160 Fla. 208, 34 So. 2d 306). Any non-profit corporation, organization or association wishing to *solicit funds or anything of value in this state*, with certain well defined exceptions, must obtain a license as required by the statute. The term "solicit funds or anything of value" would seem to extend to the seeking or appealing for anything suitable or useful in maintaining or carrying on charitable institutions, establishments and purposes, and would not seem to include the same of property or things of value for a consideration although the money or funds derived from such sale be turned over to some charitable institution for use in carrying on a charity.

In the light of these observations we feel that where the entertainments mentioned in the 1st above question and the advertisements mentioned in the 2nd question have some reasonable value to the purchasers thereof that the sale thereof would not be a solicitation of funds or other things of value within the purview of said Ch. 29992, 1955. However, if such entertainment and advertising are of no reasonable value to the purchaser, so that the sale of such tickets and advertising space is merely a design to evade the said statute, then the same would in effect be the solicitation of funds or other thing of value and within the said Ch. 29992. These observations answer the 1st and 2nd questions.

Where a non-profit charitable organization or association solicits funds for the construction of a building to be used for charitable purposes it is none-the-less soliciting funds or things of value for charitable purposes. It is presumed that no such organization would be constructing buildings for non-charitable purposes. Funds used to purchase or pay off an indebtedness on a lodge hall, used in part for rental purposes, probably are not for a charitable purpose, although some funds of the lodge are used for charitable purposes (see *Simpson v. Bohon*, 159 Fla. 280, 31 So. 2d 406). We feel that lodges and other benevolent organizations are within the statutes, although *solicitation* is confined generally to the membership. A donation without solicitation would not appear to be within the statute. These observations seem to answer the 3rd and 4th questions as well as they may be without special facts applicable to particular cases.

We hand you herewith copies of letters recently written to Hon. W. G. Ward and Hon. Charles B. Hays bearing upon other phases of the act, which may be of some assistance to you.

055-249—September 26, 1955

PROFESSIONS AND VOCATIONS

NATUROPATHY—STATE BOARD OF EXAMINERS—FEES,
EXAMINATION AND LICENSE—§§462.07 AND 462.08, F. S.

To: *Watson A. Walden, Secretary-Treasurer, Florida State
Board of Naturopathic Examiners, Fort Myers*

QUESTION:

Does house concurrent resolution No. 293, Acts of 1955, permit the state board of naturopathic examiners to increase the examination fee as provided by §462.07, F. S., and also increase the annual renewal fee as provided by §462.08, F. S.?

House concurrent resolution No. 293, 1955, provides, among other things, as follows:

"That any and all agencies of the state shall review the fees, charges, imposts or exactions now in effect as charges to the *general public* for services and sales of materials and supplies which are furnished to the *general public* and for which a charge is made or should be made, in order to insure, as nearly as possible, that the fees and charges are sufficient to afford a self-sustaining operation of the facility and amortization of equipment, supplies and materials, and the costs of the services rendered. Where it is found, after such review, that any or all of the services and sales as provided by the facilities, for which the state has provided the necessary buildings, equipment, materials and supplies, and personnel, are not now self-supporting, or as nearly so as reasonably possible, then such agency shall immediately put into effect a revised scale of fees and charges to be made so as to insure that the operation of the service will be self-sustaining, or as nearly so as reasonably possible."

The said resolution further provides that every agency which provides such services and sales to the *general public* shall make a formal report to the legislative council prior to Oct. 1, 1955, on its findings and the action to be taken by the agency to accomplish the purpose set forth above.

Chapter 462, F. S., created the state board of naturopathic examiners and invests in it the control and regulation of the practice of naturopathy in the state as prescribed by said chapter. In further construing Ch. 462, it may be said that the board is created to control and regulate certain practice of a "class of persons", to wit: naturopaths, rather than the *general public*. It is true that by the proper policing of the profession a service is rendered the public generally, especially in the field of public health.

In the performance of its duties the board of naturopathic examiners is empowered to adopt rules and regulations not inconsistent with Ch. 462, F. S. Sections 462.07 and 462.08 of said chapter fixes the examination fee of applicants for license at \$25 and an annual renewal fee of \$5.

In view of the foregoing it is my opinion that house concurrent resolution No. 293 passed by the 1955 legislature does not authorize the state board of naturopathic examiners to increase the license fees for naturopaths as fixed by Ch. 462, F. S., therefore, your question is answered in the negative.

055-250—September 26, 1955

PROFESSIONS AND VOCATIONS

FLORIDA BEAUTY CULTURE LAW—VIOLATIONS OF LICENSING REQUIREMENT—COSMETIC DEMONSTRATIONS—§§477.02, 477.20, 477.23 AND 500.03, F. S.

To: *Sue McCreary, Chairman, Florida State Board of Beauty Culture, Tallahassee*

QUESTIONS:

1. Is it a violation of the Florida beauty culture law for an unlicensed person to apply cosmetics to the face and neck (free of charge) of the general public, in attempting to sell the cosmetics?

2. If so, does the state board of beauty culture have the authority to inspect the establishments or places of business wherein such demonstrations are given?

Your 1st question was substantially dealt with in opinion No. 048-50 dated Feb. 9, 1948, copy of which is hereto attached.

The constitutionality of the Florida statutes regulating the practice of beauty culture was ruled upon by the U. S. circuit court of appeals in the case of *United Enterprises v. Dubey*, 128 F. 2d 843-844 (1942). This case presented substantially the same question as is presented here. In an opinion rendered by Judge Holmes it was held:

"By statute the state of Florida has regulated the practice of beauty culture within its bounds. Appellant, an Indiana corporation, is engaged in the manufacture of various beauty compounds, which it sells in interstate commerce. Appellees, as members of the board of examiners appointed to administer the act, attempted to enforce its provisions against employees of appellant, on the ground that certain demonstrations given by said employees in Florida, as a part of their selling technique, amounted to the practice of beauty culture as defined in the statute. Appellant thereupon sued in the court below for a declaratory judgment that the statute was not applicable to its business, or, if applicable, was violative of §8, Art. I, Clause 3, of the federal constitution and the 14th amendment thereto . . ."

"Section 2 of the statute in question provided that the administering of facial or scalp massage or treatment with oils, creams, lotions, or other preparations, or the application of cosmetic preparations, antiseptics, powders, oil, clay, or lotions to the scalp, face, or neck, constituted the practice of beauty culture. Appellant's demonstrations admittedly included many of these practices, and its employees therefore came squarely within the act and were subject to its terms . . ."

" . . . A state, by legislation under its police power,

may provide for the protection of the public health, the public morals, and the public safety . . ."

"The legislature of Florida plainly intended by this statute to prevent the spread of contagious diseases, to induce cleanliness and sanitation, and to insure the adoption of healthful standards throughout the beauty culture industry, in the interests of the public welfare. The regulatory provisions of the statute are appropriate to the attainment of the legislative object, and are not arbitrary or unreasonable. From its very nature, the practice of beauty culture is essentially an intrastate business as localized in character as any exclusively personal-service enterprise . . ."

"The Florida statute regulating practice of beauty culture as applied to employees of a foreign corporation which was engaged in manufacture of beauty compounds sold in interstate commerce and which carried on its business by means of demonstrations given by the employees, was not unconstitutional as imposing a burden on 'interstate commerce'."

The plaintiff was seeking a declaratory judgment on the basis that the Florida statute did not apply to its business. However, the court dismissed the petition and ruled that plaintiff's employees came squarely within the act and were subject to its terms.

Section 477.03, F. S., provides, among other things:

"(1) Beauty culture, beauty shop, etc.—Any one or any combination of the following practices (when not done for the treatment of disease or physical or mental ailments and when done for payment either directly or indirectly or *without payment for the public generally*) constitutes the teaching and *practice* of beauty culture:

(d) "*Applying cosmetic preparations,*" to scalp, face or neck." (Italics supplied.)

"(2) For the purpose of this chapter and as used herein, the term 'beauty shop' is hereby defined to embrace and include *any establishment or place of business* wherein the practice of beauty culture as hereinabove defined is engaged in or carried on. The term 'beautician' is hereby defined as one who practices beauty culture in its entirety." (Italics supplied.)

"Cosmetic" is defined by §500.03 (6), F. S., as follows:

"(a) articles intended to be rubbed, poured, sprinkled or sprayed on, introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance; and (b) articles intended for use as a component of any such articles, except that such term shall not include soap."

Section 477.02, F. S., which makes it unlawful to practice

beauty culture without a certificate of registration provides, among other things:

"(1) It shall be unlawful for any person to engage in the practice or attempt to practice beauty culture without a certificate of registration as a registered beautician, registered junior operator or registered manicurist and pedicurist issued pursuant to the provisions of this chapter by the board of beauty culture hereinafter established."

"(6) It shall be unlawful for any person, firm or corporation to hire or employ any person to engage in the practice of beauty culture as hereinafter defined, unless such person holds a valid, unexpired and unrevoked certificate of registration to practice beauty culture or a certificate of registration as a registered junior operator or registered manicurist and pedicurist, or a permit to work as a junior operator, or permit to work as a manicurist and pedicurist, issued under the provisions of this chapter."

In view of the foregoing, your 1st question is answered in the affirmative.

Replying to your 2nd question, §477.20, F. S., (1) empowers a majority of the members of the board to perform and exercise all duties and powers devolving upon the board, and (2) imposes a duty on board members to *inspect all schools* quarterly and (3) *to employ inspectors of shops and schools*. Section 477.03 (2), F. S., provides that the term "beauty shop" embraces any establishment or place of business wherein beauty culture is practiced.

Section 477.23 (11), F. S., authorizes the board, its agents or assistants to *inspect any shops or schools*, and sub §(10) thereof provides that the board may make any other rules and regulations and prescribe other sanitary requirements, subject to the approval of the state board of health. Therefore, it is my opinion that the board of beauty culture has the authority to inspect places of business wherein cosmetics are applied to the face and neck in the manner and under the circumstances presented here for consideration.

055-251—September 29, 1955

CRIMES

GAMBLING—LOTTERY LAW VIOLATIONS—SERVICE STATIONS—SAVING STAMP PLAN—§849.09, F. S.

To: Larry G. Smith, Assistant State Attorney, Panama City

QUESTION:

Does the enclosed promotion scheme constitute a lottery?

The facts of the enclosed promotion scheme may be stated briefly as follows:

A particular chain of service stations is using or is desirous

of using a premium or saving stamp plan whereby they are or will distribute folders within which the stamps may be affixed.

The stamps are obtainable at any of their service stations and are distributed as savings or premiums on purchases made or services rendered therein.

These stamps have a redeemable value either in cash or toward a gift "prize".

The folders, as well as serving as a convenient method for saving and accumulating the stamps, contain a "seal" which, upon redemption of the filled folder, will be broken and thereby reveal an alternative premium which, in some cases, will have more value than the already stamp-filled folder. The participant or "stamp-collector" will then either select the "sealed" prize or redeem his coupon book as he originally planned.

As to the stamps, there is no doubt that the business promotion which they represent can in no way be considered a "lottery" as legally defined and interpreted by our courts.

A lottery must consist of 3 basic elements, which are (1) a prize; (2) an award by chance; and (3) a consideration. See 54 C.J.S. 845, Lottery, §2, and *Little River Theatre Corp. v. State ex rel Hodge*, 135 Fla. 854, 185 So. 855.

The stamps afford no award by chance as all who accumulate them are entitled a cash or prize return of their own choosing so therefore one of the prerequisite elements of a lottery does not appear. One element being lacking there is no reason to discuss the other 2 as the stamp method of promotion is not a lottery.

The folder, however, does offer an alternative gift or prize. This alternative gift may in some (perhaps not many) cases be worth more in value than the completed stamp folder would normally have been without this alternative plan, *thereby creating an additional prize or value to what had been value certain.*

This additional prize is awarded solely by means of the result announced under the seal of the folder, which seal or punch is not broken until the folder is complete with stamps. Obviously, there is no skill attached to breaking the seal and even if there were, this ability to break the seal could in no way change the result printed therein. Therefore as this additional prize is awarded merely by chance one of the 3 elements of a lottery does exist.

A 2nd element, that of giving a prize, also exists. In this case it is the additional prize which may be received by the lucky holder of a folder whose seal, when broken, will announce an alternative prize of much greater value than the known value of the stamp-filled folder.

This 2nd element can best be shown by applying the facts and figures as announced in the folder. Assuming that a stamp-filled folder has a \$2 premium value, the folder announces that the designation of a letter "B" within the seal will entitle the holder to \$35 in premium value. The holder then will have the

opportunity to receive the \$35 premium value or elect to choose the \$2 premium value. Therefore, it becomes apparent that an additional prize of \$33 is offered to all the lucky holders of a stamp-filled folder whose seal, when broken, has the letter "B" printed therein. The election to take the alternate prize does not in any way vitiate the offering of this additional gift or prize and therefore it is this additional prize which constitutes the 2nd element of a lottery.

Consideration is the 3rd element which must also exist before this promotion scheme may be termed a lottery and thereby be prohibited as per §23, Art. III, Fla. Const.

The consideration flowing from the promoters to the participants or customers is the so-called alternate prize, which, for all practical purposes, may be as high as \$33 in additional premiums.

The participants, in turn, are induced to trade with the promoters and become customers. In fact the participants must be customers to the extent of having purchased 176 gallons of gasoline or other products or services equivalent thereto before they are eligible or entitled to "punch the seal" and ascertain whether or not they have won an additional prize. Although the stamps themselves are inducements to trade and we have previously stated that the stamp promotion is not a lottery, it cannot be logically assumed that the stamps are the sole inducements.

Trading stamp competition is now prevalent in Florida and where 5 years ago a merchant offering a savings through trading stamp premiums was indeed inducing customers on this basis alone, the same does not so readily exist today where many varied types of premium savings are offered by more and more merchants.

In this case the opportunity to obtain an additional or alternate prize is that extra inducements to trade with the promoters of the herein discussed scheme. It is this extra inducement which creates the extra business and increases in profits which must be realized by the promoters. These extra profits can only come from the participants or customers so therefore the promoters are or will be enjoying the consideration flowing to them from the participants.

All 3 necessary elements being present in this promotion scheme, the same can only be termed to be a lottery and as such is prohibited by the Florida constitution, supra, and constitutes a crime as per §849.09, F. S.

Your question is answered in the affirmative.

055-253—September 30, 1955

ADOPTIONS

MINORS—RECORDS CONFIDENTIAL—INSPECTION BY
ABSTRACTORS—§72.27, F. S.To: *G. W. Robarts, Clerk Circuit Court, Columbia County, Lake
City*

QUESTION:

Does §72.27, F. S., as amended, bar abstractors from access to adoption proceedings files in the making of their "take-offs" in abstract work?

Section 72.27, F. S., reads as follows:

"The court files, records and papers in proceedings for the adoption of minors are hereby declared to be confidential, and shall be indexed, where filed as required by law, in the name borne by the minor before adoption and in the name borne by the minor after adoption. At any time during the progress of the cause the court may enter an order impounding all files, records and papers therein. In all adoption proceedings, upon entry of a final decree, the court files, records and papers shall be sealed and shall not be open to inspection except upon order of said court. Provided further, that all adoption records of the state welfare board and licensed child-placing agencies are hereby declared to be confidential, and shall not be open to inspection."

While the statute declares that the papers in adoption proceedings are confidential, it was not the intention of the statute to prohibit access thereto by persons having a legitimate need for information appearing in the proceedings. Insofar as there may be matters in the adoption proceedings which affect the title to real property, or show the interest of the parties in real property, as heirs or otherwise, abstractors have a legitimate reason for access thereto and to take off such information. After the impounding of the record by order of the court prior to final decree, or after the sealing of records following final decree, the abstractor may have access to such records only on order of the court.

055-254—October 5, 1955

PUBLIC HEALTH

STATE BOARD OF HEALTH—SANITARY CODE—ENFORCE-
MENT—DUTY OF SHERIFFS—§§381.011, 381.031, 381.141,
381.051, 381.061, 381.091, 381.111, 381.121, 381.391, 901.15
AND §§1 AND 2, ART. XV, STATE CONST.To: *Florida Sheriffs Association, Tallahassee*

QUESTION:

What is the duty, authority and responsibility of the sheriffs of this state in connection with the enforcement of the state board of health's sanitary code?

The state constitution (§§1 and 2, Art. XV) authorizes the establishment of a state board of health by the legislature, and when established such board has "supervision of all matters relating to public health, with such duties, powers and responsibilities as may be prescribed by law." The state board of health of this state was established by the legislature under these constitutional provisions (§381.011, F. S., as amended), and given general supervision over the preservation of public health and sanitation in this state, with the power and authority to "adopt, promulgate, repeal and amend rules and regulations consistent with law regulating . . . (the) control of communicable diseases; prevention and control of public health nuisances" and many specific matters, including "sanitary practices relating to . . . swimming pools and bathing places . . ." (relating to the preservation of public health and welfare (§381.031, F. S., as amended). Such rules and regulations are known and designated as the sanitary code of the state of Florida. The board, the state health officer, and local health authorities are charged with the enforcement of the said sanitary code (§§381.141, 381.051, 381.061, F. S., as amended). The said sanitary code takes precedence over and supersedes conflicting local rules and regulations upon the same subject (§381.071, F. S., as amended) however, non-conflicting local rules and regulations remain in force (§381.091, F. S., as amended). Members, officers, employees and agents are authorized to enforce the rules and regulations, including the sanitary code, of the board and may procure warrants from magistrates for the arrest of violators, the same to be executed by the sheriff and constable (§381.111, F. S., as amended). It is made the duty of "every state and county attorney, *sheriff, constable, police officer* and other appropriate city and county officer *upon request* to assist the state health officer or any other agent of the board in the enforcement of the state health laws and the rules and regulations promulgated by the board . . ." (Emphasis supplied.) (§381.212, F. S.)

"Any person who violates any provision of" Ch. 381, F. S., as amended by Ch. 29834, 1955, or "any quarantine or any rule or regulation promulgated by the board under the provisions of" said Ch. 381, "is guilty of a misdemeanor. . . ." (§381.391, F. S., as amended). The request for opinion makes special reference to §§42 and 44, Ch. XX, of the sanitary code of Florida, which excludes dogs and other animals from bathing beaches and swimming pools, including their dressing rooms and other enclosures. Any violation of these provisions of the sanitary code would, under the above provision in §381.391, F. S., as amended, constitute the commission of a misdemeanor.

Under §901.15, F. S., any "peace officer may without warrant arrest a person: When the person to be arrested *has committed a felony or misdemeanor or violation of a municipal ordinance in his presence . . .*" It is the duty of sheriffs and constables to serve criminal process placed in their hands, and to "apprehend, without warrant, any person disturbing the peace . . . (and) . . . perform such other duties as may be imposed upon them by law." (§30.15, F. S.). These statutes are merely declaratory of the common law duties of the sheriff (*Fields v. State*, 160 Fla. 877, 36

So. 2d 919, text 920). At common law the sheriff was a peace officer and he "necessarily exercises police powers, and must enforce the laws enacted for the protection of the lives, persons, property, health and morals of the people." (80 C. J. S. 211, §42). He is, upon request, obligated to "assist the state health officer or any other agent of the board (state board of health) in the enforcement of the state health laws and the rules and regulations promulgated by the board . . ." (§381.121, F. S.). Sheriffs, constables and police departments, unless furnished with copies of the sanitary code of the state, probably are not charged with knowledge of such rules and regulations, it stands to reason for them to assist in the enforcement of such rules and regulations they must be furnished with copies of the same and any changes and amendments thereto made from time to time.

The above observations, statutes and authorities seem to answer the above question as well as the same may be answered generally. We doubt that it is the obligation of the sheriff, constables and police officers to constantly police bathing pools and beaches for violations of rules 42 and 44, Ch. XX, of the sanitary code, but they are obligated to assist the board and its officers and agents when requested. When any such rules or regulations are violated in their presence they are authorized to make arrests without warrants for misdemeanors committed in their presence.

055-255—October 5, 1955

TAXATION

HOMESTEAD TAX EXEMPTIONS—CONTIGUOUS VACANT LOTS—§7, ART. X, STATE CONST.

To: *City of Williston*

QUESTIONS:

1. What are the homestead tax exemption rights of a person owning $\frac{1}{2}$ acre of land or less within an incorporated municipality on which is located his dwelling house and 1 or more buildings housing rental units?

2. May a homesteader claim contiguous vacant lots as a part of his homestead property where dwelling lot and contiguous vacant lots do not exceed $\frac{1}{2}$ acre in area?

The 1st question is answered, as well as a general answer may be formed, by our opinion of March 21, 1952, to Hon. W. Homer Smith, tax assessor for Volusia County (052-98; 1951-2 Biennial Report 352), a copy of which opinion is handed you herewith.

Under §7, Art. X, State Const., the \$5000 homestead tax exemption extends to the "home and contiguous real property, as described in §1, Art. X, of the constitution . . ." Under the decisions of the supreme court of Florida a tract of land detached from or not contiguous to the land claimed as a homestead is not a part of the constitutional homestead (*Milton v. Milton*, 63 Fla. 533, 58 So. 718; *Brandies v. Perry*, 39 Fla. 172, 22 So. 268; *Oliver*

v. Snowden, 18 Fla. 823). In *Wilson v. Florida National Bank and Trust Company, Fla.*, 64 So. 2d 309, a 5 acre parcel of land was held by husband and wife as an estate by the entirety, and an adjoining and contiguous 35 acre tract by the husband in his own name, both these tracts of land were claimed as homestead exempt which claim was upheld by the court. See also *Shone v. Bellmore*, 75 Fla. 515, 78 So. 605, where it was held that the platting of one's homestead into blocks and lots, with streets between the blocks, did not prevent the owner claiming homestead tax exemption to contiguous lots and blocks.

It is doubted that a road or street will be held to separate 2 parcels of land unless the governmental agency constructing the road or street held the fee simple title to the same. If the right of way is based on an easement, with the owner of the lands lying adjacent to the road or street owning the fee under the street, the owner may claim the lands on either side of the road or street as contiguous entitling him to homestead exemption. This would not be true if the right of way is based on a fee title.

The 2nd question is answered in the affirmative, subject to the above observations concerning separations by road and street rights of way.

055-256—October 5, 1955

EDUCATION

THE SCHOOL PLANT—DISPOSAL OF PERSONAL PROPERTY—COUNTY SCHOOL BOARD—§235.04, F. S.

To: *Edward A. Turville, Attorney, Pinellas County Board of Public Instruction, Clearwater*

QUESTION:

Do the provisions of §235.04, F. S., as amended by Ch. 29797, acts of the 1955 legislature, apply to the disposal of personal property by a county school board?

Section 235.04, as amended, provides a specific method to be followed by county school boards in disposing of school land or property which has been determined to be unsuited for school purposes either because of location, condition or other cause. This method includes the procurement of an appraisal of the property in question by "3 qualified appraisers."

In discussing this problem with the office of the state superintendent, I find that the question has been the subject of some discussion by other county school boards and the objection has been made that it would be impractical to give this act such a literal construction as to require the expenditure of funds for the fees of expert appraisers in disposing of obsolete or damaged equipment which has little monetary value.

Even so, the statute does include the word "property" along with "land" and I think that this language should not be ignored in attempting to carry out the purpose of the legislature which was clearly intended to safeguard school funds and assets.

It would appear to me that no great practical problem would be encountered in carrying out the act. An appraisal of the property in question should be obtainable from dealers or others having a reasonable knowledge of the market value of the goods in question without expense to the school board. I believe, therefore, in view of these circumstances and the specific nature of the statute, that an appraisal as provided by §235.04, F. S., must be obtained before a school board may dispose of personal property as well as real property. Your question is therefore answered in the affirmative.

055-257—October 5, 1955

EDUCATION

SCHOOL DISTRICT ELECTION—QUALIFICATIONS OF CLERKS AND INSPECTORS—§§230.39, 236.32, 102.012, F. S.

To: *Easter L. Gates, Supervisor of Registration, Broward County,
Fort Lauderdale*

QUESTION:

Must clerks and inspectors of election boards appointed to conduct a regular biennial school district election be persons qualified to vote in such an election?

Laws providing for creation of school districts and election of trustees derive from provisions of §10, Art. XII, Fla. Const. Generally, it may be stated that the procedure for conducting such an election is prescribed by §§230.39 and 236.32, F. S. Amended sub §236.32(1) provides:

"All school district elections shall be held and conducted in the manner prescribed by law for holding general elections, except as provided in this chapter."

There appears to be no specific provisions in the school code relating to the qualifications of such inspectors and clerks to be appointed by the school board, hence we must refer to the law relating to the appointment of such election officials to conduct a general election. A part of §102.012, F. S., is quoted:

"Each election inspection board is composed of 3 inspectors and a clerk, all of whom must be registered qualified electors of the precinct in which they are appointed; . . ."

The quoted language refers to persons who are qualified electors within the purview of §1, Art. VI, Fla. Const., and §97.041, F. S. But we are here dealing with a regular biennial school district election restricted to those voters who are qualified electors and "who pay a tax on real or personal property within the district" (§236.32(4)). In the light of such required qualifications of electors in a school district election, the words "registered qualified electors" in relation to such an election, reasonably are to be construed as referring to registered electors qualified to vote in such an election.

Hence, in my opinion in the absence of a court construction of relevant statutes, the better position would seem to be that those persons appointed inspectors and clerks in the several precincts to conduct a regular biennial school district election should be persons duly qualified in their respective precincts to vote in such election.

055-258—October 6, 1955

COUNTY ORGANIZATION

COUNTY SEATS, CHANGE—ELECTION PROCEDURE—NOMINATION OF LOCATIONS—§§138.01, 138.02, 138.04, F. S.

To: Board of County Commissioners, Melbourne

QUESTIONS:

1. What should be the form of the petition "praying for a change of the location of" the county seat of a county under Ch. 138, F. S.?

2. What machinery should be followed for the placing of names of towns, villages or cities in nomination for a location for the county seat, under §138.04, F. S.?

3. Should the ballot to be used in an election pursuant to Ch. 138, F. S., in addition to containing the names of the towns, villages and cities placed in nomination, pursuant to §138.04, F. S., contain a blank space so as to provide for write-in voting?

Section 138.01, F. S., provides that a petition seeking an election for the location of a county seat shall be signed by at least $\frac{1}{3}$ of the qualified electors who are taxpayers on real or personal property, and pray "for a change in the location of such county seat." Under §138.02, F. S., any election called consequent upon such a petition is designed "for the location of such county seat." We find nothing in the statutes which requires that the petition pray, or even suggest, the relocation of the county seat at any particular place. A reading of Ch. 138, F. S., in the light of court decisions bearing upon the question (*Douglass v. County of Baker*, 23 Fla. 419, 2 So. 776; *Lanier v. Padgett*, 18 Fla. 842; *State v. County Commissioners*, 22 Fla. 29; *State v. Coachman*, 64 Fla. 478, 60 So. 344; *McKinney v. Board of Commissioners*, 26 Fla. 267, 4 So. 855) clearly indicates that the election petitioned for is one for the location of the county seat and not whether or not the county seat is to be moved to a designated location or remain at the present location.

Section 138.04, F. S., requires that the "names of all towns, villages or cities, put forward as candidates for the county seat of any county in this state under the provisions of this chapter shall be filed with the clerk of the circuit court of such county not later than 15 days before the date set for holding said election . . ." Nowhere in Ch. 138, F. S., is the machinery or plan for placing such candidates in nomination set up or otherwise indicated. The fact that petitions for calling such an election must

be filed in such time as will permit the giving of a 30 days' notice of the holding of the election precludes a conclusion that nominations must be made by or in such petitions (filed under §138.01, F. S.) although such a nomination in a petition probably would not invalidate it if it prayed generally for an election to locate the county seat.

Honorable W. H. Ellis, as attorney general of Florida, (subsequently a justice of the Florida supreme court) in an opinion dated October 11, 1905, evidently influenced by the provision in the statutes providing for said county seat elections, that such elections "shall be conducted in the manner prescribed by law for holding general elections in this state" (see §138.03, F. S.,) referred to the provision, then in the general statutes and laws of the state, providing for the placing of candidates in nomination upon the petition of 25 or more qualified electors, and held that the same rule might be used to place towns, villages and cities in nomination as candidates for the county seat. This ruling was made prior (1905) to the introduction (1911) of §138.04, F. S., providing for the placing of the names of towns, villages and cities in nomination by filing with the clerks of the circuit court, and may have been in the minds of the legislators when the 1911 act was enacted. Primaries have been devised for the placing of the names of persons in nomination as candidates for office in lieu of nominations by petitions; however, no such plan has yet been devised for the placing of the names of towns, villages and cities in nomination for county seats.

Although the provision in the general election laws and statutes for nomination of candidates for office by the petition of 25 qualified electors or more has been repealed and no longer remains in the statutes of the state, we feel that the legislature very probably had such a plan in mind when present §138.04 was written into the laws of Florida in 1911. We see no reason why the same plan may not be now used for the purpose of placing towns, villages and cities in nomination as candidates for county seats under said §138.04, F. S.

When we read Ch. 138, F. S., in the light of prior statutes and laws upon the same subject, and the several court decisions above cited in connection with the 1st above question, we must conclude that every person qualified to vote at elections under said Ch. 138 is entitled to vote, by write-in vote, for any town, village or city of his choice within the county, in a similar manner as an elector at general elections may write in names of persons of his choice for office although not placed in nomination by primary or otherwise. This right of the electors may be met only by permitting write-in votes and making provision for such write-in votes by providing a blank on the ballot for such write-in votes.

1. The petition mentioned in the 1st above question should be signed by not less than $\frac{1}{3}$ of the qualified electors who pay a tax on real or personal property; it should pray for an election for a change of the location of the county seat (that is, it should pray for an election for the location of the county seat). Although the petition would probably not be invalid if it put in

nomination a location as a candidate for the county seat, it should not pray for the change of the county seat from its present location to a named new location. In calling the election pursuant to such a petition the board should call the election "for the location of the county seat" as provided by §138.02, F. S.

2. Answering the 2nd question nominations of towns, villages and cities as candidates for the county seat should be by petition of not less than 25 electors.

3. The 3rd question is answered in the affirmative.

055-259—October 7, 1955

WELFARE

DEPARTMENT OF PUBLIC WELFARE—TRANSPORTATION OF APPLICANT FOR AID IN WORKER'S CAR—LIABILITY FOR PERSONAL INJURY TO APPLICANT

To: *Albert W. Graessle, Jr., Jacksonville*

QUESTION:

Where a welfare worker is transporting an applicant for aid to the permanently and totally disabled to the place for examination required by the statute and such applicant is injured in getting into or out of the worker's automobile, is the worker liable?

The welfare worker owns her car. She is not required to transport the applicant to the place of examination, but as the applicant frequently has no means of transportation the worker may offer to transport the applicant in the worker's car. The worker carries her own liability insurance, in most instances, as required by law.

The welfare worker would be liable to the same extent as any other person for her negligence, if any. In other words, if the injury is due to the negligence of the worker, she is liable, as any other owner or operator of an automobile may be liable, for injury caused by his or her negligence.

055-260—October 7, 1955

WELFARE

CHILD WELFARE—CHILDREN'S COMMISSION—NUMBER OF APPOINTIVE MEMBERS—§417.01, F. S.

To: *LeRoy Collins, Governor of Florida, Tallahassee*

QUESTION:

Under the provisions of §417.01, F. S., how many appointive members are provided for Florida children's commission?

The 1st two sentences of §417.01, F. S., are quoted:

"That there is hereby created the Florida children's commission, which shall consist of *not less than 15 nor more than 21 members all to be appointed by the governor*

of Florida. The membership of the commission shall include the state superintendent of public instruction, the state health officer, the state welfare commissioner and the chairman of the crippled children's commission." (Emphasis supplied.)

Those members described in the above-quoted 2nd sentence are public officers. Their duties as members of the commission are ex officio as to each; they are not appointed to the commission but are members under the terms of the statute. Reasonably, by virute of the italicized wording of the above-quoted 1st sentence, members provided to be appointed by the governor in number are "not less than 15 nor more than 21"; but this statement is made subject to the remarks below.

The 3rd sentence of said section is quoted:

"One-third of the members shall be appointed for the term of 4 years, $\frac{1}{3}$ for the term of 3 years, and $\frac{1}{3}$ for the term of 2 years, and thereafter the terms of office of each member shall be 4 years."

This language appears to be quite clear. It is evident that staggered terms for members (in thirds) is provided. Hence, the italicized wording in the 1st sentence of §417.01 is to be construed as providing for appointive members in numbers of either 15, 18 or 21.

Section 417.01 was originally 1947 legislation. While no careful study or inquiry has been made, it would appear from the record of commissions issued in the office of the secretary of state that in 1947 members to the commission were appointed as follows: 5 for 4 years, 4 for 3 years, 5 for 2 years. The dates below are taken from said record, the 1st column setting for expiration dates of 1st appointments to the commission, and the 2nd column expiration dates of commissions now apparently outstanding: (Your office should verify from your files data concerning outstanding commissions)

<i>Column 1</i>	<i>Column 2</i>
9-8-51	9-8-55
9-9-51	9-9-55
9-15-51	9-15-55
9-20-51	9-21-55
11-14-51	11-14-55
	1-20-59
9-17-50	9-19-58
9-24-50	9-24-58
9-25-50	9-25-58
9-25-50	9-25-58
	10-28-58
9-11-49	9-11-57
9-16-49	9-16-57
9-17-49	9-17-57
10-6-49	10-6-57
10-13-49	10-13-57
	4-1-57

With inconsequential exception, it will be noted that apparently now there are outstanding commissions corresponding as to date and required terms with the 14 original appointments. In addition to these commissions are held by Dr. Hugh A. Carithers (term expiring 4-1-57); Mrs. L. F. McCaffrey (appointed 1-20-55 for "4 years"); and Ralph D. Newman (10-28-54 to 10-28-58). So in numbers of members present expiration dates as to years appear to be as follows: 6 in 1957, 5 in 1958; 6 in 1959 (including 1955 expirations when appointments are made).

There is the rule that where a statutory office is created, and the statute is silent as to the beginning of the term, the term begins when the office is first filled, which fixes the cycle of the term. See for example *State v. Amos*, Fla., 133 So. 623. Section 417.01 provided in effect for the appointment of 15, 18 or 21 members, original appointments to be as above noted and thereafter for 4 years as to all members. Reasonably it appears that respectable argument could be made that the statute contemplated original appointments on the same date, hence, that the appointment of the 1st member fixed the cycle of the term for all members. However, the point is debatable and we do not here raise the question of the cycle of terms fixed for individual members as above evidenced and followed.

In the light of the foregoing, the question is answered as follows:

The 4 public officers as ex officio members of the commission have no relationship to the language of the statute relating to members to be appointed by the governor, viz., either 15, 18 or 21. Hence, the number of members for the groups whose terms expire in the years 1957, 1958 and 1959 may be increased to a total of 7 as to each group. In any event, to fulfil statutory intent, these groups should be equal as to number, either 5, 6 or 7.

055-262—October 10, 1955

EDUCATION

COUNTY SCHOOL SYSTEM—ELECTIONS—SCHOOL TRUSTEE CANDIDATES—FILING DATE

To: *Donald W. Hulmes, Attorney, Broward County Board of Public Instruction, Hollywood*

QUESTION:

When a statute requires candidates for the office of school trustee to file with the county board of public instruction at least 15 days prior to the holding of the election and the beginning of the 15-day period falls on a Sunday, what is the last day on which a candidate may file?

The rule is well established that "in computing the time within which an act required by a statute must be done, if the last day falls on Sunday it cannot be excluded unless the intention of the legislature to exclude it is manifest." (*Simmons, et al v. Hanne, et al* - Fla. - 1905, 39 So. 78). See also *Johnson v.*

Myers, 54 Fed. 417, 4 CCA 399; Alderman v. Phelps, 15 Mass. 225; Haley v. Young, 134 Mass. 369; American Tobacco Co. v. Strickling, 88 Md. 500, 41 Atl. 1083.

Your question is therefore answered as follows: Sunday may not be excluded and the candidates must file on the preceding Saturday.

055-263—October 10, 1955

HIGHWAY PATROL

DIRECTOR—SALARY—APPLICATION OF §321.07, F. S.
(AM. CH. 29962, 1955)

To: *H. N. Kirkman, Director, Department of Public Safety, Tallahassee*

QUESTION:

Is the director of the Florida highway patrol entitled to the increase in pay provided for highway patrol officers in Ch. 29962, 1955?

Chapter 29962, 1955, provides for certain salary increases for officers of the highway patrol based on length of service.

Although it is true that the director of the highway patrol is declared to be a conservator of the peace along with members of the patrol (§321.05, F. S.), and §321.02 designates the director of public safety as the commander of the highway patrol, it does not appear that the legislature intended to classify the director as an officer along with patrolmen for the purpose of determining the salary to be paid the director.

The salary of the director is the subject of separate legislation and is fixed by the appropriations act (Ch. 29966, 1955).

This act provides in part: (Item 46 "Public Safety, Department of")

"A—Salaries—Including salary \$9000 for director and \$7200 for supervisor of driver's license division and including salaries for 50 new patrolmen."

Your question is therefore answered in the negative.

055-264—October 10, 1955

PUBLIC LANDS AND PROPERTY

INTERNAL IMPROVEMENT FUND—TITLE TO FILLED IN
WATER BOTTOM LANDS CONTIGUOUS TO
UPLAND—§253.12, CH. 271, F. S.

To: *Trustees Internal Improvement Fund, Tallahassee*

QUESTION:

Where lands under navigable waters are filled in, consequent upon the deposit of spoils from dredging and improving such navigable waters by the federal government, in such manner as to extend the land area beyond

the surveyed area of the upland, who holds title to such made or filled in lands?

In dredging and improving Caseys Pass, also known as Venice Inlet, the rock, sand and soil dredged from the water bottoms of the pass have been, and will in the future be, deposited upon the water bottoms contiguous to and around a large portion of Lot 4, Sec. 1, Twp. 39 S., Range 18 E., in Sarasota County. The map handed us with the said request for opinion indicates considerable extension of the land area shown by the 1907 survey of said lot 4 by the federal government, most, if not all, of which extension of land was probably due to the deposit of the spoils taken from the bottom of the pass in the dredging of the pass by the federal government. The said map also indicates plans for the further extension of the land area by the deposit of spoils from such dredging in the future by the federal government. Although the map before us indicates the extension of the land area beyond the area indicated by the survey of 1907, we do not have before us evidence as to what portion of the lands in question was made by such dredging and what portion, if any, was produced by nature as accretion.

In the U. S. the several original states succeeded to all the rights of the English Crown and parliament in the soil under navigable tidewaters, and retained such title, subject to such rights as they may have surrendered to the national government by the adoption and ratification of the U. S. constitution (56 Am. Jur. 865, §453). Title to the soil under navigable waters acquired by the U. S. by cession was and is held by the U. S. in trust for the future state so that all states are upon an equal footing as required by the U. S. constitution. Hence, the title to all lands under navigable waters in this country passed to the new states upon their admission into the union (56 Am. Jur. 865, §453). The American rule in this connection differs slightly from the English or common law rule (56 Am. Jur. 864, §452). "Upon the admission of Florida into the Union by Act of Congress of March 3, 1845, the state, by virtue of its sovereignty, became the owner of all lands under the navigable waters within the state, including the shores or spaces, if any, between ordinary low-water mark and ordinary high-water mark, and also all tidelands, viz., lands covered and uncovered by the daily ebb and flow of normal tides" (Martin v. Bush, 93 Fla. 535, 112 So. 274, text 283). The same rule is applicable to all navigable waters whether affected by the tides or not. The state of Florida, upon its admission to the union, became the owner of, and, unless lawfully conveyed or granted, still owns, the beds of all navigable waters within the state (Martin v. Bush, supra). State statutes and laws regulate the title to lands under navigable waters and the rights of riparian owners and the general public with reference thereto (Fox River Paper Co. v. Railroad Commission, 274 U. S. 651, 47 S. Ct. 669, 71 L. Ed. 1279; Appleby v. New York, 271 U. S. 364, 46 S. Ct. 569, 70 L. Ed. 992). The state may gain or lose lands by reason of accretion, reliction, erosion, etc., caused by nature. There appears to have been no erosion or submergence of any of the upland here considered. There has been no withdrawal of the waters so as to uncover any of the lands. If there has been any change of the ownership

of the submerged lands at this point (which came to the state upon its admission into the union in 1845) it must have been by reason of accretions or under Ch. 271, F. S., also known as the Butler Act.

"At common law and under statutes declaratory thereof a riparian or littoral owner acquires title to land formed by accretions to, or reliction from, his contiguous shore" (65 C. J. S. 174, §82). "'Accretion' may be defined as an addition to riparian land gradually and imperceptibly made by the water to which the land is contiguous; a gradual and imperceptible increase of land through the operation of natural causes . . . It is always gradual and imperceptible in character, and should be so gradual that no one can tell how much is added at each moment of time . . ." (65 C. J. S. 172, §81). "In determining whether an addition to land constitutes accretion, the length of time during which it is in the course of formation is not important if it is gradually and imperceptibly made . . ." (65 C. J. S. 173, §81). Although there are some adverse authorities, the general rule is that the doctrine of accretions does not extend to lands reclaimed by filling in lands once under water, or by the artificial drainage of land (65 C. J. S. 177, §82) such as the drainage of the Everglades by governmental agencies (*Martin v. Bush*, 93 Fla. 535, 112 So. 274, text 287). Where the change in the lands takes place suddenly and perceptibly there is no change of ownership and the boundary between the upland and the submerged lands remains the same (56 Am. Jur. 892-895, §477).

Where water bottoms are filled in by reason of dredging in navigable waters, whether by the federal government or otherwise, such filling in is not gradually and imperceptibly, nor is it done through the operation of natural causes, although it may have the effect of extending existing uplands into the navigable waters. Water bottoms fills, whether contiguous to upland areas or upon water bottoms so as to form islands, made through the deposit of spoils derived from dredging, are not accretions to the upland to which they are contiguous. Any of the area mentioned in the above question, which has been made upon water bottom areas by the deposit of spoils obtained through dredging by the federal government, although contiguous to or adjoining uplands, is not an accretion to such uplands. The state holds title to such made lands unless title to the same has passed by reason of the operation of Ch. 271, F. S.

The two easements mentioned in the file as being from the Venice Inlet Co. to the U. S. (embracing parcels numbered DO-2006 and DO-2007 on the plat furnished us with the request for opinion) appear to have been made, executed and delivered in 1936 and 1937 respectively. It is presumed that the dredging and filling of the lands described in said easements were commenced at or near the dates mentioned. Ch. 271, F. S., was in force and effect at least until the enactment of Ch. 26776, 1951 (see *Duval Engineering and Construction Co. v. Sales*, Fla., 77 So. 2d 431). Although Ch. 7304, 1917, (brought forward into F. S., as §§253.12, et seq.) vested the title to certain islands, sand bars, shallow banks and small islands in the trustees of the internal improvement fund, such description did not vest all

submerged sovereignty lands in Florida in such trustees (Holland v. Fort Pierce Financing and Construction Company, 157 Fla. 649, 27 So. 2d 76) and left other submerged lands in the sovereign state subject to the operation of Ch. 271, F. S., at least until the enactment of said Ch. 26776, 1951 amending §253.12, F. S. The Butler Act (Ch. 271, F. S.,) vested "in the riparian owner . . . title to the submerged areas from the high water mark in the direction of but only to the edge of the channel, but the title thus vested is a qualified one, which will become absolute when and if the upland owner shall actually bulkhead and fill in from the shore." (Holland v. Fort Pierce Financing and Construction Co., 157 Fla. 649, 27 So. 2d 76, text 80; Bridgehead Land Co. v. Inter County Telephone and Telegraph Co., 145 Fla. 389, 199 So. 361, text 363). Full title does not vest until bulkheaded and filled in (Commodores Point Terminal Co. v. Hadnall, DC Fla., 3 Fed. 2d 841).

We do not have before us sufficient evidence from which to draw a legal conclusion as to whether there may have been a bulkheading and filling in by the upland owner under Ch. 271, F. S., prior to the enactment of Ch. 26776, 1951.

The above question is, therefore, answered by stating that unless title was acquired by the upland owner by reason of his having bulkheaded and filled in the land in question under Ch. 271, F. S., title remains vested in the state of Florida or its trustees of the internal improvement fund. No title appears to have vested in the upland owner by reason of accretion.

055-265—October 10, 1955

EDUCATION

BOARD OF CONTROL—CONTRIBUTIONS TO FUND FOR SURVEY OF NEEDS OF HIGHER EDUCATION— INCOME TAX DEDUCTIONS

To: *Board of Control, Florida State University, Tallahassee*

QUESTION:

Is a contribution to a fund for needs of higher education a charitable contribution within the meaning of federal income tax laws?

You state that due to the insufficiency of the appropriation to your board to complete its survey of the needs of higher education in the state, you propose to seek donations from interested individuals or corporations to supplement the funds which you have for that purpose. You inquire whether such donations or gifts would be charitable contributions within the meaning of federal income tax laws.

The board of control is a public corporation of the state whose function, exclusively, is the operation and management of the state's institutions of higher learning. The board is supported by state appropriations except that on occasion it receives a donation or grant from an individual or corporation to pay in whole or in part the cost of one or more of the board's projects

in the state's program of higher learning. Such a project is the board's present survey of the resources and needs of higher education in Florida. The study is being made by the council for the study of higher education, a committee of experts selected by the board for that purpose.

A contribution either to the board of control, an agency of the state, or to the council for the study of higher education, to supplement the board's available funds for the costs of its survey of higher education is a charitable contribution within the meaning of the federal income tax laws, and deductible as such like other charitable contributions under the federal tax regulations relating to deductions permitted from income taxes. See §170, Internal Revenue Code of 1954, 26 U.S.C.A.

055-266—October 10, 1955

AGRICULTURE, HORTICULTURE AND ANIMAL INDUSTRY

STATE PLANT BOARD—CERTIFICATE OF INSPECTION— EXEMPTIONS—§581.081, F. S. (AM. CH. 29767, 1955)

To: *State Plant Board, Board of Control, Florida State University, Tallahassee*

QUESTION:

May the state plant board exempt the following classes of growers from obtaining certificate of inspection as required by §581.081, F. S. (§4, Ch. 29767, 1955)?

1. Any grower, person, or firm, who uses the nursery stock grown on his own property, or who accepts no money or anything else of value for the nursery stock grown.

2. All government agencies producing nursery stock for research purposes, reforestation, or for the landscaping of government-owned lands.

3. Garden clubs, 4-H clubs, churches, and all other charitable or non-profit organizations recognized as such by the state plant board.

4. Any person 65 years of age or older who grows all of the nursery stock he sells, and total sales do not exceed \$100 per year.

Section 581.081 reads as follows:

"Certificate of inspection.—Before any nurseryman, dealer or agent shall sell or distribute, or offer for sale or for distribution, any nursery stock in this state he shall apply to the board and obtain a certificate of inspection indicating that he has complied with the provisions of this act and the lawful rules and regulations made and promulgated by the board. Each application for a certificate of inspection shall be accompanied by a certificate fee in such amount as shall be determined by the board; and upon the issuance of such certificate it shall be renewed annually thereafter upon its anni-

versary date, upon satisfactory showing to the board that the provisions of this law and the regulations of the board have been complied with and upon the payment of an annual renewal fee in such amount as shall be determined by the board; provided, however, that neither such certificate of inspection fee nor such annual renewal fee shall exceed \$25. All monies received by the board under the provisions of this section shall be deposited with the state treasurer in the state agencies fund, and shall be used by the board to defray its expenses in carrying out the additional duties imposed on the board by this act."

The primary purpose of the statute is the protection of agriculture and horticulture in the state.

Section 581.14, F. S., defines nurseryman as "any person engaged in the production of nursery stock for sale or distribution." The same section defines dealer as "any person not a grower of nursery stock in this state who buys or otherwise acquires nursery stock for the purpose of reselling or reshipping independently of any control of the nurseryman." Agent is defined by that section as "any person selling or distributing nursery stock under the partial or full control of a nurseryman."

The state plant board has no authority whatever to exempt anyone included in the statute. Only the legislature can do that. Your authority to make regulations does not extend that far although you may fix the amount of the inspection fee for any class or group covered by the statute.

Answering as to the 1st, 3rd and 4th groups included in your question, if any of them are within the definition of nurseryman, dealer or agent, they are covered by the statute, and it makes no difference whatever as to whether the nursery stock is sold or is distributed free of charge. The amount of sales has no bearing on the question. If any of them, nurseryman, dealer or agent, are within the definitions quoted above and sell, or offer to sell, or distribute nursery stock, they are included within the provisions of the statute and are required to comply.

With reference to the 2nd group, that is, government agencies producing nursery stock, the general rule is that a statute does not include state or government agencies unless the wording of the statute clearly implies an intention of the legislature to include them (82 C. J. S. 554). Ordinarily, government agencies cooperate with each other. In the event of failure of such cooperation, it can usually be accomplished by a directive from the chief executive to the non-cooperating agency. Also, there might be circumstances and conditions which would bring a state agency within the purview of a statute of this kind. Until you have an actual case which could not be handled in the manner mentioned above, I think it better to postpone a more specific answer.

055-267—October 11, 1955

ELECTORS AND ELECTIONS

REGISTRATION FOR SCHOOL BOND ELECTIONS— BROWARD COUNTY—CH. 30634, 1955

To: *Donald W. Hulmes, Hollywood*

QUESTION:

Under the provisions of Ch. 30634, 1955 (senate bill 1099), providing special registration for school bond elections in Broward county, may the supervisor of registration open the special registration book therein provided prior to the 60th day before the date of such election?

We assume this local act is valid and condition this opinion upon such assumption.

It is here necessary to refer only to that part of the act which provides that the special registration book for registration of freeholder electors, therein required, shall be opened "60 days before the holding of such election, and shall remain open for . . . 30 days thereafter . . ."

In 1884, our supreme court held in *State v. Sumter County Commissioners*, 20 Fla. 859, that a registration of voters made at a time, or in another manner, than that prescribed by statute, is not a legal registration. We feel that rule still obtains.

Hence, the question is answered in the negative; that is to say, that said special registration book should be opened for registrations on the 60th day before the date of such a bond election.

055-268—October 13, 1955

MOTOR VEHICLES

REGULATION OF TRAFFIC ON HIGHWAYS—EMERGENCY VEHICLES—AMBULANCES—§§317.01 AND 317.74, F. S.

To: *Department of Public Safety, Tallahassee*

QUESTION:

Is an ambulance owned and operated by a funeral home in the usual manner an emergency vehicle within the purview of sub §(1), §317.01 and sub §(4), §317.74, F. S.?

Subsection (1) of §317.01 and sub §(4) of §317.74, F. S., are identical, each being as follows:

"AUTHORIZED EMERGENCY VEHICLE. Vehicles of the fire department (fire patrol), police vehicles, and such ambulances and emergency vehicles of municipal departments or public service corporations as are designated or authorized by the director of the department of public safety or the chief of police of an incorporated city."

The Illinois Uniform Traffic Act contains a definition substantially identical with the above subsections (although limited to the larger counties of the state), together with provisions relative to drivers of emergency vehicles also substantially identical with §317.74(4), F. S., (see *Perrine v. Charles T. Bisch & Son*, 409 Ill. 175, 98 N. E. 2d 754, text 755-56). The appellate court of Illinois, 3rd Dist., in *Perrine v. Charles T. Bisch & Son*, 346 Ill. App. 321, 105 N. E. 2d 543, text 546, said that "the very nature of an ambulance, when it is responding to an emergency, lifts it out of the class of ordinary vehicles. It then becomes an emergency vehicle and, except as is necessary to observe the rules of safety, both for itself and others using the highway, it is entitled to precedence over other vehicles, all other circumstances being equal," and held that the ambulance operated by the funeral home, Charles T. Bisch & Son, was an emergency vehicle within the purview of said Illinois statutes, which are substantially identical with the above Florida statute. The same rule seems to be applicable to the Florida statute.

Above subsections of §§317.01 and 317.74, F. S., concern public safety. They authorize the director of public safety, as well as chiefs of police as to vehicles operated within municipal corporations, to designate ambulances as emergency vehicles. An ambulance, when being operated in connection with an emergency, is an emergency vehicle, within the above statute, and funeral homes serving the general public are public service establishments in the broad sense of the term. Only certain types of public service establishments are required to be licensed by the Florida railroad and public service commission.

The above question is answered in the affirmative.

055-269—October 13, 1955

TREASURER

DEPOSITS, SECURITY FOR—CERTIFICATES ISSUED PURSUANT TO CH. 30154, 1955

To: *J. Edwin Larson, State Treasurer, Tallahassee*

QUESTION:

Are the certificates of indebtedness and fuel tax anticipation certificates, issuable under the provisions of Ch. 30154, 1955, acceptable as collateral to secure deposits of the state treasurer in banks?

Section 1 of Ch. 30154, 1955, provides that any county having a population in excess of 100,000 inhabitants according to the last preceding federal census, by resolution of its board of county commissioners, upon certification by the state board of administration of adequate anticipated revenues to accrue to such county from surplus gasoline taxes under §16, Art. IX, Fla. Const., may issue interest-bearing certificates of indebtedness maturing not more than 4 years from date, payable from the 20% surplus gasoline taxes, proceeds to be used by such county to acquire rights-of-way for primary roads to be constructed in such county under supervision of the state road department.

Section 2 of the chapter provides that upon resolution of the board of county commissioners of any such county, the state road department shall be authorized to issue interest bearing fuel tax anticipation certificates, maturing not more than 4 years from date of issue, payable from the 80% of such county's surplus gasoline taxes remitted to the state road department for expenditure in such county, for the sole purpose of enabling such county to acquire such rights-of-way; provided, that upon request by resolution of the department the state board of administration is authorized to act as agent of the department in the issuance, sale, management and payment of such certificates.

Chapter 30154 is similar to Ch. 28865, 1953, applying to counties in excess of 150,000, the mentioned proviso above in §2 of the former chapter being the only difference between the acts.

Section 18.111, F. S., provides that the state treasurer, acting as such or as ex officio treasurer of any county, board, etc., is authorized to accept as collateral security for any funds deposited by him, bonds, notes or certificates hereafter issued by any county or board, commission, authority, agency or other instrumentality of the state, which contain a pledge of and are payable solely from the 80% surplus 2 cents 2nd gasoline tax accruing under §16 of Art. IX of the state constitution, provided that such securities have been approved by the state board of administration.

In view of the foregoing, the question is answered as follows:

There appears to be no statutory authority making the certificates of indebtedness issuable under §1 of Ch. 30154, 1955, eligible as collateral security for deposits of the state treasurer.

The fuel tax anticipation certificates issuable under §2 of said chapter appear to be "notes or certificates", as such words are used in §18.111; and if such are issued and contain "a pledge of and are payable solely from the 80% surplus 2¢ gasoline tax accruing under §16 of Art. IX of the constitution of the state", and if such certificates have been approved by the state board of administration as to their legal and fiscal sufficiency, they are eligible as collateral security for such deposits.

055-271—October 14, 1955

CORPORATIONS

STOCK DIVIDENDS—ISSUANCE BASED ON APPRECIATION OF CAPITAL—§§608.15, 608.18, 608.52, F. S.

To: R. A. Gray, Secretary of State, Tallahassee

QUESTION:

Can a Florida corporation, having the power through its charter or amendment thereto, declare a stock dividend on the basis of the unrealized appreciation of the capital paid in when the corporation was chartered?

The situation referred to in the question occurs because of a proposed charter amendment which would authorize the payment of a stock dividend and the necessary increase in capital stock. It appears that certain realty obtained by the corporation through the issuance of stock has increased in value over a period of years to the point where its actual value greatly exceeds its book value which should be the value placed on the realty when it was acquired.

It is here noted that this opinion will be limited to the consideration of whether a "stock dividend" may be issued in the manner here contemplated, since the issuance of a cash dividend of such circumstances would require the consideration of different authorities.

Share of stock are items of personal property which indicate the ownership of a corporation. Within certain limits the value of each share, and the cost of each share, are determined at least to some degree by the directors and stockholders of the corporation. If for bookkeeping purposes, or for other lawful purposes, it becomes expedient for a corporation to issue additional shares of stock, it may, if so authorized by its charter, either sell additional shares or issue additional shares as a stock dividend. Since the term "stock dividend" is used in the question, it is assumed that the corporation in question will receive no additional remuneration for the additional shares of stock which it proposes to issue and that the shareholders will receive no immediate increase in their wealth by virtue of such dividends. (See the distinctions between stock and cash dividends discussed in 13 Am. Jur. 642-645.)

Section 608.52, F. S., provides as follows: "Dividends may be paid to stockholders from the net earnings or from the surplus of the assets over the liabilities including capital of a corporation, but not otherwise. When the directors shall so determine, dividends may be paid in stock." Implicit in this section and in other provisions of our corporation laws is the principle that the capital of a corporation must not be reduced by the payment of a dividend.

However, the nature of a bona fide stock dividend is such that the capital of a corporation is not decreased but that it is increased by adding to it certain surplus assets. In 13 Am. Jur. 652, it is stated that "a stock dividend can not be said to impair the capital or capital stock of the corporation, for it takes nothing from the corporate property." See also §608.15, F. S., which includes the statement in effect that in the absence of fraud the judgment of the directors of a corporation as to the value of the consideration given for shares of stock shall be conclusive. Also §608.18(4), F. S., as amended, clearly authorizes the amendment of a corporate charter for the purpose of increasing "by any amount the authorized number of shares of any kind, class or series of stock."

In view of these authorities and others that might be cited, it is my opinion that the question should be answered in the affirmative. It is cautioned, however, that this answer is purely theoretical in nature and can not be properly applied by par-

ticular corporations in the absence of complete knowledge of their financial situation and other relevant facts and laws applicable thereto.

055-272—October 17, 1955

TAXATION

ESTATES—FOREIGN EXECUTOR—TAX ON INTANGIBLE PERSONAL PROPERTY—§§732.36 AND 732.47, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where a citizen and resident of this state, by her last will and testament makes provision for the probate of her will as to a stated portion of her estate in another state, and as to the balance of her estate in this state, and executors are appointed and qualified pursuant to such will in both states, what portion of the decedent's intangible personal property is subject to taxation in this state?

The decedent's last will and testament was properly executed on Jan. 3, 1951, but was amended by codicils properly executed on Aug. 6, 1952, April 19, 1953 and June 10, 1953; the decedent died, a citizen and resident of this state, on Sept. 27, 1954. By her said last will and testament and codicils the decedent divided her estate into 2 parts, 1 part (including "the real estate and tangible personal property situated in Florida, any bank accounts in banks located in Florida and any securities, the physical evidence of which shall at the time of my death be situated in Florida") being designated as *the Florida assets*; all other assets of the estate are referred to as "my estate (other than the Florida assets)." Florida executors are appointed for the portion of the estate in Florida, or the Florida assets; other executors are appointed for the estate other than the Florida assets. The last will and testament directs that the Florida executors probate the will in Florida, as to the Florida assets, and that the other executors probate the will in New York, as to the remaining assets of the estate.

"It is essential to the power of taxation that either the owner of personal property be a resident or the property be situated within the district attempting to exercise the power to tax . . ." (State v. Beardsley, 77 Fla. 803, 82 So. 794, text 797) "Intangible property, in contemplation of law, accompanies the person of the owner, and is taxable at his domicile, and upon his death such property passes into the custody and control of his administrator or executor, at the domicile of the decedent . . . The weight of authority is that such property, in the hands of an administrator or executor, is taxable at the domicile of the decedent or the place of granting the letters of administration, which is usually the place of the domicile of the decedent . . ." (State v. Beardsley, *supra*). We are not here dealing with a case where an administrator or executor appointed by a probate court in this state removes the assets of the estate to another state (1947-8 Biennial Report 239; Opinion of Dec.

29, 1947; 047-438); but with an administration of a portion of the estate of the decedent being had in another state, as provided for and directed in the last will and testament of the decedent.

"Ordinarily the domicile of a decedent determines the situs for purposes of taxation of his personal property which is of an intangible character not permanently located elsewhere, even where the personal representative is a non-resident, at least until administration has been awarded. . . Personal property in the hands of an ancillary administrator of another state may not be assessed against a domiciliary executor where such executor has no control of the property . . ." unless title to the property did not vest in the ancillary representative by such ancillary administration. (84 C. J. S. 242-3, §119; see also 51 Am. Jur. 491-2, §483.) "The state of the domicile of a decedent cannot subject his personal estate to taxation, where the estate is not actually within the state, and the executor or administrator who is its owner is a nonresident." (51 Am. Jur. 491-2, §483)

The general rule seems to be that an appropriate court of a state in which assets of an estate of a nonresident are found has jurisdiction to grant probate of a decedent's last will and testament, even though the will has not been presented for probate or probated in the state of the decedent's domicile (Annotation in 119 A. L. R. 491-512). Several New York cases hold that where a nonresident decedent left personal property in that state that his will may be probated in New York prior to the probate of his will in the state of his residence at the time of his death; there are like holdings in other states (Annotation in 119 A. L. R. 498-502). Here the material question seems to be whether or not the courts of the other state have jurisdiction, by reason of the provisions of the decedent's will and the presence in the other state of the evidences of title to intangible personal property owned by the decedent. Certificates of stock, bonds and other securities do not constitute the actual intangible personal property but are merely the evidence of such property; such property may have its actual situs in one state while the evidence thereof is in another state.

The decedent appears to have done everything in her power prior to her death, short of moving her domicile from the state, to give certain of her property, including certain intangibles the evidence of which was located in another state, a situs for purposes of administration in such other state. She has appointed separate executors to administer such portion of her estate, and directed that they administer such portion of her estate in such other state and under its statutes and laws. It is not clearly apparent that the decedent was prohibited in so directing the administration of a portion of her estate in such other state by §§732.36 and 732.47, F. S. The statutes and laws of one state may not control the jurisdiction and proceedings in the courts of a sister state; and the judgment of the courts of a sister state, so long as they have jurisdiction of the subject matter and parties to the suit, is binding on the courts of this state (§1, Art. IV, U. S. Const.).

"Personal assets of decedent's estate, situated within the

territorial jurisdiction of the court, confer a local probate jurisdiction regardless of the domicile or residence of the decedent" (33 C. J. S. 897, §20). "For the purpose of probate jurisdiction, tangible assets are deemed located where they happen to be, but the locality of intangible assets depends on the exact nature of the particular assets" (33 C. J. S. 900, §20). It has been stated, upon the question of jurisdiction for the purposes of probate proceedings, that a specialty debt's situs is where the instrument happens to be (33 C. J. S. 901, §20; *Beers v. Shannon*, 73 N. Y. 292), that the situs of a judgment debt is where the judgment is recorded (33 C. J. S. 902, §20; *Beers v. Shannon*, *supra*), that the situs of corporate stock is not the location of the certificate but at the principal place of business of the corporation or where its property is located (33 C. J. S. 902, §20; *In Re. Fitch*, 160 N. Y. 87, 54 N. E. 701). We doubt the power and authority of a decedent to vest jurisdiction in a probate court in another state to administer a portion of his or her estate, when none of the above matters of jurisdiction exists. Unless clearly without jurisdiction the fact that a court in another state has assumed jurisdiction of certain properties of a decedent and is proceeding to administer the same would seem to be *prima facie* evidence of jurisdiction, at least until overcome by proof. The fact that the state or its subdivision wherein such foreign probate proceedings are being enforced has assessed taxes against a portion of the estate in the hands of executors or administrators appointed by said court would like be *prima facie* evidence of the situs of such property.

In the light of the above statutes, authorities and observations, it is clearly apparent that no positive and definite answer may be given to the question, other than to state that the assets in the hands of the Florida executors are subject to taxation. Whether any other assets are subject to taxation in this state largely depends upon the jurisdiction of the court of the other state and its executor. The question of jurisdiction may involve questions of fact.

055-273—October 17, 1955

COURTS

FEES OF JUSTICES OF THE PEACE AND CLERKS OF CIVIL COURT OF RECORD—§§28.24 (AM. CH. 29749, 1955), 81.26 AND 33.04, F. S.

To: *Bryan Willis, State Auditor, Tallahassee—J. F. McCracken, Clerk Civil Court of Record, Miami*

QUESTIONS:

1. To what fees are justices of the peace entitled, under §81.26(2), F. S., since the enactment of Ch. 29749, 1955, which amended §28.24, F. S.?

2. To what fees are clerks of the civil courts of record entitled, under §33.04, F. S., since the enactment of Ch. 29749, 1955, which amended §28.24, F. S.?

Section 81.26(2), F. S., provides that "the fees of a justice of the peace shall be the same as those of the clerk of the circuit

court for similar services." §33.04, F. S., provides in part that the clerk of the criminal court of record shall be the clerk of the civil court of record and "shall have the same powers and perform the same duties in the civil court as are performed by and required of the clerk of the circuit court in said court, and as compensation for his services he shall receive *the same fees as the clerks of circuit court receive for similar work.*" The last mentioned provision is identical with the one contained in §3, Ch. 8521, 1921, under which the civil court of record for Duval county was organized and now exists. Section 33.04, F. S., was derived from §3, Ch. 11357, 1925, said §3 being substantially identical with §3 of said Ch. 8521, 1921.

The reference in sub §(2) of §81.26, F. S., that "the fees of a justice of the peace shall be the same as those of the clerk of the circuit court for similar services," appears from its history note to have been derived from §57, Ch. 2040, 1875; however, the actual provision in said §57 was that "the fees and costs of justice of the peace shall be as already provided by law." From an examination of the session laws in force in 1875 when said Ch. 2040 was enacted we find that the fees and costs of justice of the peace were specifically, item by item, set out in §8, Ch. 1981, 1874; §6 of this same act set out the fees and costs of the clerk of the circuit court and §7, the fees and costs of the sheriff. Said §§6, 7 and 8 were expressly amended by Ch. 2089, 1877, still specifically setting out the fees of justices of the peace, item by item. Chapter 3106, 1879, further amended said §§6, 7 and 8 of said Ch. 1981, 1874, specifically setting out the fees of costs of clerks of the circuit court and the sheriffs; but amending §8 so as to provide some specific fees and costs for the justices of the peace, but omitting many others set out in the 1874 and 1877 acts and in lieu thereof providing that "all other fees the same as is allowed clerks of the circuit court and sheriffs of the counties for like services," said reference clearly being a specific one to §§6 and 7 of the 1874 enactment as amended by the 1877 enactment. The reference was the same general enactment and not to general fee provisions of the statutes. In this connection see *Williams v. State*, 100 Fla. 1570, 131 So. 864; *State v. Harllee*, 100 Fla. 1572, 131 So. 866.

The reference in §33.04, F. S., (which was derived from §3, Ch. 11357, 1925, which §3 was identical with §3, Ch. 8521, 1921,) is that the clerk of the civil courts of record "shall receive the same fees as the clerks of circuit court receive for similar work." This reference was not to some specific provision in the same general enactment but generally to the statutes and laws of the state regulating the fees and costs of clerks of the circuit court. Adoption by one statute of another statute by specific reference takes the adopted statute as it exists, unaffected by subsequent amendments or repeal; on the other hand, the adoption by a statute of law governing a particular subject, without reference to a particular statute, includes the law then in force and all subsequent laws, not inconsistent with the adopting statute, on the same subject (50 Am. Jur. 58, §39; *Williams v. State*, 100 Fla. 1567, 125 So. 358). *Williams v. State*, 100 Fla. 1570, 131 So. 864, and *State v. Harllee*, 100 Fla. 1572, 131 So. 866, are not inconsistent with this rule.

The legislature, by Ch. 11893, 1927, fixed the fees to there-after be charged "by clerks of the various courts of record," including the clerks of the civil court of record, so that the reference in the 1921 and 1925 acts may be said to have been transferred to the 1927 enactment. These facts seem to distinguish the fees of the clerks of the civil court of record from those of the justice of the peace (see *State v. Harllee*, 100 Fla. 1562, 131 So. 866, text 867). Any limitation upon the process of civil courts of record not placed on the process of the circuit courts, as to cases within the same jurisdictional amount, is at least questionable (*State v. Barrs*, 105 Fla. 27, 140 So. 908; *State v. McCall*, 107 Fla. 564, 145 So. 841). The duties and powers of the clerks of the civil court of record are substantially the same as that of the clerks of the circuit court as to the cases within the jurisdictional amount of the circuit court in counties having no civil court of record.

Answering the 1st question, as the reference in §81.26(2), F. S., is to §28.24, F. S., specifically (*Williams v. State*, supra; and *State v. Harllee*, supra) and not generally, the fees of justices of the peace are those provided in §28.24, F. S., prior to the 1955 amendment, and without reference to the said amendment.

Answering the 2nd question, as the reference in §33.04, F. S., is to the statutes generally which fix the fees of the circuit court clerks, and not specifically to §28.24, F. S., the fees of the clerks of the civil court of record are those provided by §28.24, F. S., as amended by Ch. 29749, 1955.

Mr. Hubbard's letter also requested an opinion regarding the specific fee for certifying a copy of a final judgment entered by the court, which copy is prepared by some one other than the clerk. The fee for examining, comparing, verifying and certifying transcripts of record, in appellate proceedings or otherwise, prepared by attorney for appellant or some one else other than the clerk, is 20¢ per page, and is found in the 6th item of the fee schedule of §28.24, F. S. as amended by Ch. 29749, 1955. If the copy of the final judgment is taken from the minutes or records of the court, that fee applies in every case, since a copy of anything from the minutes or records of the court is a transcript of at least a part of the record. See Item 18 of the circular dated Aug. 3, 1955, published by Hon. C. Burton Marsh, president, Florida clerk's association. If the copy is made from the record of the judgment as recorded in the judgment lien record, the fee for certifying it is found in the 8th item of the fee schedule, reading: "For certifying copies of any instrument recorded in the public records, 50¢." The latter fee applies where the certification is of any instrument recorded in the public records but the copy of which is not made from the minutes or records of the court.

055-274—October 18, 1955

MOTOR VEHICLES

FINANCIAL RESPONSIBILITY LAW—DEFINITION "COURT OF COMPETENT JURISDICTION"—DEPOSIT BY OWNER—CH. 324, F. S.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTIONS:

1. What is the meaning of "court of competent jurisdiction," as such words are used in §324.04(2)(d), F. S.?

2. Section 324.04(2)(f), F. S., provides for the operator of a motor vehicle making a deposit with the state treasurer in pursuance of §324.041, F. S. Was it not the legislative intent that the owner of such a vehicle might also make such a deposit to avoid suspension of registrations?

At the outset it is to be noted that the 2nd question derives from circumstances where a motor vehicle is involved in an accident when it is being operated by a person other than the owner. The discussion herein is limited to those situations where such other person is operating the owner's vehicle with the latter's express or implied consent and under circumstances which, under our decisions, would subject the owner to liability for its negligent operation.

The section numbers used herein are those found in Ch. 29963, 1955. That session law provides a considerable revision of our financial responsibility law as the same formerly was set forth in Ch. 324, F. S.

Section 324.001 provides, among other things, that the purpose of revised Ch. 324 is to require "that the owner and operator of a motor vehicle involved in an accident shall respond for such damages and show proof of financial responsibility to respond for damages in future accidents as a requisite to his future exercise of such privileges."

Section 324.02 prescribes the manner of proving financial responsibility. Section 324.04 describes accidents involving motor vehicles falling within the purview of the law; sets forth that in event of such an accident, the insurance commissioner shall, within 30 days after receiving notice of such an accident, "suspend the licenses of the operators and all registrations of the owners" of the vehicles involved in such accident and, as to a nonresident, suspend nonresident operating privileges in this state, unless such owner or operator, prior to expiration of such time, shall be found by the commissioner to be exempt from the operation of the law for reasons and under circumstances enumerated in §324.04(2)(a), (b), (c), (d), (e) and (f). Said sub §(d) is quoted: "Such operator or owner has been finally adjudicated not to be liable by a court of competent jurisdiction." Said sub §(e) is quoted: "Such operator or owner had secured a duly acknowledged written agreement providing for relief from

liability by all parties injured as a result of said accident and had complied with one of the provisions of §324.02." Said sub §(f) is quoted: "Such operator has deposited with the state treasurer security to conform with §324.041 and has complied with one of the provisions of §324.02."

Section 324.041 recites that the "security deposited pursuant to the provisions of sub §(2)(6) of §324.04 (obviously intended to mean §324.04(2)(f)) with respect to claims for injuries" shall be in the form and amount determined by the commissioner to be sufficient to compensate for injuries arising out of an accident, but the amount shall not exceed the limits" as specified in subsection (7) of §324.01."

Section 324.05 recites that, "Any operator or owner whose license or registrations have been suspended pursuant to sub §(2) of §324.04 may effect its reinstatement upon compliance with the provisions of paragraphs (d), (e), or (f) of said sub section;" provided that renewals of drivers' licenses and registrations shall not be granted within the period of 3 years of such reinstatement, nor shall any other license or registration be issued, "unless the owner or operator is continuing to comply with one of the provisions of §324.02."

The suspension period of operators' licenses and registrations provided in §324.04(3) is 3 years, unless reinstated as set forth in the law.

We find that in event of such an accident, "licenses of operators and all registrations of the owners of the vehicles involved in such accident" shall be suspended unless exempt from such suspension features by reason of the provisions of either sub §§ 324.04(2), (d), (e), or (f). Attention is directed to the disjunctive in the words "owner or operator" as used in said sub §§(d) and (e), and the absence of the word "owner" in said sub §(f). Thus, if *either* the owner or operator meets the requirements of sub §§(d) or (e), there is no suspension of licenses or registrations; and while compliance with sub §(f) by the operator will effect exemption of the owner, there is no provision in sub §(f) for the owner to escape the suspension "of all registrations" by depositing security required by §324.041 in event the operator should fail to do so.

We revert to §324.05 relating to reinstatements. Again we find the words "operator or owner." The disjunctive as used here is not to be construed as meaning that if *either* the operator or owner meets the requirements of the section such will release suspension of both the driver's license involved and the owner's registrations. Once these have been suspended, the operator has his license restored and renewals thereof issued upon *his* compliance with the section; likewise as to the owner in relation to his registrations. It might be urged that since the owner under this section may obtain reinstatement of registrations by complying, among other things, with §324.04(2) (f), that it must have been the legislative intent to permit him to comply with said subsection to avoid suspension of his registrations in event the operator did not comply therewith. However, the 3-year provision found in §324.05, F. S., makes the situations existing before and after suspension quite different.

No necessity exists to burden this opinion with citations to support the principle of statutory construction that where the language of a statute is plain and unambiguous, it is to be accepted. Any person who feels that there is ambiguity or invalidity in any of these provisions, and can show injury by their application, may always resort to the courts.

In the light of the foregoing, in my opinion the questions are answered as follows:

1. The words "court of competent jurisdiction" as used in §324.04(2)(d) means a civil court, including its appellate court, having jurisdiction of any action for damages arising from an accident involving motor vehicles, as contemplated by Ch. 324, F. S.; hence the words do not include traffic or other courts not exercising such jurisdiction.

2. There is no provision in §324.04(2)(f) for the owner of a motor vehicle involved in an accident to deposit securities with the state treasurer, as provided by §324.041, F. S., prior to suspension of registrations.

055-275—October 19, 1955

PROFESSIONS AND VOCATIONS

CHIROPRACTORS—LICENSE RENEWAL REQUIREMENTS— §460.27, F. S.

To: *Daniel K. Kirk, Secretary-Treasurer, Florida State Board of Chiropractic Examiners, Jacksonville*

QUESTION:

Are all licensed chiropractors, as a prerequisite to renewal of license on or before October 1 of each year, required to attend the 2-day educational program as provided by §460.27, F. S., within the calendar year immediately preceding Oct. 1 of each year?

Section 460.27, F. S., provides that all licensed chiropractors shall, on or before Oct. 1, annually renew his or her license and pay a renewal fee of \$5 each year; provided that, beginning on Oct. 1, 1942, in addition to paying the renewal fee, the licensee applicant for renewal shall furnish to the board satisfactory evidence that he or she has attended the 2-day educational program conducted by the Florida association of chiropractors, or its equivalent as approved by the state board, *in the year preceding each such application for renewal*. Exception provided: those physically or mentally incapacitated from practice for the entire year preceding Oct. 1 of the year in which application for renewal is made.

Black's Law Dictionary, 3rd edition, defines "on or before" as:

"These words, inserted in a stipulation to do an act or pay money, entitle the party stipulating to perform at any time before the day; and upon performance, or tender and refusal; he is immediately vested with all the rights which would have attached if performance were made on the day."

Application for renewal is not specifically required to be made on Oct. 1 of each year, but *on or before* that date; therefore, if an applicant made application for renewal on Aug. 1 of each year, he must have attended the educational program, to quote the statute, "*in the year preceding each such application for renewal*". (Emphasis supplied.)

Therefore, it appears that Oct. 1 of each year is not a *specific date* provided by statute for renewal of licenses, and that an applicant may renew on any date on or before Oct. 1 of each year, and that as a condition precedent, he must furnish to the state board of chiropractic examiners satisfactory evidence that he or she has attended the 2-day educational program as conducted by the Florida association of chiropractors (or its equivalent as approved by the state board of chiropractic examiners of the state,) in the year preceding each such application for a renewal.

055-276—October 19, 1955

INSURANCE

RETALIATORY PROVISIONS OF §§631.16, 626.061, F. S. (CH. 29680, 1955)

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTION:

What is the effect of Ch. 29680, 1955?

This is a retaliatory statute. It is not novel; many states have enacted laws of this nature. The general object of these statutes is to protect domestic corporations from undue burdens, prohibitions and limitations of other states in which they seek to do business (29 Am. Jur. 75, §34). Certain of our states have held that the nature of such laws is reciprocal rather than strictly retaliatory (e.g., *Bankers Life Co. v. Richardson*, Cal., 218 Pac. 586; *State v. Ins. Co. of N. A. Neb.*, 71 Neb. 320; *People v. Fire Assn. of Philadelphia*). On the other hand, such a statute has been held to be purely retaliatory (*State ex rel Attorney General v. Fidelity & Casualty Ins. Co.*, Ohio, 31 N. E. 658; 16 L.R.A. 611). In any case, such statutes are subject to strict construction (29 Am. Jur. 76, §40). The constitutionality of these statutes has been upheld. Generally, they have withstood the charge that they contravene the equal protection clauses (e.g., *Fire Association of Philadelphia v. New York*, 119 U.S. 110, 30 L. Ed. 342; but see *State v. Firemen's Fund Ins. Co.*, Ala., 134 So. 858, wherein an Alabama retaliatory law was held to deny equal protection); and the charge that these laws constitute an unlawful delegation of legislative power (e.g., *State v. Firemen's Fund Ins. Co.*, supra; *State ex rel Baldwin v. Ins. Co. of N. A. Ind.*, 17 N.E. 574; *Western and S. L. Ins. Co. v. Com.*, Ky., 181 S.W. 1123); and the charge that such laws violate constitutional provisions against discrimination (e. g., *State ex rel Baldwin v. Ins. Co. of N. A.*, supra; *Union Central Life Ins. Co. v. Durfee*, Ill., 45 N.E. 441; *State v. Ins. Co. of N. A.*, supra).

In harmony with the mentioned principle of strict construction, the prevailing rule among the courts is that a statute of

this nature must not be applied in any case which does not fall within its scope (*Bankers Life v. Richardson*, *supra*; *Metropolitan Life Ins. Co. v. Boys*, Ill., 129 N. E. 724; *Life and Casualty Ins. Co. v. Coleman*, Ky., 25 S.W. 2d 748).

Section 1 of Ch. 29680 deals with Florida companies applying to do business in another state or country and such companies which are doing business in another state or country. A part of the section is quoted, the numbered subdivisions being inserted in the interest of clarity:

"Whenever the existing or future laws of any other state or country shall require of companies incorporated or organized under the laws of this state (1) actually applying to do business in another state as a condition precedent to their doing business in such other state or country, compliance with laws, rules, regulations and prohibitions more onerous or burdensome than the rules and regulations imposed by this state on foreign or alien companies, or shall require any deposit of securities or other obligations in such state or country for the protection of policyholders or otherwise or (2) require of such companies actually licensed and doing business in such other state, fees, penalties, charges or taxes greater than the penalties, fees, charges or taxes required in the aggregate for like purposes by the laws of this state of foreign or alien companies, (3) then such laws, rules, regulations and prohibitions of said other state or country shall apply to companies incorporated or organized under the laws of such state or country doing business in this state, and all such companies doing business in this state shall, in the same manner and for the same purpose be required to make deposits, pay penalties, fees, charges and taxes, in amounts equal to those required in the aggregate for like purposes of Florida companies doing business in such state or country; . . ."

Some state retaliatory laws have been construed as immediately effective even though no corporation of the retaliatory state was doing business in the state retaliated against (e.g., *Germania Ins. Co. v. Swigert*, Ill. 21 N.E. 530; *State ex rel Phillips v. Fidelity & Casualty Co.*, Ill. 42 N. W. 509). We need not labor that question here; under the terms of Ch. 29680, we are dealing with companies incorporated and organized under Florida law "actually applying to do business in another state" and "actually licensed and doing business in such other state." It is noted that in this section at times there are the words "other state or country" and then again "other state"; and the latter is to be construed as including "other country".

In the light of the foregoing, and in the absence of application of the provisions of this act to a particular foreign or alien company in Florida domiciled in a state or country retaliated against, a fair and descriptive statement of the general effect of this act is set forth in its title:

"An act to impose the same requirements on foreign and alien insurance companies doing business in this

state as is required of Florida insurance companies doing business in other states and countries; . . ."

The retaliatory features of the act are activated by (1) a Florida company actually making application for admission to another state or country, or (2) a Florida company actually licensed and engaged in business in such other state or country at the time of the act's adoption. In either event the retaliatory features in relation to a company of such other state or country operating in this state are the same. Hence, once the retaliatory provisions are called into play the laws, rules and regulations of the state or country retaliated against are applicable to a company of such state or country operating in Florida to the extent that the laws, rules, regulations and prohibitions, including required deposits, of such other state or country are more burdensome, onerous or are in excess of ours in relation to foreign and alien companies, and to the extent that such laws, rules and regulations require fees, penalties, charges and taxes in amounts greater in the aggregate than required under our laws of foreign and alien companies operating here.

No need exists to elaborate on the qualification and the exception set forth in the concluding part of §1 of the act in relation to these retaliatory features; the wording with respect to such qualification and exception is quite clear.

The provision of §2 of Ch. 29680 to the effect that "in the case of an insurance company incorporated in Canada the domicile shall be deemed to be in Canada," is free of ambiguity and needs no further comment.

The further provisions of §2 of the act consist of conditions prescribed to establish the domicile of an alien company in the U. S. This is rather confusing. §1 of the act deals with companies "incorporated or organized" under the laws of this state or under the laws of another state or country. There is provision in our statutes (§631.16, F. S.) and in the laws of certain other states licensing alien insurers and providing for U. S. branches of such insurers; but such will not translate an alien insurer into a company "incorporated or organized" under the laws of any state merely because of the licensing and the establishment of a U. S. branch of an alien in such state. Hence, these further provisions of the act concerning domicile of alien insurers are to be disregarded.

Generally, the foregoing states the effect of Ch. 29680, 1955. Should the insurance commissioner be uncertain with respect to the application of the act's retaliatory features to any particular foreign or alien insurer in Florida, we will be glad to furnish additional advice.

055-277—October 20, 1955

COUNTY ORGANIZATION, OFFICERS AND REGULATIONS

**COUNTY COMMISSIONERS—POWERS—CONSTRUCTION OF
SIDEWALKS ON COUNTY ROADS ADJACENT TO
PUBLIC SCHOOLS—§§125.01, 242.10, 334.03(14), F. S.**

To: Jack H. Greenhut, County Attorney, Escambia County, Pensacola

QUESTION:

May the board of county commissioners expend county funds for construction of sidewalks on county roads adjacent to public school buildings?

Section 125.01, F. S., provides: "The board of county commissioners of each county, at any legal meeting, may elect one of their number chairman, and make such orders concerning the care and improvement of the corporate property of the county as may be deemed expedient, and also: (1) to build and keep in repair county buildings, roads and bridges."

Roads are defined in §334.03(14), F. S. (the Florida Highway Code of 1955) as follows: "The term road shall be construed to include streets, alleys, highways, and other ways open to travel by the public, including the road bed, right-of-way, and all culverts, drains, sluices, ditches, waterways, embankments, slopes, retaining walls, bridges, tunnels and viaducts necessary for the maintenance of travel and all ferries used in connection therewith."

In the case of *Woodson v. Metropolitan St. R. Co.*, 224 Mo. 685, 123 S. W. 820, "sidewalk" was defined as follows: "It is usually recognized as that part of the street upon either side thereof that has been arranged for foot passengers, and not intended for use by vehicles and horsemen." In the case of *Wabash Ry. Co. v. DeHart*, 32 Ind. App. 65, 65 N. E. 193, the court said: "... the word sidewalk has a well understood meaning. We understand ex vi termini, that a part of the street is meant."

It seems clear that sidewalks are an integral part of a road as defined in Ch. 29965, 1955, *supra*, to be constructed where necessary. It follows that if the roads in question are county roads and the county was authorized to construct or maintain them in the first place, it is also authorized to build sidewalks as a part of the road where necessary for the protection and convenience of the public.

The foregoing establishes the power in general of the board of county commissioners to construct and maintain sidewalks on county roads. The legislature has specifically conferred the power with regard to roads adjacent to or through free public school property by enactment of §242.10, F. S.

Your question is therefore answered in the affirmative.

055-278*—October 20, 1955

COURTS

JURISDICTION—CIRCUIT COURT—JUVENILE COURT—DEPENDENT CHILDREN—COMMITMENT TO LICENSED CHILD-PLACING AGENCIES—§§39.02 AND 39.11, F. S., §11, ART. V, STATE CONST.

To: *Margaret Ward, Supervisor of Adoption Services, Department of Public Welfare, Jacksonville*

QUESTION:

Does Ch. 19597, 1939, creating a juvenile and domestic relations court of Dade county confer exclusive jurisdiction on that court in the matter of permanent commitment of children to licensed child-placing agencies for purpose of adoption, or could the Dade county circuit court permanently commit children for adoption to a licensed child-placing agency?

As I now understand it, sometimes an unwed mother who wishes to place her child for adoption with a licensed child-placing agency would prefer to have the commitment made by the circuit court because some judges of juvenile courts require 2 appearances instead of one, and have other procedures which she sometimes finds inconvenient.

As I said in the opinion of March 21, 1955, if the circuit court has jurisdiction of the child in any proceeding, i.e., divorce, the circuit court may make such orders as it deems proper, including commitment of a child to a child-placing agency for adoption in proper cases. It could do this in any other case where it had jurisdiction of a child, such as a bastardy proceeding, and perhaps others. But you now inquire whether in the absence of any such circumstances the application can be made to the circuit court as an original proceeding solely for the purpose of commitment.

In §39.02, F. S., the legislature has provided that the juvenile court shall have exclusive original jurisdiction of dependent and delinquent children, and in §39.11(1)(d) authorizes the juvenile court to permanently commit such a child to a child-placing agency for adoption. Section 11, Art. V, State Const., provides that "circuit courts shall have exclusive original jurisdiction in all cases in equity . . ." Minors are wards of the court of chancery and within the equity jurisdiction of the circuit court. Your inquiry in effect questions the constitutionality of the statute giving juvenile courts exclusive original jurisdiction of dependent children. It has not been the policy of this office to pass upon the constitutionality of a statute. That is a matter more properly left to the courts in the determination of an actual case. As stated in my opinion of March 21, 1955, the circuit court has power and jurisdiction to make whatever orders may be appropriate for the welfare of a child of which the court has taken jurisdiction, including commitment of a child to a child-placing agency for adoption. I think that if an original proceeding were filed in the circuit court solely for commit-

ment of a child to a child-placing agency for adoption the court would most likely decline jurisdiction and transfer the case to the juvenile court. Until the statute is declared unconstitutional by a competent court original proceedings in such cases should be filed in the juvenile court as provided in Ch. 39, F. S.

*This opinion supplements opinion 055-65.

055-279—October 21, 1955

SERVICE OF PROCESS

NONRESIDENT DEFENDANT—CERTIFIED MAIL—REGISTERED MAIL—§47.30, F. S.

To: *James M. McEwen, State Attorney, Tampa*

QUESTION:

May service upon a nonresident defendant under the provisions of §47.30, F. S., be made by certified mail instead of by registered mail?

I enclose a copy of my opinion 055-165, dated July 20, 1955, discussing substitution of "certified mail" for "registered mail" in service of notice under the provisions of §42.10, F. S.

I said in that opinion that the tenor of the decisions concerning *constructive service* indicates that the authorizing statutes must be strictly followed, (*McGhee v. McGhee*, 156 Fla. 346, 22 So. 2d 788 and cases there cited) and reached the conclusion that in the situation where the purpose of using "registered mail" is to acquire jurisdiction over the defendant, I was unable to say "certified mail" could be substituted.

I reach the same conclusion with regard to service upon non-residents under the provisions of §47.30, F. S., as well as in any other case where the purpose is to acquire jurisdiction over a defendant.

055-280—October 21, 1955

LEGISLATURE

HOUSE OF REPRESENTATIVES—CH. 31378, 1955, REAPPORTIONING MEMBERSHIP—EXTRAORDINARY SESSION—VALIDITY

To: *R. A. Gray, Secretary of State, Tallahassee*

QUESTION:

Is Ch. 31378, Laws of Florida, Extraordinary Session, 1955, reapportioning the membership of the house of representatives, valid in view of the failure to this date of the legislature to apportion the representation of the state in the senate?

A part of §3, Art. VII, Fla. Const., is quoted:

"The Legislature that shall meet in regular session A. D. 1925, and those that shall meet every 10 years

thereafter, shall apportion the Representation in the Senate, and shall provide for 38 Senatorial Districts, such Districts to be as nearly equal in population as practicable, but no county shall be divided in making such apportionment, and each District shall have 1 Senator; and at the same time, the Legislature shall also apportion the Representation in the House of Representatives, and shall allow 3 Representatives to each of the 5 most populous counties, and 2 Representatives to each of the next 18 more populous counties, and 1 Representative of each of the remaining counties of the State at the time of such apportionment . . ."

The title of Ch. 31378 states that it is an act providing for the "reapportionment of the membership of the house of representatives of the legislature of the state of Florida as required by the state constitution." It amends §10.03, F. S., to accomplish that purpose. The chapter was approved by the governor on June 18, 1955, and filed in the office of the secretary of state on June 22, 1955.

Section 10.03, as amended by said chapter, among other things recites that, "as provided by Art. VII, §3, of the state constitution," there shall be "95 members of the house of representatives" to be apportioned among the several counties as follows:" and continues with names of the counties in alphabetical order, and designation of the number of representatives as to each county. There is the recital that such apportionment was made in accordance with the federal census of 1950. There is the further provision that said "section shall take effect on the day of the next general election to be held on the 1st Tuesday after the 1st Monday in November, 1956, and at such general election, representatives shall be elected in the various counties in accordance with the reapportionment provided for in this section."

We assume without question that the act provides apportionment as to house membership in accord with the above-quoted specific requirements of the constitution.

It is generally known that at the 1955 regular session the legislature did not apportion the representation in the senate and the house; that at the extraordinary session convened in pursuance of provisions of said §3, Art. VII, the membership in the house was reapportioned in and by said chapter, but that no apportionment of the senate was accomplished; and that such extraordinary session now stands recessed until the early part of June, 1956.

The mentioned constitutional provision charged the legislature with the accomplishment of 2 duties, viz., that it should "apportion the representation in the senate" and that it should "apportion the representation in the house." There seems little doubt that such apportionment can be accomplished by one act (e.g., Ch. 16781, 1935); on the other hand, reasonably the apportionment of the representation in said legislative bodies may be done by separate acts (e.g., Chs. 23613 and 23614, Laws of Florida, Extraordinary Session, 1945).

The fairly recent (1944) case of *Stenson v. Secretary of State*, Mich., 13 N.W. 2d 202, is here relevant. Section 4, Art. V, of the Michigan constitution, provided in substance that each 10th year after 1913, the legislature should by law apportion anew the representatives among the counties and districts of the state and also provide for rearrangement of senatorial districts. In this suit attacking a 1943 act by which representative districts were reapportioned, it was contended among other things that the act was invalid because the legislature did not also provide "rearrangement" of senatorial districts. To this contention the court replied: "We are not in accord with intervening plaintiffs' further contention that since the constitution, Art. V, Sec. 4, provides for 'rearrangement' of senatorial districts, as well as reapportionment of representative districts once in each 10 years, the 1943 reapportionment act as to representative districts should be held invalid as an 'abuse of legislative discretion', because the 1943 legislature did not also rearrange senatorial districts." The court held the act valid.

As we have noted, Ch. 31378, 1955, apportions the house in the manner provided by §3, Art. VII, Fla. Const. No discretion was involved in that legislation; it declared the specific mandate of the constitution with respect to its subject matter. We agree with the secretary of state to the effect that its validity depends in no way upon action by the legislature with respect to reapportionment of the senate.

In view of the foregoing, in my opinion the question is answered as follows: Chapter 31378, Laws of Florida, Extraordinary Session, 1955, is valid. Hence, the secretary of state, with respect to his duties in relation to the 1956 primaries and general election, may proceed on the assumption that said act is valid.

055-281—October 24, 1955

TAXATION

INTANGIBLE PERSONAL PROPERTY TAX—BONDS OF INTER-AMERICAN TRADE CENTER—§554.102 (§4, CH. 29830, 1955)

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are the bonds and other securities issued by the Inter-American center authority subject to intangible personal property taxes in this state?

The Inter-American center authority was created and established as "*an agency of the state of Florida . . . for the purpose and with the powers*" set out in Ch. 554, F. S., (§554.01, F. S.). It may "provide by resolution for the issuance of negotiable revenue bonds . . . for the purpose of paying all or any part of the cost . . . of establishing, maintaining and operating an Inter-American cultural and trade center. The principal and interest of such bonds shall be payable solely from the special fund or funds," authorized by statute "to be provided for such payment . . ." (§554.08, F. S.). Section 554.09, F. S., prohibits the pledging of the credit of the state or that of any of its counties or municipalities; however, §554.10, F. S., provides in part that the authority

may "encumber and create a lien upon any or all of the real or personal *property of the authority*" to secure the payment of its revenue bonds. In this connection attention is directed to *Brash v. State Tuberculosis Board*, 124 Fla. 167, 167 So. 827, bearing upon the question of the authority of the tuberculosis board to encumber its real property.

Under §4, Ch. 29830, 1955, it is provided in part that "any and all bonds issued by the authority, their transfer and the income therefrom (including any profit made on the sale thereof) shall at all times be free from taxation within the state" The above reference to "bonds" must be construed as referring to the revenue bonds of the authority and not general obligation bonds; this because the authority being an agency of the state can issue only revenue bonds and may not issue general obligation bonds.

The above stated question is answered in the negative upon the authority of said §4, Ch. 29830, 1955.

055-282—October 24, 1955

HIGHWAYS, BRIDGES AND FERRIES

BRIDGE TOLLS—EXEMPTION—MEMBERS OF MILITARY FORCES—§347.19, F. S.

To: Mark W. Lance, Major General, State Arsenal, St. Augustine
QUESTION:

Under the provisions of §347.19, F. S., is a member of the military forces of the state, where properly identified and performing a mission as prescribed by the aforementioned statute, eligible for free toll passage over the toll bridges of the state, even though traveling in a privately-owned conveyance?

Your question is answered in the affirmative.

Any vehicle, regardless of the question of ownership, when used for the purpose of transporting military personnel and property of the state, and which is in charge of a person belonging to the military forces of the state and being used for the specified statutory purpose, is entitled to the privilege of free passage over toll roads and bridges.

The exemption is extended to any person belonging to the military forces of the state when engaged in a military service who presents such identification as may be prescribed by the adjutant general and who is driving vehicles for the purpose of transporting military personnel, stores and property.

It is the authorized use of the vehicle which entitles it to free passage as distinguished from its ownership. Any other interpretation of the statute would result in the defeat of its clearly expressed purpose, and it may reasonably be assumed that the use by a member of the armed forces of a privately-owned vehicle is authorized by the adjutant general.

055-283—October 25, 1955

EDUCATION

BOARD OF CONTROL—USE OF WESTCOTT ESTATE FUNDS
—COSTS OF SURVEY OF HIGHER EDUCATION
IN FLORIDA*To: Board of Control, Florida State University, Tallahassee*

QUESTION:

May the board of control authorize the use of any part of the surplus in the Westcott estate income fund, as shown by the most recent audit of the Florida state university, toward the cost of completing a survey of higher education now being made by the council for the study of higher education?

The council for the study of higher education is a group of experts organized by the board of control to study the present and future needs of higher learning in Florida. Certain funds were appropriated by the legislature for this work but they are found to be insufficient by approximately \$20,000. The scheduled completion date of the study is March, 1956. The board finds it necessary, therefore, to find other funds for this purpose, and the question is whether the Westcott estate surplus funds may be used for that purpose. The recent audit shows an unused balance in that fund of \$50,605.93.

It is now known that the impending large enrollment in the state's institutions of higher learning will be far beyond the capacity of all of the present institutions. The problem of the board of control in that respect and the purpose of the survey is to determine how to meet that situation, whether by expansion of present institutions, construction of new colleges or universities, by raising the standard of admission, or by all of these and perhaps other measures.

The source of the Westcott estate income fund was the trust created by James D. Westcott in his will dated August 28, 1884. Judge Westcott died April 28, 1887, and that part of Judge Westcott's will creating the trust estate reads as follows:

"The rest of my estate, I wish held in trust for the benefit of The West Florida Seminary, the institution located at Tallahassee, with which Col. Rivers is connected.

"I wish only the interest upon the principal used yearly, and in this and in all other matters my executor is hereby given authority to change investments of funds in his discretion. If, however, he should not qualify, then the investment may be changed by the officers controlling the institution. I wish at least $\frac{1}{2}$ of this interest expended for the benefit of students of Leon county under the direction of the managing officers of the institution. I wish none of it used for buildings or improvements of grounds."

It will be observed that the trust estate for the West Florida

seminary, now Florida state university, states that $\frac{1}{2}$ of the annual income is to be used for the benefit of students of Leon county and the other $\frac{1}{2}$ for any other need of the institution except buildings or improvements of the grounds.

All of the state's institutions of higher learning, including F. S. U., will be affected by the result of the survey, and undoubtedly benefited by it. It is my opinion, however, that Judge Westcott, in his use of the words: "benefit of The West Florida Seminary",—meant a direct benefit to that institution, of which he was an alumnus, rather than an indirect benefit such as may be derived from the survey. For this reason, it is my opinion that the question must be answered in the negative.

055-284—October 25, 1955

EDUCATION

STATE INSTITUTIONS OF HIGHER LEARNING—FUNCTION OF CAMPUS TRAFFIC COURTS—DISPOSITION OF FINES AND PENALTIES COLLECTED—§§239.53-239.58, F. S. (CH. 29723, 1955)

To: *Board of Control, Florida State University, Tallahassee*

QUESTIONS:

In view of Ch. 29723, 1955, (House Bill No. 314), may the campus traffic courts at the state institutions of higher learning:

1. Continue to function as heretofore?
2. Retain as a part of the funds of the student government those fines and penalties which it collects for infraction of the campus traffic regulations?

Heretofore, there have been in operation on the campuses of the several state institutions of higher learning so-called campus traffic courts operated with the approval of the board of control as a part of the student government. These campus traffic courts have had schedules of "penalties" and "fines" for violations of various traffic and parking regulations. The fines collected are paid into the student fund and used for part of the cost of student self-government and activities. From time to time the plan appears to have had varying degrees of success and failure.

In order to more effectively control the rapidly increasing traffic problems on the campuses of the universities, House Bill No. 314, Ch. 29723, 1955, was prepared for an exclusive method of traffic control. It did not contain the last words "and campus traffic courts shall be permitted to function." As originally filed, the act set up the procedure for handling campus traffic violations in the traffic courts of the adjacent cities, Gainesville and Tallahassee. The net effect was to extend the adjacent municipalities' traffic regulations or ordinances as well as the board of control traffic and parking rules to the streets and grounds of the university campuses. This included responsibility

of the municipalities' police departments and traffic courts. For that reason the fines and penalties were to be paid to the municipalities as partial reimbursement of the additional expenses of the city. The legislature refused to adopt a proposed amendment to the act designed to transfer the fines to the institutions' auxiliary funds. Later, by a committee amendment, the act was amended by adding the concluding words of the chapter "and campus traffic courts shall be permitted to function."

The question now arises as to whether the campus traffic courts may continue to function, and who gets the fines. It seems clear from the history of the act that the legislature recognized the propriety of payment of the fines and penalties collected through the municipal traffic court to the city by way of reimbursement of the additional costs and expenses imposed upon the municipality by the act. It also seems clear from the amendment of the bill as originally introduced, and quoted above, that the legislature intended to permit the campus traffic courts to function as they were then functioning, including retention of the fines and penalties collected by the campus traffic court in the student fund.

It is my opinion that the student campus traffic courts may continue to function under appropriate rules and regulations of the board of control as that board may determine, and when so functioning the fines and penalties collected by the campus traffic court may be transferred to the student government funds as they were handled at the time of the enactment of Ch. 29723, 1955. It appears that the legislature intended that the municipal traffic court should have concurrent jurisdiction with authority to function as set out in the act, and that fines collected by or bonds forfeited to that court should be paid into the fine fund of the municipality as set out in the act.

As a practical matter, it may become necessary for the city and the board of control to agree on what kind of violations will be handled by each of the courts, —otherwise there may be serious confusion.

055-285—October 27, 1955

COUNTY ORGANIZATION, OFFICERS AND REGULATIONS

SHERIFFS—OFFICE EXPENSES—JUNIOR DEPUTY PROGRAM—\$145.02, F. S.

To: *Bryan Willis, State Auditor, Tallahassee*

QUESTION:

May expenses incurred in connection with the organization and operation of the Junior Deputy program, sponsored by the National Association of Sheriffs, be properly charged to the expenses of the sheriff's office, under §145.02, F. S.?

"Net income" means the balance of the income of the sheriff's office "... after deducting all reasonable expenditures for salaries of clerks and assistants and for the *necessary expenditures for the*

proper operation of said office." (§145.02, F. S.) (Emphasis supplied.)

We have held in opinion 051-303, dated Sept. 5, 1951 (AGO 1951-1952, p. 51) that the dues of a sheriff, payable to the Florida Sheriffs' Assn., are a proper item of expense in connection with the operation of the office. Likewise, necessary expenses incurred in attending meetings of his association are proper expenses of the office.

As we understand the junior deputy program, it is sponsored by the National Assn. of Sheriffs and has been in evidence for some time in other states. More recently it has come into Florida and apparently in some instances the cost of such program was originally sponsored by civic clubs or other organizations interested in the public welfare. The junior deputy program has received recognition as a means of combating juvenile delinquency. We understand from the information furnished us that the junior deputy is furnished a card indicating his affiliation and a badge so identifying him in connection with the program. The program is essentially one of education and has as its primary objective that youth be taught respect for law.

The office of sheriff is an ancient one and he is a conservator of the peace in his county. (Sweat, sheriff, v. Waldon, 123 Fla. 428, 167 So. 363) One of the primary duties of the sheriff is the enforcement of the criminal laws and it is his responsibility to maintain law and order so that persons and their property are protected (Sheriff's Manual, p. 2). The duties of the sheriff are in a large measure the same as are imposed on police officers (80 C. J. S., Sheriffs and Constables, §42, p. 211). He is under a legal duty to investigate crimes, to suppress them and to arrest and prosecute persons who commit them. See, also, 47 Am. Jur., Sheriffs, Policemen and Constables, §26, p. 839 and Anderson on Sheriffs, Coroners, Constables, §6.

Under modern concepts of law enforcement, more and more persons concerned with combating crime are convinced that the proper approach to the problem should be by concentration upon prevention of crime. A sound educational program on crime prevention could share equal importance with good law enforcement.

The cost of the junior deputy program can be justified as an incidental item of expense *provided the same is kept to a reasonable amount*. The expenditure should be in good faith and not in the interest of political favor or advancement.

Hence, as qualified, the question is answered in the affirmative.

055-286—October 31, 1955

COURTS

COUNTY JUDGE'S COURTS—FEES—§§36.17 AND 28.24 F. S.

To: Bryan Willis, State Auditor, Tallahassee

QUESTION:

Since Ch. 29749, 1955 amends the fees for clerks of the circuit court set forth in §28.24, F. S., as well as

repeals sub §§(2) and (3) of §696.05, F. S., to what fees is the county judge presently entitled?

As indicated in the question, §28.24, F. S., was amended by Ch. 29749, 1955. Certain fees formerly appearing in said §28.24 were eliminated and others incorporated therein.

Section 36.17 provides for certain fees of the county judge, sub §§(1) and (2) thereof providing specific items and the amounts to be charged therefor. Sub §(3) thereof reads:

“(3) When not otherwise specified, the county judge’s fees shall be the same as charges made for like services by the clerk of the circuit court.”

The question with which we are here concerned relates to those fees and items specifically set forth in §28.24 which are not specified in §36.17, F. S., and not included in the flat fees of the county judge.

In opinion 055-273 we discussed and set forth the rule that adoption by one statute of another by a specific reference takes the adopted statute as it then exists and it remains unaffected by subsequent amendments or repeal, but that the adoption of a statute of laws governing a particular subject without reference to a specific statute includes the law then in force and all subsequent laws not inconsistent with the adopting statute on the same subject.

Said §36.17, F. S., a general law on the subject, is complete in itself. Consequently, I believe that where a county judge performs a service not specifically covered by said section, nor included in the flat fees provided by Ch. 36, F. S., reference should then be made to §28.24, F. S., to determine the fee, if any, which should properly be charged. In other words, I believe §36.17 (3), F. S., is ambulatory.

This answers your question as definitely as the same may be answered.

055-287—October 31, 1955

(Amendment to Opinion 055-233)

TAXATION

EXCISE TAX ON DOCUMENTS—WHOLESALE WAREHOUSE MORTGAGE AGREEMENT, DEFINITION—§201.21, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

What is an “agreement commonly known as a wholesale warehouse mortgage agreement” within the purview of §201.21, F. S.?

Where the note, bond or other written obligation to pay money is “secured by mortgage, deed of trust or other lien on real or personal property” there is no doubt but that it is within the said statute; however, where a purchase of personal

property is upon conditional sale, sometimes referred to as a retention of title agreement, we are confronted with the question of whether such an agreement is a lien within the purview of said §201.21, F. S. "Although a mortgage and a conditional sale are, in important respects, governed by the same principles, and the relationship between the parties, under the 2 forms of contract, are in many respects similar, there is a difference between a conditional sale and a mortgage which cannot be ignored by the courts." (14 C. J. S. 588, §7) The usual remedies of a seller under a conditional sales contract are to recover the possession of the property, including an action in replevin, or by an action at law to recover the unpaid purchase price (78 C.J.S. 344, §597) and in some states the conditional sales contract may be foreclosed in the nature of a lien (78 C. J. S. 403, §614; *Malone v. Meres*, 91 Fla. 709, 109 So. 677, text 694). This right of foreclosure is especially applicable in states having statutes like or similar to §697.01, F. S., which provides in part that "all conveyances, obligations, conditioned or defeasible, bill of sale or other instruments of writing conveying or selling property, either real or personal, for the purpose or with the intent of securing the payment of money . . . shall be deemed and held mortgages . . ." The phrase "conditioned or defeasible" was inserted in the statute by Ch. 525, 1853, and was set off from the word "obligations" with a comma. The comma was omitted from the statutes probably through error. Under the above statute the holder of a retained contract or agreement may treat it as a mortgage or lien subject to foreclosure and may foreclose it in equity (*Malone v. Meres*, supra). Under the common law the owner or holder of such a retained title contract or agreement may take possession of the property under his retained title or he may sue upon the obligation secured; and under the above statute he may foreclose the lien under said §697.01, F. S. Contract for sale of a motor vehicle retaining title vendor may be foreclosed as a mortgage under said §697.01, F. S. (*Varn v. Ashbrook*, 84 Fla. 626, 94 So. 384).

"In the absence of a statute to the contrary, the holder of a chattel mortgage may, on the mortgagor's default, sue at law to recover the mortgaged property, or for its conversion, or he may sue in equity to foreclose the lien which he has by virtue of the mortgage" (14 C. J. S. 1014, §363), or he may sue on the mortgaged indebtedness (14 C. J. S. 1098, §440). The same remedies seem to exist in Florida notwithstanding §697.01, F. S. Section 697.01, F. S., does not provide that the vendor may at his election treat his retained contract as a mortgage, but provides that such a contract "shall be deemed and held mortgages . . ." They are at least made mortgages on the equitable interest of the purchaser, which mortgage may be foreclosed in equity, although under the decisions of the supreme court of this state other remedies are available to the vendor. Although a retained title contract may not be a mortgage or lien at common law and in the absence of §697.01, F. S., might not be foreclosed in equity; it seems clear by said §697.01, that it is also a mortgage under the laws of this state, although it may be that the holder thereof may have an election as to the manner of enforcement.

We feel that the above observations furnish a formula from

which the above question may be answered when the facts and circumstances of each particular case are considered; however, we doubt that a general answer may be formulated applicable in all cases. With regard to the questions posed by Ward and Ward, in their letter to you under date of July 22, 1955, which was handed us with the request for opinion, we feel that the questions designated as (a) and (b) are within the statute, when the mortgages are in wholesale quantities. As to the question designated as question (c) by Mr. Ward, upon which we have given additional and further careful consideration, we have now reached the conclusion that §697.01, F. S., makes retained title contracts statutory mortgages, although, as the decisions of the supreme court indicate that such contracts may also retain their common law status so as to permit common law enforcement, they have another status at common law, which does not seem to have been abolished by §697.01, F. S. We see no reason why a statutory mortgage may not be a mortgage within §201.21, F. S., as added in 1955.

These observations answer the above question as well as the same may be answered under the facts and circumstances before us.

055-288—October 31, 1955

ELECTORS AND ELECTIONS

SCHOOL TRUSTEES—BALLOTS—VOTING PROCEDURE

To: *Rodney Thursby, Supervisor of Registration, DeLand*

QUESTION:

Assuming that school trustees are elected by a county-wide vote and only 1 trustee can be elected from each trustee district, how should the ballot be arranged to avoid the election of more than 1 trustee from the same district?

I believe that a common-sense solution to the above problem would be to list the candidates according to the county board member districts in which they are running, with an explanation that only 1 trustee can be elected from any one district. This explanation would be in addition to the customary instructions included on ballots to vote for 3 candidates only.

055-289—October 31, 1955

CRIMES

GAMBLING—LOTTERY LAW VIOLATIONS—NATIONAL SOAP COMPANY'S SWEEPSTAKES

To: *Fred A. Jones, Investigator, Office of State Attorney, Miami*

QUESTIONS:

1. A national soap company has been conducting in Florida and elsewhere a "sweepstakes" by which envelopes are mailed to persons containing free entry blanks upon which the recipients write their names and

addresses. The entry blanks are then sent back to the national soap manufacturer. A drawing is held by the company and prizes are awarded to those whose names are drawn. There is no admission fee of any nature. Is such a lottery, or against the law?

2. Another plan in operation is as follows: A large supermarket has advertised that it will award duplicate prizes to the aforesaid mentioned scheme if the entry blanks have been stamped at said supermarket. Is such proposed scheme a violation of our lottery laws?

AS TO QUESTION 1:

It is well settled that there are 3 elements to a lottery, viz., (1) a prize, (2) an award by chance, and (3) a consideration. It is perfectly clear that the above outlined scheme contains the first 2 elements of a lottery, viz., a prize distributed by chance. Whether or not the necessary element of consideration is also present is a more difficult matter to determine.

It appears from the newspaper statement of facts, that no money or thing of value is paid directly for the right to participate in the drawing described.

Long ago, our supreme court held that the element of consideration was present in the "bank night" scheme, conducted by theatres, even though many of the participants who had a chance to win the bank night prizes were not patrons of the theatre and had paid no consideration for their chance, and even though there was no requirement that any particular participant or participants should pay a consideration either in the form of admission to the theatre at the time of the drawing or otherwise (*Little River Theatre Corporation v. State ex rel Hodge*, 185 So. 855).

The court held on the statement of facts presented in the above case, that it was evident that the patronage of the theatre was greatly increased on the nights that the drawings were held and that many of the patrons who attended and paid admission on "bank night" did so solely for the purpose of being present at the drawing and within easy and comfortable distance to claim the award if their names were called. It also held that the payment of a valuable consideration by a part of the participants was sufficient to condemn the scheme as a lottery, even though many other participants paid nothing.

The "sweepstakes" scheme, outlined above, is materially different in its operation from the "bank night" scheme which our supreme court has previously condemned as a lottery. The drawing is not held in any place of business for profit where the owner or operator would financially benefit from a large group of participants being attracted to his place of business at a particular time. The entry blanks are not only freely available, having been sent through the mails to many thousands of Florida citizens, but the drawing herein is held in a place where no admission fee is necessary.

An examination of the authorities induces the belief that

the consideration requisite to a lottery is lacking in the proposed scheme. In my opinion, from the facts presented to me, concerning the "sweepstakes" outlined above, free participation is a reality and the element of consideration is lacking. There being no valuable consideration, the scheme does not constitute a lottery. I know of no other gambling laws of the state which are offended by this scheme.

AS TO QUESTION 2:

This question relates to whether the essential element of consideration exists by persons having their entry blanks stamped at a named supermarket, for the purpose of receiving duplicate prizes from it, should the entrant win the national "sweepstakes" prize described in question 1. It appears that in this proposed scheme the element of consideration is present, thereby condemning the scheme as a violation of our lottery law. It is perfectly clear that the above outlined scheme contains the first 2 elements of a lottery, namely, a prize distributed by chance. I also think that in the proposed scheme, a valuable consideration moves directly from the participants. The offering of duplicate prizes by having the entry applications stamped by the place of business where the owner or operator of the store would financially benefit by a large group of participants being attracted to his place of business at a particular time, appears to be the substantial consideration necessary for a lottery. The inducement is sufficient in bringing the participants into the place of business at which time it is hoped that they will trade and purchase not only the soap manufacturer's products through discount coupons but also other products displayed for sale by the store. A further consideration consists of the fact that the participants render services by advertising the scheme at large, which advertising not only benefits the soap manufacturer but the sponsoring merchant as well. It appears there is ample consideration flowing to the sponsoring supermarket.

Participants must expend time and effort and many of them will incur auto and bus expense in going to the place of business of the sponsoring supermarket in order to have the entry blank stamped. The time and effort of such persons, and the travel expense incurred by them, together with the benefits that concomitantly flow to the business of the supermarket as a result of such persons going to the place of business to have the forms stamped, constitutes a consideration for the chance to win a duplicate prize. Having people go to the supermarket is for the benefit of the owner or operator, because it builds up his business and increases his sales. All, or substantially all, prospective participants are subjected to the sales appeal of the merchandise offered for sale at the supermarket. When a person appears at such a place of business to have his entry blank stamped and becomes a participant in the hope of receiving a free prize, that person is made aware of the various commodities offered for sale there and he frequently makes a purchase, then or later, as the result of the initial trip to obtain the store's stamp upon the entry blank. The reason the store sponsors the scheme is to make these sales and the profit it reaps therefrom. It is clear that the sponsoring store has in mind achieving a financial profit out of the

scheme, and not merely the purpose of becoming public benefactors. This benefit to the sponsoring store furnishes a consideration for the chance to win a prize.

It is my opinion that the element of consideration is amply present and that the "double your winnings" scheme is a lottery conducted by the supermarket. Therefore, I think that your question 2 is properly answered in the affirmative (see *State v. Lynch* (Okla.), 137 P. 2d 949; *Maughs v. Porter* (Va.), 161 S. E. 242).

055-290—October 31, 1955

CRIMES

SALE OF CIGARETTES TO MINORS—LICENSING OF CIGARETTE MACHINES BY MUNICIPALITIES—§§859.06, 205.63 AND 205.02, F. S.

To: *Laurence F. Coles, Chairman, Public Welfare Committee, Dade County Grand Jury, Miami*

QUESTIONS:

1. Is §859.06, F. S., prohibiting the sale of cigarettes to minors, still in effect?

2. If said §859.06 is still in effect, to what extent are municipalities liable who promote the promiscuous sale of cigarettes with no regard to age, particularly by licensing vending machines ostensibly to benefit from the fees and cigarette taxes?

Answering question 1, §859.06, F. S., is still in full force and effect.

Since you inquire as the chairman of the public welfare committee of the grand jury, I take it that you intended by question 2 to inquire as to the criminal liability of municipalities under the circumstances set forth in said question.

Said §859.06 makes it a criminal offense for any person to "sell, barter, furnish or give away, directly or indirectly, to any minor, any cigarette, cigarette wrapper or any substitute for either." Therefore, only those who actually participate directly or indirectly, in the selling, bartering, furnishing or giving away of cigarettes to minors are liable under said statute. I do not think that a municipality becomes such a participant by licensing cigarette vending machines, especially since §205.63, F. S., specifically authorizes the licensing of vending machines, and §205.02, F. S., authorizes municipalities to impose a license tax upon vending machines not to exceed 50% of the state license tax.

It might well be that the proprietor of an establishment in which a cigarette vending machine is located would be criminally liable under §859.06 if he should knowingly permit a minor to purchase cigarettes from the machine but it does not follow that the municipality which issued a license for the machine is criminally liable. As above indicated, I think that a municipality

is not criminally liable, if children purchase cigarettes from vending machines, merely because the municipality licensed the machines.

055-291—October 31, 1955

STATE PURCHASING COUNCIL

BOARD OF CONTROL—FLORIDA ALLIGATOR, UNIVERSITY
OF FLORIDA STUDENT PUBLICATION—COM-
PETITIVE BIDS—§287.08, F. S.

To: *Board of Control, Florida State University, Tallahassee*

QUESTIONS:

1. Are purchases by the Florida Alligator, published at the university of Florida, required to be made on competitive bids?

2. If so, must the contract be awarded, in every instance, to the lowest bidder in dollars and cents?

The Florida Alligator is published at the U. of F. by the student government. Its funds are derived from a part of the student activity fee required of each student upon registration, and from advertising.

The publication is by and for the student, with a minimum of university control.

The university business office receives these funds allocated to the Florida Alligator and deposits them in a local depository, classifying them as an agency fund. This agency fund is a fund classification that is recognized by college and university accounting authorities. The funds are bonded by the business manager of the university. They are deposited by the business manager of the university, and are disbursed only on the requisition or order of the student body executive council. All purchases outside of the university are made through the university purchasing division and are made on university purchase order forms. The fund is audited annually by the state auditing department along with the other university accounts and funds.

While certain aspects of this student publication have the marks of funds of the students or student organization, it is inseparable from the university as such, and ultimate financial responsibility would doubtless rest upon the university.

Everything considered, it is my opinion that expenditures are to be governed by the laws and regulations relating to state agencies in the matter of purchases. See §287.08, F. S., and pertinent board of control regulations.

Answering your 2nd question, it is not necessary to accept the lowest dollar and cent bid provided it can be shown by convincing evidence that the lowest dollar and cent bid is not the best bid or is not to the best interest of the agency.

I enclose herewith copy of opinion 051-371 in which I dis-

cussed the duties of a public agency in considering whether the lowest dollar and cent bid must be accepted. Similar rules would apply to purchases by the student publication, the Florida Alligator.

055-292—November 1, 1955

MILITARY CODE

FLORIDA MILITIA—RETIREMENT SYSTEM—ELIGIBILITY OF MEMBERS—§250.22, F. S. (AM. CH. 29725, 1955)

To: *Military Department, State of Florida, St. Augustine*

QUESTION:

Where a member of the organized militia of Florida elects to retire under the provisions of sub §(2), §250.22, F. S., as amended, should his retirement pay "be reduced by an amount of retirement pay, pension or compensation which such person is eligible to receive from the federal government for military service," as where the retirement is under sub §(1) of the said section; and if not, how should it be calculated?

Section 250.22, F. S., prior to its amendment by Ch. 29725, 1955, consisted of 3 subsections numbered (1), (2) and (3). Section 2 of said Ch. 29725, purports to add an additional subsection to said §250.22, to be known and designated as sub §(2) and renumber sub §§(2) and (3), as sub §§(3) and (4). Said sub §(2) authorizes the retirement of members of the organized state militia with 30 years service upon their attaining the age of 60 on reduced benefits. Sub §(1) authorizes retirement of such members of the said militia upon attaining the age of 64 years; such retirement pay to be "in an amount equal to $\frac{1}{2}$ of the base pay" In a particular case we are advised that the retirement pay of the person retiring at the age of 62, with 30 years service, has been determined to be .87825 times the retirement pay of a person retiring at the age of 64 years. Under sub §(2) of said §250.22, as amended, persons retiring thereunder are to "receive a reduced benefit which would be the actual equivalent" of the benefits he would have received had he waited and retired under sub §(1) of said section.

It is provided in sub §(1) of said §250.22, "that retirement pay *under this section* shall be reduced by an amount of retirement pay, pension or compensation which such person is eligible to receive from the federal government for military service." The above reference to "this section" is not confined to sub §(1) of said §250.22, as amended, but seems to refer to the entire section; which since the 1955 amendment consists of 4 subsections. We find nothing in the section itself which seems to indicate application to sub §(1) only. Prior to the 1955 amendment sub §(1) of the said section provided that "no person shall be eligible to receive retirement pay under the provisions of this section who is at the same time receiving retirement pay from the state or the government of the U. S. under some other provision of law." (Emphasis supplied.)

The language of the statute being clear and unambiguous there is no reason for construction, and we should not depart therefrom. The above question is, therefore, answered in the affirmative.

055-293—November 3, 1955

EDUCATION

SCHOOL SYSTEM PERSONNEL—TEACHERS—LEAVES OF ABSENCE—EXCHANGE TEACHERS—§231.42, F. S.

To: *Board of Control, Florida State University, Tallahassee*

QUESTION:

A teacher in the demonstration school of F. S. U. expects to receive an appointment under the Fulbright Act to go to Great Britain, in exchange for a British teacher who would take her place in the F. S. U. demonstration school. Under the exchange plan, Great Britain would pay the salary of the teacher sent to us, and F. S. U. would pay the salary of the teacher who goes to Great Britain. May F. S. U. lawfully continue to pay the teacher who proposes to go to Great Britain her agreed salary as a member of the demonstration school faculty?

Under the plan of payment referred to in the question, both parties retain whatever their rights may be in their home countries, such as derive from continuity of service, retirement credits, etc.

In §231.42, F. S., the legislature has authorized professional leave of absence with pay to instructional personnel, under appropriate regulations. My predecessor construed this section of the statutes as authority for exchange of teachers with other states and countries by means of professional leave of absence with pay. See 1945-1946 Attorney General Biennial Report, p. 402. The demonstration school teacher is not in the public school system but is an employee of F. S. U., and even if for that reason the statute may not be directly applicable to her the policy of the legislature as indicated in the statute may reasonably be so applied.

In 14 C.J.S. 1357, it is said:

"Both by custom and in some instances under statutory authority, the governing board of a college or university may elect members of the faculty to emeritus positions and grant them sabbatical leaves of absence with pay, and such grants have been held not to violate state constitutions as respects the faculty of a state institution."

The text is supported by the South Dakota case of *Johnson v. Jones*, 216 N. W. 584, where it is said:

"The evidence also shows that election to emeritus positions and the granting of sabbatical leave are in accordance with general custom in higher institutions of

learning in this country. Such election and grant are not in violation of either the letter or spirit of the constitution or statutes. They do not constitute a gratuity or donation, but are for a public purpose, and are sustainable on the ground of their beneficial effect upon the public service."

Assuming that the substituted teacher coming from Great Britain is substantially equal in ability, and that the exchange is in all respects approved by the board of control as advantageous to the demonstration school, it is my opinion that your question should be answered in the affirmative.

055-294—November 3, 1955

SHERIFFS

COST OF SERVING WITNESS SUBPOENA—DEPOSIT BY SOLVENT DEFENDANT

To: *W. P. Joyce, Sheriff, Leon County, Tallahassee*

QUESTION:

Where witness subpoenas come into a sheriff's hands for service on behalf of a solvent defendant in a criminal case, may the sheriff properly demand a sufficient deposit from said defendant to compensate him for service of said subpoenas?

We are not here concerned with an insolvent defendant who may, upon filing the requisite affidavit, have issued subpoenas for witnesses on his behalf at county expense. See §§932.36, 932.37, 939.07, F. S., §9, Art. XVI, Fla. Const.

The Florida Sheriff's Manual, at p. 132, states: "a deposit for costs may be demanded by the sheriff, before service of any civil process, except when the fees are payable by any state board or agency". Your attention is invited to *Sweat v. Waldon*, 123 Fla. 428, 167 So. 363 where the court held that a sheriff might properly require compensation for service of process in advance. This was a civil proceeding. However, I can see no distinction so far as a solvent defendant is concerned in a criminal case than in a civil case. I believe, then, that the sheriff may properly demand a sufficient deposit to cover the cost of serving witness subpoenas for a solvent defendant in a criminal proceeding when, in his judgment, such is proper, subject, of course, to making a proper accounting.

The question is therefore answered in the affirmative.

055-295—November 3, 1955

PROFESSIONS AND VOCATIONS

MASSEURS AND MASSEUSES—BODY MASSAGE WITH MECHANICAL APPARATUS—CH. 480, F. S.

To: *Edith Dearborn, Secretary-Treasurer, Florida Board of Massage, Miami*

QUESTION:

Is a person who uses equipment which vibrates, and is operated by electricity, for the purpose of body contouring, body reducing and body slenderizing, engaged in the practice of massage within the purview of Ch. 480, F. S., as amended by Ch. 29971, 1955?

Prior to the enactment of Ch. 29971, 1955, a "masseur" or "masseuse" was defined as a person who practiced the "... art of body massage, either by hand or with any mechanical or electrical apparatus for the purpose of body massaging, reducing or contouring, the use of oil rubs, salt glows, hot and cold packs, tub, shower, sitz and similar baths, cabinet baths, excluding fever therapy," and the term "masseur" or "masseuse" was defined as "a person who practices, administers or teaches all or any one or more of the above named subjects and methods of treatments."

Section 480.01, F. S., was amended in 1955 by Ch. 29971, and that section now reads, in part, as follows:

"(1) Masseur and masseuse:

"(a) For the purpose of this act the term masseur or masseuse shall be deemed to be a person who practices, administers or teaches all or any one or more of the following subjects and methods of treatments, viz: who *administers or teaches treatments with any mechanical or electrical apparatus for the purpose of body slenderizing, body reducing or body contouring.*

"(b) Further, a person who has studied the underlying principles of anatomy and physiology and administers or teaches all or any one or more of the following subjects and methods of treatments, viz: oil rubs, salt glows, hot or cold packs, all kinds of baths, including steam rooms, cabinet baths, sitz baths, colon irrigations, *body massage* either by hand or *by any mechanical or electrical apparatus or device (excluding fever therapy), applying such movements as stroking, friction, rolling, vibration, kneading, cupping, pettrassage, rubbing, affleurage, tapotement.*" (Emphasis supplied.)

Therefore, it is apparent that a person who practices, administers or teaches a method of treatment by administering any mechanical or electrical apparatus for the purpose of body slenderizing, body reducing, or body contouring, or a person who has studied the underlying principles of anatomy and physiology and administers body massage by any mechanical or electrical apparatus or device, by vibration, is now defined as a "masseur" or "masseuse" by §480.01, F. S.

The supreme court of Florida held in 1950, prior to the enactment of said Ch. 29971, that one who operated an electrically operated mechanical device consisting of hip chair, arm chair, hobby horse, foot table and couch which caused a gentle vibration of the human body without massage by hand for the sole purpose of slenderizing the body was not a "masseur" or "masseuse" within

the meaning of the statute requiring such persons to register and possess certain educational qualifications (Florida Board of Massage et al. v. Underwood, 45 So. 2d 134, 17 A.L.R. 2d 1181).

However, the supreme court said, among other things:

"... It is our opinion that, by appending the term 'electrical apparatus' as a descriptive phrase to 'the act of body massage,' the legislature has clearly limited such electrical apparatus to that which rubs, strokes or kneads the body, according to the general definition of the term 'massage'. It is true that the legislature has also included in its definition other practices, ordinarily found in a massage establishment, which do not involve a rubbing, stroking, or kneading of the body, such as hot and cold packs, tub, shower, sitz, and cabinet baths, but this merely reinforces our opinion, since the legislature could have added 'electrical apparatus' to this group of practices not involving an actual massage of the body." (Emphasis supplied.)

Prior to the quoted amendment enacted in 1955 to §480.01, F. S., the term "vibration" did not appear in the statute. Neither was the clause "applying such movements as stroking, friction, rolling, vibration, kneading, cupping, pettrassage, rubbing, affleurage, tapotement" a part of that section.

It seems to us that the legislature, when it amended §480.01(1)(b) so as to define a "masseur" or "masseuse" as being one who, among other things, administers or teaches "body massage either by hand or by any mechanical or electrical apparatus or device (excluding fever therapy), applying such movements as stroking, friction, rolling, vibration, kneading, cupping, pettrassage, rubbing, affleurage, tapotement;" clearly intended to make Ch. 480, F. S., applicable to any person who administers body massage with an electrical apparatus causing vibration of the body.

It is our opinion that the question, therefore, should be answered in the affirmative.

055-297—November 7, 1955

ELECTORS AND ELECTIONS

PERMANENT REGISTRATION SYSTEM—COUNTY COMMISSIONERS—OPENING REGISTRATION BOOKS—BOUNDARIES OF ELECTION PRECINCTS—§§98.041-98.151 AND 98.361, F. S.

To: Frank D. Upchurch, St. Augustine

QUESTIONS:

1. Where the board of county commissioners adopts for the county the permanent registration system provided by §98.041-98.151, F. S., may the registration books be opened for registration of electors prior to Jan. 1 succeeding such board's action?

2. May a board of county commissioners with the recommendation and approval of the supervisor of registration change the boundaries of election precincts during the year 1955?

Sections 98.041-98.151 provide for a permanent single registration system for the several counties of Florida.

Section 98.041 provides in part: "The system shall be established on or before Jan. 1, 1960, and become effective in each county on Jan. 1 subsequent to the date the board of county commissioners shall officially adopt the system. When the system is adopted, the supervisor shall obtain materials as provided in §98.361. Electors shall be registered in pursuance of this system by the supervisor or by precinct registration officers, and electors registered shall not thereafter be required to register or reregister except as provided by law or as provided for the registration of freeholders."

Section 98.051(1) provides that "The permanent registration books shall be kept open each week day in the office of the supervisor, and at all offices at which a deputy supervisor or registration officer is on duty from 9:00 a.m. until 12:00 M., and from 2:00 p.m. until 5:00 p.m., to permit electors previously registered and others, to be registered under this permanent registration system . . ."

Section 98.051(2) provides in part: "The first year only when the permanent registration system becomes effective, the books may be kept open each week day by the precinct registration officers from 9:00 a.m. until 12:00 noon and from 1:00 p.m. until 9:00 p.m. at a convenient place in the precinct during the months of January and February . . ."

Section 98.051(1) as amended at the 1955 session, is not construed as being in conflict with amended §98.051(2). It is recognized that respectable argument might be made that when a board of county commissioners "adopts" the permanent registration system, as contemplated by §98.041, even though the system does not become "effective" until the succeeding January 1, the registration books may be opened at any time after date of such adoption. We are reminded however that as far back as 1884 our supreme court held in *State v. Sumter County Commissioners*, 20 Fla. 859, that a registration of voters made at a time, or in another manner, than that prescribed by statute, is not a legal registration; and we feel that such rule still controls. Hence, in absence of a court construction of these relevant statutes to the contrary, ordinary caution would seem to dictate the position that when such system is so adopted, registration books shall not be opened for registrations thereunder until January 1 thereafter. This position finds support in the quoted wording of §98.051(2).

Section 98.031, F. S., provides that "Each election precinct, election district and polling place in this state as defined and fixed is recognized and continued. The board of county commissioners in each county upon recommendation and approval of the supervisor may, in any general election year, on or before February 1 alter or create new districts or precincts. Each pre-

cinct shall be numbered and a polling place at a suitable location designated. The district or precinct shall not be changed thereafter without the consent of 4 members of the board of county commissioners and the supervisor in a joint meeting." And there is further provision for the conforming of precinct and municipal boundaries; and this no doubt is to be read in conjunction with the provisions of §98.091, F. S. The latter section permits municipalities to adopt the permanent registration system mentioned above. Such adoption by a municipality shall be done "before July 1 of any odd-numbered year"; and the board of county commissioners, upon being notified of such adoption, "shall, prior to the following January 1, arrange the boundaries of the precincts in the county" to conform with municipal boundaries and ward or district boundaries in the municipality, as provided.

Prior to the finding of our Supreme Court in *Ervin v. Richardson*, Fla., 70 So. 2d 585, the following wording in §100.081, F. S., was unconstitutional:

"providing, that the county commissioners are nominated by the several districts of the county instead of by the county at large"

quite apparently when there was required a redistricting of county commissioners districts in pursuance of §5, Art. VIII, Fla. Const., the necessity might have arisen to conform precinct boundary lines to such district lines. We do not here labor the question but suggest that even now such might be required.

The language of §98.031 is not too clear. However, again as a matter of caution, we must assume the position that, except in the 2 possible instances mentioned above, the boundaries of election precincts should be changed only during January of a general election year. .

Hence, in my opinion the questions are answered as follows:

1. When a board of county commissioners has adopted the permanent registration system provided by §§98.041-98.151, F. S., the books for registrations under such system should not be opened until Jan. 1, succeeding the adoption of the system.

2. Except to comply with the above-mentioned provisions of §98.091, F. S., and possibly to conform precinct boundary lines when there has been a change of county commissioner districts as above indicated, the boundaries of election precincts in the county should not be changed except in January of general election years. Hence, this question as conditioned is answered in the negative.

055-299—November 9, 1955

HIGHWAYS, BRIDGES AND FERRIES

COUNTY ROADS—WIDTH OF MUNICIPAL STREETS MAINTAINED BY COUNTY UNDER AGREEMENT—
§336.02, F. S. (§42, Ch. 29965, 1955)

To: *Dewey A. Dye, Jr., Attorney for County Commissioners, Manatee County, Bradenton*

QUESTION:

Does the mere acceptance by the board of county commissioners of a subdivision plat under §177.10, F. S., together with an agreement on the part of the board to maintain the subdivision streets which are opened for public travel require that the widths of said streets be 66 ft. in order to comply with §42 of Ch. 29965, 1955, the Florida highway code, 1955?

The words "of all public roads hereafter established" in said §42 should be read in context with other language in said section. It should also be read in connection with the definitions in said chapter and in connection with §2(5) and §25 of said act.

Section 42 has reference to county roads which in §2(5) of said chapter are defined as state roads outside municipalities not included in the state, primary, secondary or park road systems.

Section 42 in terms refers to "county roads and structures." In §25 of said chapter it is noted that state roads are divided into 4 classes, one of which consists of the "county road system."

In our opinion none of these classifications necessarily include subdivision streets or dedications thereof although it may be that the county commissioners or the state road department, at the time of the dedication or thereafter, may provide by appropriate procedure that a certain street or streets in a subdivision be established as a part of or an extension to the state or county road system. In which event, but only in such event, does the right-of-way width have to be not less than 66 ft.

The mere dedication of streets in a subdivision and the approval of the map of the subdivision by the county commission under §177.10, F. S., does not ipso facto establish such streets, county roads or state roads. Neither does the agreement of the county commissioners under authority of said §177.10 to open up and keep such streets in repair necessarily establish the same as county or state roads.

Such maintenance agreements under authority of §177.10 may be entered into by the county commission as necessary and convenient to the people resident in the subdivision, possibly as a temporary measure until the subdivision may be annexed or incorporated within the boundaries of a municipality, but it is inconceivable that the mere maintenance of a number of streets in a subdivision by the county commission could conclusively and permanently establish the same officially as a part of the county road system when such streets have no logical relation to the county-wide road system and are not duly established as such.

The procedure for establishing both county and state roads is much more elaborate than is involved in procedure set forth in §177.10, or by mere maintenance of a subdivision street. See §§26 and 47 and other pertinent sections of the Florida highway code, 1955, relative methods of officially establishing state and county roads.

The state road department, as well as several of the counties, has in many instances maintained certain roads and streets as a necessity for the public benefit until such time as a permanent official state or county road has been established along the route, or, in the case of a street, until a municipality takes the same over as a part of municipal maintenance. But such maintenance has not resulted in establishing such roads or streets as officially established state or county roads.

The foregoing considered, your question is answered in the negative.

055-300—November 9, 1955

BEVERAGE LAW

INTOXICATING LIQUORS—COUNTIES WHERE PROHIBITED
—SEARCH AND SEIZURE—DISPOSITION OF WHISKEY
SEIZED—§§568.03, 568.11, 568.12, 568.14, 933.14
AND 901.15, F. S.

To: *John A. Rudd, Municipal Judge, Tallahassee*

QUESTION:

Where a defendant is arrested without a search warrant and a quantity of whiskey is seized and is charged with the sale and the possession for the purpose of sale of bonded whiskey in a dry county, and upon trial of said charge is adjudged not guilty, is it necessary for the said defendant to file an affidavit stating that said whiskeys were not possessed for an illegal purpose?

For the purposes of this opinion I shall assume that you mean to inquire as to whether the affidavit mentioned in your question must be filed as a prerequisite to the return of the bonded whiskey to the acquitted defendant.

Section 568.14, of Ch. 568, F. S., entitled "Intoxicating Liquors in Counties where Prohibited", provides:

"For the purpose of enforcing the provisions of this chapter the director and supervisors of the state beverage department shall exercise and perform all powers and duties vested in the several sheriffs and their deputies in the state under the provisions of this chapter."

Section 568.03, F. S., provides:

"It is unlawful for anyone to keep, or possess, intoxicating liquors, wines or beer in any county that has voted against the sale of such intoxicating liquors, wines or beer."

Section 568.11, F. S., provides:

"The right of property in and to intoxicating liquors, wines or beer sold or possessed by any person, association of persons, or corporation in violation of any of the provisions of this chapter is declared not to exist in any person, association of persons, or corporation and the same shall be forfeited."

Section 568.12, F. S., provides:

"Any sheriff, who seizes intoxicating liquors, wines or beer as provided for in this chapter, shall keep a permanent itemized record of all such liquors including a complete record of the destruction of such liquors, which record shall be verified by the signature of the sheriff in person, and such records shall be open to inspection at all times."

The city of Tallahassee as I understand it has an ordinance which adopts the laws of the state as city ordinances, and in that event, where beverage officers or the sheriff or his deputies are mentioned in the above statutes, the ordinances would be applicable to police officers and the chief of police. §568.05, F. S., says "Any person who sells, or causes to be sold, any intoxicating liquors, wines or beer in any county that has voted against the sale of intoxicating liquors, wines or beer, or keeps or possesses in any such county any such liquors with the intent to sell or dispose of same unlawfully shall for each offense be punished by fine not exceeding \$500 or by imprisonment in the county jail for not more than 6 months," so the offense to which you refer is a misdemeanor.

Section 933.14, F. S., relating to search warrants, provides that if it appears to the magistrate or judge before whom the warrant is returned that the property or papers taken are not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds upon which the warrant was issued, the judge or magistrate may order a return of the property taken, but the very next paragraph of the said section provides as follows:

"No intoxicating liquor seized on any warrant from any place other than a *private dwelling house* shall be returned, but the same may be held for such other and further proceedings which may arise upon a trial of the cause, unless it shall appear by the sworn petition of the claimant and proof submitted by him that said liquors so seized were held, used or possessed in a lawful manner, and in a lawful place, or by a permit from the proper federal or state authority, the burden of proof in all cases being upon the claimant. The sworn affidavit or complaint upon which the search warrant was issued and the finding of such intoxicating liquor shall constitute prima facie evidence of the illegal possession of such liquor, and the burden shall be upon the claimant for the return thereof, to show that such liquor was lawfully acquired, possessed, held and used." (Emphasis supplied.)

As to intoxicating liquor then a special or different rule is provided for its disposition.

The supreme court of Florida in the case of *Harvey v. Drake*, 40 So. 2d 214, in which warrants had been issued by one of the circuit judges of the first judicial circuit authorized the search of several premises in Walton county, a dry county, for intoxicating liquors (red liquor). The search was made, the property seized and returns made to the clerk of the circuit court of Walton county. The several parties whose premises had been searched filed motions for judgment and order for return of the property seized, but in their motion for order of the return of the property seized, none of them alleged that they were in lawful possession of the liquors at the time of the search and seizure. Subsequently, the interested parties brought a writ of prohibition in the circuit court seeking to prohibit the county judge from any further proceedings in the case. The interested parties took the position that the beverage officers making the search should file a formal complaint against the persons whose premises were searched, charging them with some offense against the state concerning the property seized under the search warrant, and the circuit judge was apparently of the same view, however, the supreme court in answering this said:

"But was it legally necessary for criminal prosecutions to be brought against these 4 individual appellees in the county judge's court before any further proceedings could be had regarding the disposition or destruction of the property seized upon their respective premises under the 4 search warrants issued by Judge Fabisinski? The learned circuit judge who entered the judgment denying the writ of prohibition evidently considered that this question should be answered in the affirmative, *but, if so, we must disagree.*" (Emphasis supplied.)

The court then refers to §933.14, *supra* and says that the county judge of Walton county was not the magistrate or judge before whom the search warrants were returned, and even if he had been, the motions for judgment and for return of the property seized were entirely insufficient under the provisions of §933.14, F. S. Aside from that, if the movants in the county judge's court had any right whatever to relief by way of return of the property seized or otherwise, *their remedy was outlined in §933.14, F. S.*

Except where the intoxicating liquor is seized from a private dwelling and then only when the magistrate is convinced by the evidence that it is not what was described in the warrant or that there was no probable cause for believing the existence of grounds that it should be seized from a private dwelling, no intoxicating liquor seized elsewhere should be returned unless upon sworn petition and in pursuance of the other provisions of the last paragraph of §933.14 quoted above. Under these statutory provisions the existence of a search warrant is not the criterion, *but the possession of the liquor in a dry county for purposes of resale is the pole star that must be looked to by the court.* The manner in which a defendant is arrested is wholly immaterial, particularly since the advent of the automobile and its use in transporting intoxicating liquors. This distinction between a dwelling house or a place of business and an automobile has been recognized by the courts of all jurisdictions.

Recently in the case of *Turner v. State*, 74 So. 2d 891, James Turner was tried and convicted in Orange county for unlawfully aiding and assisting in the promoting and setting up of a lottery or lottery drawing. The court referred to §901.15, F. S., which gives officers under certain conditions a right to arrest without a warrant, and held that this section *was not limited to situations where the arresting officer had no warrant but was related to situations where an officer was armed with an arrest warrant which later proved to be defective*. In that case the court said:

"Section 901.15, F. S. A., is not limited in its application to those situations where the arresting officer is without a warrant but is also applicable where the arresting officer is armed with a warrant that later proves to be defective if the arresting officer has, as stated in the 3rd section of said statute, 'reasonable ground to believe that a felony has been or is being committed and reasonable ground to believe that the person arrested has committed or is committing it.' *Brown v. State*, supra. The arresting officer based his arrest on information of the 3 policemen who secured the evidence. The fact that the warrant was defective is not material; while it should be secured if reasonably possible, the statute does not make it mandatory. There must be authority for the arrest somewhere . . ."

From this reasoning we believe that it is not necessary in all cases for a search warrant to have been issued before a person other than an occupant of a private dwelling is required to follow the procedure set out in §933.14, supra, prior to having intoxicating liquors returned to him.

055-301—November 15, 1955

FLORIDA HIGHWAY PATROL

PERSONNEL—WEIGHTS SECTION—ASSIGNMENT OF OFFICERS, CORPORALS—§321.04, F. S.

To: H. N. Kirkman, Director, Department of Public Safety, Tallahassee

QUESTION:

Are the 2 corporals now assigned to duty with the weight division chargeable against the regular complement of the highway patrol of 16 corporals?

The language of §321.04 as amended at the 1955 session implies that patrol members in addition to members of the regular patrol (300 patrol officers) may be assigned to special departments. These are limited to those departments referred to in said §321.04, but include those assigned to the departments enforcing the weights section laws. There are some 25 patrolmen assigned to the weights division under the supervision of a chief. There is authority indicated in the language "exclusive of those members assigned to special departments and whose salaries are paid by the departments" that in said divisions some of the patrolmen may be designated corporals since there is

no prohibition against it. Moreover, in the orderly operation of the weights section rank, grade and salary of the patrolmen seem to be matters within the sound discretion of the director, with the approval of the board. It is assumed that the standards applicable to the regular patrol in the matter of salary would not be exceeded, however.

055-302—November 16, 1955

TAXATION

HOMESTEAD TAX EXEMPTION—LIMITATION ON ALLOWANCE—§§192.12, 192.16, F. S.; §7, ART. X, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

After the county tax roll has been completed, equalized, extended, approved and delivered to the tax collector, may additional homestead benefits be granted and entered thereon?

Homestead tax exemption benefits are granted pursuant to §7, Art. X, State Const., and §§192.12, et seq., F. S., wherein the rules and regulations as to who is and who is not entitled to the benefits; however, under §192.16, F. S., each taxpayer claiming homestead benefits is required to file his application therefor with the tax assessor on or before April 1 of the tax year. As the tax roll under the statute may not be completed, equalized, extended and delivered to the tax collector until long after April 1, it is evident that no additional applications may be filed; this being true any changes in the tax roll regarding homestead tax exemption must be made, if at all, upon applications for homestead tax exemptions made and filed on or before April 1 of the tax year.

Boards of county commissioners have no general power in making tax assessments and only such special or limited power as is specifically conferred by statute in order to secure equalization of tax values (*Sparkman v. State*, 71 Fla. 210, 71 So. 34, text 41; *Sanders v. State*, Fla., 46 So. 2d 491, text 494) and, at least prior to Ch. 10040, 1925, "when the power, as specially conferred, is exercised, and final adjournment is taken, their special power as a board of equalization ceases" (*Sparkman v. State*, supra). Ch. 10040, supra, together with all amendments thereto, was brought into the Florida statutes, and now appears as §192.21, F. S., which section provides in part, so far as here material, that "no act of omission or commission on the part of any tax assessor or any assistant tax assessor, or any tax collector, or any board of county commissioners, or any clerk of the circuit court, or any officer of this state . . . shall operate to defeat the payment of said taxes; but any such acts of omission or commission may be corrected at any time by the officer or party responsible for the same in like manner as is now or may hereafter be provided by law for performing such acts in the first place . . ." We are of the opinion that after the tax roll has been delivered to the tax collector, as contemplated by the above question, that the authority and jurisdiction of the tax assessor and

the board of county commissioners sitting as a board of equalization are at an end; except in so far as §192.21, F. S., permits corrections of omissions and commissions of the taxing officials.

Answering the above question, after the county tax roll has been completed, equalized, extended, approved and delivered to the tax collector no additional homestead benefits may be granted and entered thereon except such as may be corrections of omissions and commissions of the taxing officials within the purview of §192.21, F. S.

055-303—November 16, 1955

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS
WORKMEN'S COMPENSATION COVERAGE; LIABILITY OF
COUNTY FOR PREMIUM FOR ITS EMPLOYEES—FI-
NANCIAL RESPONSIBILITY LAW; LIABILITY OF
OPERATOR OF COUNTY TRUCK—CHS.
440 AND 324, F. S.**

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*

QUESTIONS:

1. Where workmen's compensation coverage is procured for employees of public officers of a county, is the county liable for the premium required?

2. Under the financial responsibility law, what is the status of an operator of an uninsured county truck involved in a motor vehicle accident?

The questions are answered as follows:

1. The case of *Parker v. Hill*, Fla., 72 So. 2d 820, dealt with this situation: In a proceeding on a claim by a widow and others before a deputy commissioner of the workmen's compensation division for benefits under the workmen's compensation law for death of a deputy sheriff, against Gulf county and the sheriff thereof, the deputy commissioner ruled that the county and not the sheriff was liable. The industrial commission reversed that ruling; and the circuit court affirmed the award of the industrial commission holding the sheriff liable. The supreme court held that the deputy commissioner was correct in his holding but in error with respect to his theory; that the deputy sheriff was not an employee of the county, as considered by the deputy commissioner, but an officer not elected at the polls, and that the county and not the sheriff was liable. In view of the reasoning in that case and the relevant provisions of our workmen's compensation law (Ch. 440, F. S.), reasonably it appears that the county is liable under said law for benefits payable in pursuance thereof to county employees, which includes employees of officials of the county.

Whether the county carries insurance is immaterial since it is a self-insurer if it has not procured such coverage. No county officer with respect to his employees can bind the county for premiums for coverage; the election of whether the coverage should be obtained is to be determined by the board of

county commissioners. Hence, if the coverage contemplated by the question is procured with the knowledge and consent of the county, the latter is liable therefor.

2. Florida's financial responsibility law is set forth in Ch. 324, F. S., as the same was revised and amended by Ch. 29963, 1955. According to the provisions of §324.04(2), 30 days after receipt of notice of an accident involving a motor vehicle, resulting in bodily injury or death or total damage of \$50 or more to property, the insurance commissioner shall suspend the licenses of the operators and all registrations of owners of the vehicles involved, unless the motor vehicle is exempt from operation of the chapter, as set forth in §324.04(2)(a) to (f) inclusive. §324.04(2)(c) provides the following exemption: "The motor vehicle was owned by the U. S. government, this state, any political subdivision of this state or any municipality therein . . ."

From this it would appear that the driver of such a county truck as contemplated by this question would be exempt from the operation of said Ch. 324, F. S.

055-306—November 15, 1955

HIGHWAY PATROL

PERSONNEL—LIMITATION OF NUMBER EMPLOYED— SPECIAL PROJECTS—§321.04, F. S.

To: H. N. Kirkman, Director, Department of Public Safety, Tallahassee

QUESTION:

Is the Florida highway patrol authorized to employ up to 300 patrol officers exclusive of any assigned to special projects such as the Skyway bridge who are paid by the state road department?

Section 321.04, F. S., provides:

"Personnel of highway patrol; probation; subsistence.—The director shall employ not more than 300 patrol officers exclusive of those members of the patrol who are assigned to special departments and whose salaries are paid by the departments; . . ." (Emphasis supplied.)

Your question is therefore answered in the affirmative, assuming that the number of patrolmen employed and paid by the highway patrol must come within the amount appropriated for salaries of the department by the 1955 legislature and that the standards applicable to the regular patrolmen as to salary and qualification would apply to patrolmen employed for special projects under other departments.

055-307—November 17, 1955

INSURANCE

DEPOSIT WITH INSURANCE COMMISSIONER—SUBSTITUTION OF SECURITIES UNDER §626.25, F. S.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTION:

A domestic fire, casualty and title insurance company has a voluntary deposit with the insurance commissioner under §626.25, F. S. Said insurer has requested the commissioner to release from such deposit \$110,000 par value U. S. treasury bonds and to accept in lieu thereof \$110,000 par value capital of Puerto Rico general obligation public improvement 2¾% bonds, due July 1, 1968. May the commissioner lawfully comply with such request?

The following is quoted from the letter from said company to the insurance commissioner: "We are applying to . . . (the) superintendent of insurance commonwealth of Puerto Rico to extend our certificate of authority and license to write two additional lines of insurance . . . In order to qualify for the additional lines we find it necessary to increase our investment in Puerto Rican bonds from \$40,000 to \$150,000 . . . As soon as the bonds are ready for delivery they will be shipped directly to you for our account with instructions that the bonds be deposited under the provisions of §626.25, F. S., when you have released to us a like amount of U. S. treasury bonds that you now have on deposit under the provisions of the said statute."

Attached hereto are copies of opinions 050-347 and 050-450. They involved the same insurance company at a time prior to the 1951 amendment of §626.25, F. S., which added thereto the words: "and, in addition thereto, it may invest in the securities of any territory or insular possession of the U. S." Attention is directed to such copies of opinions concerning generally the purposes of said voluntary deposit, the trust with which it is impressed and the circumstances under which such deposit may be withdrawn.

As we understand it, since a deposit under §626.25, F. S., is controlled and governed entirely by the provisions of said section, if this company sees fit to add to its deposit Puerto Rican bonds it may do so; and regardless of the effect of possible statutes of Puerto Rico, a deposit made under provisions of said section is subject to the trust created by the provisions of the section.

Reasonably it would appear that an insurer making such a deposit may substitute permissible securities for other securities in said deposit, if the securities substituted are not less than the value of those withdrawn.

Hence, the question is answered as follows: The insurance commissioner may accept for deposit under provisions of §626.25, F. S., these described Puerto Rican bonds, and release to the insurance company the U. S. government securities above de-

scribed; provided, (1) that the above described Puerto Rican bonds are general obligation bonds of Puerto Rico; and (2) that the U. S. securities to be released shall not exceed in present value the bonds substituted therefor.

055-308—November 17, 1955

CONSERVATION

GAME AND FRESH WATER FISH—LICENSES—DEFINITION OF RESIDENT—§30, ART. IV, STATE CONST., §372.001, F.S.; RULE 3.01 OF COMMISSION

To: *A. D. Aldrich, Director, Game and Fresh Water Fish Commission, Tallahassee*

QUESTION:

Inasmuch as the definition of "resident" in §372.001, F. S., conflicts with the definition of "resident" in Rule 3.01 of the rules and regulations of the game and Fresh water fish commission, which definition should be used for the purpose of selling licenses prescribed by the legislature?

Section 30, Art. IV, Fla. Const., which creates the game and fresh water fish commission and vests in it the management, restoration, conservation and regulation of the birds, game, fur-bearing animals and fresh water fish of the state, provides in sub §7 that "... all laws imposing license taxes shall be enacted by the legislature from time to time."

From a study of the history of the license taxes imposed by the legislature which may be collected and used by the game and fresh water fish commission, it appears that the definition of the word "resident" was originally enacted at the same time and in the same act, being Ch. 13644, 1929, as the original license tax provisions.

Therefore, it is my opinion that since only the legislature can impose license taxes, that any definition or other provision of law enacted by the legislature as a means of determining how and who shall be required to purchase a license should be followed. It further appears that the game and fresh water fish commission has no authority to make rules and regulations contrary to any license law provision enacted by the legislature pursuant to §30, Art. 4, Fla. Const.

055-309—November 18, 1955

REGULATION OF TRADE AND COMMERCE

EXPLOSIVES—LICENSES—STATE AND FEDERAL AGENCIES—CH. 552, F. S.

To: *J. Edwin Larson, State Fire Marshal, Tallahassee*

QUESTION:

Does Ch. 29944, 1955, require federal or state agen-

cies, whose functions at times necessitate the use of explosives, to purchase a state license and/or blaster's permit?

Chapter 29944 is a comprehensive regulatory law relating to the manufacture, distribution, sale and use of explosives. Certain licenses and permits are required, which exact payment of annual fees as follows:

Manufacturer-Distributor	\$25.00
Dealer	25.00
User	1.00
Blaster	1.00

Section 1 of the act consists of definitions, among which is the following: "Person". Any natural person, partnership, association or corporation". Neither this nor the other definitions found in said section contemplate or include agencies of the federal or state governments. Nothing in the remainder of the act touches upon the essential use of explosives at times by such agencies in the performance of their legal functions. Section 9 of the act specifically exempts military and naval forces of the U. S. and the states, police and fire departments; but failure to mention other federal and state agencies is not to be urged as a legislative attempt to bring them within the act.

Quite obviously the mentioned fees (which are excise taxes) may not be exacted of the federal or state government. However, the word "sale" is defined in §1 of the act as "including delivery of an explosive with or without consideration." Section 4 of the act sets forth certain records to be kept or conditions to be met by a manufacturer-distributor or dealer in explosives in connection with their sale of the same; and there is the provision in this section that no manufacturer-distributor or dealer shall sell any explosive without being satisfied "that the purchaser thereof is duly licensed under the provisions of this act and authorized to purchase same and that said explosive is to be used by the purchaser for a purpose covered by the latter's license . . ." Since it is here concluded that this act does not apply to officers and agents of federal and state agencies, to avoid complications, the state fire marshal should issue them written authority for their purchase and use of explosives to carry out their required functions.

Hence, in my opinion the question is answered as follows:

Federal and state agencies, and their respective officers and agents, are not within the regulatory provisions of Ch. 29944, 1955, in relation to their acquisition and use of explosives in the discharge of their official functions.

055-311—November 21, 1955

MOTOR VEHICLES

REGULATION OF TRAFFIC ON HIGHWAYS—LICENSE TAGS
AND DRIVERS' LICENSES—ELECTRICALLY PROPELLED
VEHICLES (CARTS)—§§317.01(11), 320.02, 320.08,
321.01, 322.01 AND 322.03, F. S.

To: *Noble C. Doss, City Attorney, Gulfport*

QUESTIONS:

1. Does Florida law require electrically propelled vehicles (carts) operated on public streets and roads to carry a license tag?

2. Does Florida law require the operators of such vehicles to have drivers' licenses?

Section 317.01 (11), F. S., relating to regulation of traffic defines a motor vehicle as follows: "Every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated upon rails."

Section 321.01 (1), F. S., relating to the licensing of motor vehicles, contains the following definition, "Motor vehicle, includes automobiles, motorcycles, motor trucks and all other vehicles operated over the public highways and streets of this state and propelled by power other than muscular power . . ." (Emphasis supplied.)

Section 320.02, F. S., provides that "Every owner, or person in charge of a motor vehicle . . . which shall be operated or driven upon the highways of the state, or which shall be maintained in this state, shall for each such vehicle so owned, cause to be filed by mail or otherwise, in the office of the motor vehicle commissioner of the state, a certified application for registration of same on a blank to be furnished. . . ."

Section 320.08, F. S., provides for license fees for different kinds of vehicles. Electrically propelled vehicles are not specifically provided for but would logically fall in the classification of "T series," net weight of 2,000 pounds or less: \$5 flat."

Section 322.01, F. S., relating to drivers' licenses defines "(1) Vehicle: Every device in, upon, or by which any person or property is or may be transported or drawn upon a public highway, excepting devices moved by human power or used exclusively upon stationary rails or tracks."

This same section of the law (§322.01 (2)) defined "Motor vehicles: Every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated upon rails."

Section 322.01 (6) defines "Operator: Every person, other than a chauffeur, who is in actual physical control of a motor vehicle upon a highway."

Section 322.03 (1) provides, "No person, except those herein-after expressly exempted, shall drive any motor vehicle upon a highway of this state unless such person has a valid license as an operator or chauffeur under the provisions of this chapter. . . ."

I find no exception made for operators of the type of vehicle described in your question.

Based on the above quoted sections of the Florida law, your questions are answered as follows:

1. Your 1st question is answered in the affirmative.
2. Your 2nd question is answered in the affirmative.

055-312—November 21, 1955

SHERIFFS

REIMBURSEMENT—WAGES PAID COOK FOR FEEDING PRISONERS—§§30.23 AND 30.25, F. S.

To: *Bryan Willis, State Auditor, Tallahassee*

QUESTION:

Is a sheriff entitled to reimbursement by the county for wages paid up to \$3 a day to a cook for preparing meals for prisoners in the county jail?

Section 30.23, F. S., provides reimbursement to a sheriff for "Servants, not more per day than \$3." Section 30.25, F. S., provides the sheriff shall receive for feeding prisoners \$1.25 per day for each prisoner fed.

It should be pointed out that public officers have claim to compensation and reimbursement only if allowed by statute. (*Rawls v. State*, 98 Fla. 103, 122 So. 222; *Gavagan v. Marshall*, 160 Fla. 154, 33 So. 2d 862; *State ex rel. Landis v. Reardon*, 114 Fla. 755, 154 So. 868; *State ex rel. May v. Fussell*, 157 Fla. 55, 24 So. 2d 804.) Also, fee statutes are to be strictly construed and no fee allowed except where clearly provided by law. *Bradford v. Stoutamire*, Fla., 38 So. 2d 685.

In *Brown v. St. Lucie County*, 114 Fla. 798, 153 So. 906 the court was considering the right of a sheriff to reimbursement of funds expended by him in the employment of a servant at the jail and of 2 guards. In the original majority opinion it is stated, at p. 908:

"The item of feeding prisoners in jail includes the purchase, preparation, and delivery of the food to the prisoner where he is to eat the same, and the furnishing of the proper utensils for his use in partaking of the food. Therefore it includes cook hire if the sheriff undertakes to prepare and serve the meals to the prisoners."

On rehearing the dissenting opinion of Chief Justice Davis was adopted as the controlling opinion in the case. However, the language quoted is what I conceive to be a correct statement

of the law which is that the \$1.25 per day allowed for feeding a prisoner included the purchase and preparation of food for this purpose, as well as the hire of a cook.

Of course, the portion of the opinion dealing with "proper utensils" is not now applicable by reason of the enactment of §125.45 (c), F. S. We dealt with this statute in opinion 051-252, dated Aug. 2, 1951, stating that what kitchen equipment is adequate for feeding of prisoners is for the determination of the board of county commissioners.

Accordingly, the question is answered in the negative.

055-313—November 22, 1955

MOTOR VEHICLES

FINANCIAL RESPONSIBILITY LAW—MISCELLANEOUS QUESTIONS—CH. 324, F. S.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee
QUESTIONS:

1. A person owns 4 automobiles, 3 of which are properly insured and 1 is not. The uninsured car is involved in an accident. Would the registrations of the insured cars be suspended if such person failed to meet the requirements set forth in the provisions of sub §(2) (a) to (f) inclusive of §324.04, F. S. (part of financial responsibility law)?

2. Does the financial responsibility law apply to accidents involving motor vehicles occurring solely upon private property?

3. Three cars are involved in an accident with physical contact between only 2. Does the 3rd car which has no contact with either of the other 2 come within the purview of Ch. 324, F. S.?

4. The law empowers the judge of a court granting judgment to arrange satisfaction thereof on the installment plan. Does it follow that a conditional release is acceptable within the meaning of §324.04(2)(e) in lieu of an absolute release?

As indicated above, the law involved is our financial responsibility law, as Ch. 324, F. S., was amended by Ch. 29963, 1955. The section numbers mentioned below are those which appear in said amended Ch. 324, F. S.

The questions are answered in their numbered order as follows:

1. Section 324.04(2) provides that "in the event of an accident involving a motor vehicle within this state which has resulted in bodily injury or death to any person, or total damage of \$50 or more to property, the commissioner shall suspend the licenses of the operators and *all registrations of the owners* of the vehicles involved in such accident," 30 days after receipt

of notice of the accident, and under the conditions prescribed. And in this connection see the words "all registrations" and "registrations" as used respectively in §§324.18 and 324.19. We think also that the following provision in the latter section is relevant to this question: "It shall be unlawful . . . for any person whose registrations have been suspended, to obtain another vehicle for the purpose of circumventing this chapter." Hence, this question is answered in the affirmative; that is to say, that the registrations of the insured motor vehicles would be revoked under the circumstances contemplated by the question.

2. The following wording in §324.001, with the by-line, "Purposes of Chapter", would appear to answer this question: "It is the intent of this chapter to recognize the existing rights of all to own motor vehicles and to operate them on the *public streets and highways* of this state when such rights are used with due consideration for others." Hence, the question is answered in the negative; that is to say, that accidents involving motor vehicles occurring on private property are not within the purview of Ch. 324, F. S.

3. It is recognized that the operation of a motor vehicle may proximately contribute to an accident involving one or more other vehicles without actually coming in contact with such other vehicles. In many instances, under such circumstances, it is to be recognized that such operation of a motor vehicle proximately causes or contributes to an accident involving another motor vehicle; and on the other hand, in other instances such is not the case. Between these two extremes there is a broad area involving controversy and the application of technical principles of law.

At this point, to avoid any misunderstanding, we reiterate what we stated in opinion 055-220, to the effect that in event of an accident involving motor vehicles, the question of negligence has nothing to do with the matter of the application of the provisions of Ch. 324, F. S., and we repeat here from the quotation cited in said opinion from *Ballou v. Reeves, Ky.*, 238 S. W. 2d 141: "The requirement of financial responsibility does not in any sense predetermine the question of liability which could only be decided in a judicial proceeding." Reference to "proximate cause" normally is related to the question of liability; here it is to be related only to the question of whether the motor vehicle contemplated by the question is in "an accident involving a motor vehicle", as such words are used in §324.04(2).

In certain instances in other jurisdictions, financial responsibility laws have been attacked on the ground that provisions of such laws vest in *administrative* officers power to make determinations involving questions which are primarily *judicial* ones and constitutionally determinable only by courts of competent jurisdiction. For example, in *State v. Stehle, Wis.*, 56 N. W. 2d 514, the contention was made that the power of the commissioner to ascertain damages resulting from an accident was a *judicial* and not an *administrative* function. The court did not sustain the contention, and we agree with that holding. We feel that where it is clearly apparent that an accident, within the purview of Ch. 324, is proximately caused by the operation of a motor vehicle, and which motor vehicle has no contact with another in the re-

sulting accident, such motor vehicle will be "in an accident involving a motor vehicle", as such words are used in §324.04(2); and the determination by the commissioner to that effect will constitute an "administrative" as distinguished from a "judicial" function.

Hence, this question is conditionally answered in the affirmative; that is to say, that when it clearly appears that a 3rd automobile which had no physical contact with the other two, proximately caused such accident, such 3rd automobile will be in "an accident involving a motor vehicle." On the other hand, if reasonable doubt exists concerning the question of whether said 3rd automobile caused the accident, it should not be considered "in an accident involving a motor vehicle".

3. The question apparently arises by reason of provisions of §324.13, providing for instalment payment of judgments, under the circumstances there stated. That has no relationship to the requirement of §324.04(2)(e); "Such operator or owner had secured a duly acknowledged written agreement providing for release from liability by all parties injured as the result of said accident . . ." The release thus contemplated is not a conditional one, but an absolute one. Hence, the question is answered in the negative.

055-314—November 22, 1955

DOG RACING AND HORSE RACING

RACING COMMISSION—BREAKS TAX—MINUS POOL—
§550.26, F. S. (AM. CH. 29810, 1955)

To: *George F. Gilleland, Attorney, Florida State Racing Commission, Miami*

QUESTION:

When a race results in a minus pool, does the Florida state racing commission have the authority to allow a racing association to use an equivalent amount of the plus breaks in the other pools of the race in which the minus pool occurs to offset the minus pool?

Chapter 29810, 1955, amended §550.26, F. S., and insofar as the question raised by you is concerned, provides as follows:

"(1) A tax is hereby levied upon every pari-mutuel pool conducted by horse tracks and dog tracks within the state authorized by law so to do equal to the 'breaks,' which said 'breaks' shall be the difference between (a) the amount contributed to a pool and (b) the total of the commissions and the sums actually redistributed to the contributors, which tax shall be known as the 'breaks tax.'

"(2) The tax hereby levied shall be paid at the times and places as provided by law for the payment of other taxes based on a per cent of the pari-mutuel pool.

"(3) It shall be the duty of every such horse race track licensee and of every such dog race track licensee to pay unto the state treasurer the tax hereby levied and said licensee shall be liable therefor."

This language of the 1955 act is clear and needs no explanation. There is no question but that an organization holding a permit to conduct pari-mutuel wagering on horse races, dog races and jai alai in the state can use from its own funds money to offset a "minus pool" when one occurs, but under the foregoing statute a tax has been imposed by the legislature equal to the "breaks" which is defined in the above statute and is known as the "breaks tax" and this tax must be paid by the licensee irrespective of whether a "minus pool" occurs or not. Therefore your question is answered in the negative.

055-315—November 30, 1955

AUTO TRANSPORTATION COMPANIES

LICENSED PRIVATE CONTRACT CARRIERS—ON TRANSPORTATION OF TRAILERS—RETURN TRIPS— §323.15, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. Where a person, firm or corporation, is licensed, by the Florida railroad and public utilities commission, as a private or public carrier, to move trailers, in initial movements, in truckaway service, over the highways of Florida, for compensation, is the vehicle pulling the trailer to a point in Florida and leaving it there, required to pay a return mileage tax when no trailer is moved by it for compensation?

2. If the above question is answered in the affirmative, will that answer be changed in any way where the license so issued contains a provision that there shall be "no transportation for compensation on return"?

We have examined copies of the certificates of registration issued by the Florida railroad and public utilities commission, and find that certain persons, firms and corporations have been licensed "to transport trailers designed to be drawn by passenger automobiles, in initial movement, in truckaway service, over irregular routes," from points without to points within Florida, some, but not all, of such licenses having the following additional provision inserted therein, to wit: . . . "with no transportation for compensation on return except as otherwise authorized." From the request for opinion it appears that the trailers are drawn over the Florida highways "by motor trucks or special designed motor tractors."

The National Trailer Convey, Inc., a corporation, with offices in or near Tulsa, Oklahoma, holds certificates of registration from the Florida railroad and public utilities commission, for trailer truckaway services, over irregular routes, for trailers

from points in the U. S. to other points in the U. S., specifically mentioning truckaway service of trailers from Brunswick and East Point, Georgia; Denison, Texas; Clarion, Pennsylvania; Wichita, Kansas; Elkhart, Indiana; Chicago, Illinois, and other specifically mentioned points within the U. S. to other points within the U. S. In view of this information we doubt that it may be presumed that a towing vehicle makes a return trip in any case; the question of whether such a towing vehicle makes a return trip is a question of fact. Here the license issued by the railroad and public utilities commission is for towing of trailers, not the carrying of them in motor trucks as is the case in carrying automobiles and boats in most cases.

Section 323.15, F. S., provides in part that "there shall be collected by the comptroller of the state from every auto transportation company . . . to which has been granted a certificate of public convenience and necessity or a permit authorizing it to engage in the transportation of passengers or freight or both . . . for every mile traveled for compensation by the motor vehicle of such auto transportation company over the highways of this state . . ." For the definition of "auto transportation company" as used in Ch. 323, F. S., see §323.01(7) F. S.

Here we are concerned with a private contract carrier for hire and not a common carrier operating over fixed routes, on fixed schedules and charging fixed charges for such transportation, which distinguishes this case from the one considered by the supreme court in *State ex rel. Five Transportation Co. v. Lee*, Comptroller, 132 Fla. 183, 139 Fla. 835, 181 So. 179, 191 So. 10, where the auto transportation company in question was a common carrier operating over fixed routes, on fixed schedules and for fixed charges. However, the auto transportation company involved in *State ex rel. National Trucking Co. v. Lee*, Comptroller, 132 Fla. 533, 139 Fla. 832, 181 So. 182, 191 So. 17, was a contract carrier not operating over fixed routes, fixed schedules and for fixed fees, in which the court remarked that "we take it that when the relator contracts to convey merchandise from one point to another he must necessarily, when figuring the prices and terms of his contract, take into consideration the fact that the motor vehicle will in all probability carry load but one way and the expense of one way of the trip empty must be included as a part of the basis upon which his compensation is to be fixed." In this case it was held that the return trip was presumed to have been made for compensation although the motor vehicle made the return trip empty. We gather from the opinion that this presumption is a rebuttable one and may be overcome by actual proof. We do not think that the statute provides for the collection of constructive mileage, but only when the return trip is made for compensation. Before mileage for the return trip may be collected it must appear, which may be by presumption as in the *National Trucking Co.* case, that there was compensation received for the return trip.

Answering the above questions:

1. Where a return trip was made for compensation, (although no trailer is moved on such return trip for compensation), within the purview and meaning of the holding in the *National*

Trucking Co. case, the 1st question is answered in the affirmative; however, the presumption that a return trip was made for compensation may be overcome by proof to the contrary.

2. But where the license issued by the railroad and public utilities commission provides that there shall be "no transportation for compensation on return," no return mileage may be collected in the absence of evidence that compensation for the return trip was actually received. The fact that the license contains the above limitation raises the presumption that no compensation was received for the return trip, however, this presumption seems to be one that may be overcome by proof. These observations answer the 2nd question.

055-316—December 2, 1955

LEGISLATURE

INTERIM LEGISLATIVE COMMITTEE—EXPENSES—SENATE CONCURRENT RESOLUTION NO. 648, 1955

To: *C. H. Bourke Floyd, Chairman, Interim Poultry Committee, Apalachicola*

QUESTION:

Are the members of the legislative interim poultry committee, established under and existing pursuant to senate concurrent resolution No. 648, of the 1955 regular session of the state legislature, entitled to their per diem and mileage expenses while attending meetings of the said committee?

This legislative interim committee is charged with the duty of investigating the possibilities and potentialities of the poultry industry in Florida and making a report of the said investigation to the 1957 session of the legislature, together with its findings and recommendations. Under §11.13, F. S., as amended by §2, Ch. 29627, 1955, and Item 33, §1, Ch. 29966, 1955 (the 1955 general appropriations act) members of interim legislative committees may be paid per diem and mileage "as provided for state employees" while on duty within the state and per diem and mileage "as provided for the governor and members of the state cabinet under general law" while on duty without the state. The per diem and mileage of state employees while on duty within the state, and of the governor and his cabinet while on duty without the state is fixed by §112.061, F. S. These observations answer the above stated question as to members of the state legislature who are members of the said committee.

There is no doubt as to the power of the legislature, by the joint action of both houses, to appoint its members to interim committees; however, there is little case authority upon its power and authority to appoint private citizens to such committees. In *Terrell v. King*, 118 Tex. 237, 14 S. W. 2d 786, the supreme court of Texas held that in the absence of constitutional inhibition the legislature may appoint private citizens to such a committee. It, therefore, seems that the committee was valid notwithstanding its non-legislative members.

The above question is answered in the affirmative; the committee members to be paid the same per diem and mileage as is provided for state employees, where the services are performed in this state, and as is provided for the governor and his cabinet where the services are required to be performed without the state.

055-317—December 2, 1955

LEGISLATURE

INTERIM LEGISLATIVE COMMITTEE—EXPENSES—HOUSE CONCURRENT RESOLUTION NO. 1775, 1955

To: *Perry E. Murray, P. O. Box 307, Frostproof*

QUESTIONS:

1. Are the members of the joint interim committee, existing under and pursuant to house concurrent resolution No. 1775 of the 1955 regular session of the state legislature, entitled to mileage and per diem when attending committee hearings and meetings?

2. Is the said joint interim committee authorized to expend funds in obtaining assistance and advice of scientists having special training in the fields of industrial fumes, etc., and if so, may such employment be on a weekly or monthly basis, or must it be obtained on a contract basis?

3. In what form should requisitions be for the payment of committee expenditures and per diem and mileage and by whom should they be signed?

Said house concurrent resolution No. 1775, established a joint legislative committee of the house and senate and directed that it make a study of industrial and other fumes and their effect on citrus and other farming and livestock in this state, and report its findings, conclusions and recommendations to the 1957 regular session of the state legislature. The preamble of the said house concurrent resolution clearly indicates a definite legislative concern of the problem to be investigated. Section 2 of the said house concurrent resolution provides "that said joint interim committee is authorized to employ technical advisors as deemed necessary to effectuate its purpose, and to use funds from the general appropriation bill, for interim committees, such sum not to exceed \$20,000" These technical advisors do not appear to be members of the said joint interim committee, but are employees or contractors of the said committee to perform certain designated services and give advice to the committee. The above language quoted from the concurrent resolution would be sufficient as an appropriation if contained in a legislative act instead of a concurrent resolution.

Section 4, Art. IX, State Const., provides that "no money shall be drawn from the treasury except in pursuance of appropriations made by law," and when this constitutional provision is considered in the light of other constitutional provisions it is apparent that "money can be appropriated by the

legislature only by means of a bill by it enacted into law with the formalities prescribed by the constitution for enacting bills into law as distinguished from resolutions." (Advisory Opinion, 43 Fla. 305, 31 So. 348; Advisory Opinion, 156 Fla. 45, 22 So. 2d 397; Advisory Opinion 156 Fla. 48, 22 So. 2d 398; Advisory Opinion, 158 Fla. 872, 30 So. 2d 377; Advisory Opinion, Fla. 55 So. 2d 99) Under the rule reflected by these advisory opinions appropriations may not be made by resolution but must be made by acts of the legislature complying with the requirements of Section 15, Art. III, State Const., as to enacting clauses. The above quoted provisions in said house concurrent resolution No. 1775 are not sufficient as an appropriation under §4, Art. IX, State Const.

Section 11.13, F. S., as amended by §2, Ch. 29627, 1955, provides in part that "members of interim committees, authorized by law, of either branch of the legislature, shall be paid per diem or mileage or per diem and mileage incurred while on official business within the state as provided for state employees unless otherwise provided by joint or concurrent resolution, and shall be paid per diem and mileage without the state as provided for the governor and members of the state cabinet under general law. Per diem and mileage paid to members of legislative committees shall be paid out of legislative expense appropriation as provided in §11.12, F. S." We find a note appended to Item 33, §1, Ch. 29966, 1955 (the 1955 biennial appropriations act) substantially identical with the above quoted portion of §11.13, except it expressly includes joint interim committees of the legislature. These statutes and acts of the legislature answer the 1st above question in the affirmative, but do not answer the 2nd question.

Although there is authority that an interim legislative committee may be created only by joint action of both houses of the legislature (81 C.J.S. 959, §42) it seems that this rule was very probably complied with by the legislature when it adopted concurrent resolution No. 1775 above mentioned. We shall, therefore, presume that this interim committee is legally and regularly created and constituted as an agency of the legislature. In the light of the advisory opinion reported in 156 Fla. 45, 22 So. 2d 397, we feel that the said concurrent resolution is insufficient as an appropriation within itself. Although appropriations are contained in the 1955 general appropriations act and §11.13, F. S., as amended, for per diem and mileage of interim committee members, such act and section of the statutes do not seem to make appropriations for general interim committee expense. The appropriation made by sub §(2) of §11.12, F. S., prior to its amendment by §1, Ch. 29627, 1955, was "made available as needed at any time *during the session of the legislature*," however, the 1955 amendment makes the appropriation "available as needed *and authorized*," deleting the reference to "during the session of the legislature." Item 33, §1, Ch. 29966, (the 1955 general appropriations act) makes an appropriation of \$800,000 for the 1st year of the current biennium and \$1,600,000 for the said biennium. Although it is provided, by the note appended to said Item 33, that the appropriation shall be used during the session of the legislature it is made clear that the appropriation

covers expenses of the legislative council and reference bureau and interim committee per diem and mileage, which clearly indicates that the appropriation is not limited to the payment of expenses during sessions of the legislature only.

Section 11.08, F. S., relates to committee hearings both of committees of one of the houses and committees appointed by "the senate and house of representatives" of joint committees. §11.11, F. S., provides that "all expenses incident to hearings and investigations by any committee mentioned in §11.08 shall be paid by the state out of any moneys in the state treasury not otherwise appropriated." When we take into consideration the fact that §§11.08 and 11.11, F. S., are not and have not been limited by their own terms to session of the legislature, although limited, prior to 1955, by the limitation in the appropriation made by sub §(2) of §11.12, F. S., which was available "as needed at any time during the session of the legislature," prior to 1955, but is now available as needed and authorized, without any express limitation to sessions of the legislature as prior to the 1955 amendment of §11.12. We, therefore, feel that the general statutes and laws authorize the payment of interim committee expenses, under the same limitations as apply to such expenses during the legislature; however, there is a limitation placed upon such expenditures by said concurrent resolution No. 1775 of \$20,000. The scientific assistance mentioned in the 2nd question may be obtained on the basis of an employment, weekly or monthly, in which case the person employed would seem to become a state employee, or on a contract basis provided the contracts are let under any existing limitations relative to state contracts. This answers the 2nd question. This answer should not be taken as generally applying to all interim committees.

For the payment of per diem and mileage allowed by law to committee members and employees, the usual form used for such purpose by state officers and employees should be used; for the payment of the salaries of any employees the usual form used for the payment of state officers and employees salaries should be used. Requisitions for the payment of sums due under contracts should be in the usual form used by the comptroller's office. Such requisitions should be approved by the chairman of the interim committees, unless rules of the legislature should provide otherwise as to committee members and committee employees. These observations answer the 3rd above question.

055-318—December 2, 1955

TAXATION

INTANGIBLE PERSONAL PROPERTY TAX—EXEMPTION—
RELIGIOUS, CHARITABLE AND EDUCATIONAL ASSO-
CIATIONS OR CORPORATIONS—§199.02(5), §1, ART.
IX AND §16, ART. XVI, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Is intangible personal property belonging to any religious, charitable, benevolent or educational associa-

tion or corporation entitled to tax exemption without regard to the use thereof?

The request for opinion specifically relates to a promissory note, in the sum of \$350,000, made, executed and delivered to, and now held by the W. & L. Food Stores Foundation, a Florida corporation, existing under and by virtue of Ch. 617, F. S., and secured by a mortgage encumbering real property in Florida. Without discussing the charter of the corporation at length, it may be said that it shows on its face that the corporation was organized as a religious, charitable, benevolent or educational association or corporation, and is such an association within the literal language of §199.02(5), F. S., which provides, in so far as here material, that

"Intangible personal property belonging to any religious, charitable, benevolent or educational association shall be exempt from taxation."

We deem it necessary that the above language used in said §199.02, F. S., be construed.

This "is a democracy in which every parcel of property is expected to bear its due portion of the burden of government, unless exempted by the legislature in the manner provided by §1, Art. IX, State Const." (Bancroft Investment Corp. v. City of Jacksonville, 157 Fla. 546, 27 So. 2d 162, text 170). "The legislature is without power to provide for exempting from taxation any class of property which the constitution makes no provision for exempting . . . the constitution must be construed as a limitation upon the power of the legislature to provide for the exemption from taxation of any class of property except those particularly mentioned classes specified in the organic law itself . . ." (L. Maxcy, Inc. v. Federal Land Bank, 111 Fla. 116, 150 So. 248, text 250; State v. St. John, 143 Fla. 544, 197 So. 131, text 134; State v. Doss, 146 Fla. 752, 2 So. 2d 303, text 304) The legislature is not authorized to add to or subtract from the tax exemptions provided by §16, Art. XVI, State Const. (State v. St. John, 143 Fla. 544, 197 So. 131). The purpose of §16, Art. XVI, State Const. was to limit the exemptions of corporate property to those specified in said section (Lumms v. Florida Adirondack School (123 Fla. 810, 168 So. 232, text 239). If §199.02(2), F. S., is to be construed literally so as to exempt all intangible personal property of religious, charitable, benevolent or educational associations or corporations, without regard to the use of such property, then its constitutionality is brought into serious question.

The right of tax exemption may not be determined altogether by the character and charter of the corporation or association owning it, but is to be determined, not by the ownership alone, but by the ownership and use; that is the use to which the property is actually put (University Club v. Lanier, 119 Fla. 146, 161 So. 78; State v. St. John, 143 Fla. 544, 197 So. 131; Rast v. Hulvey, 77 Fla. 74, 80 So. 750; Lumms v. Florida Adirondack School, 123 Fla. 810, 168 So. 232; Simpson v. Bohon, 159 Fla. 280, 31 So. 2d 406). For property to be exempt from taxation under §16, Art. XVI, State Const., it must be *held and used ex-*

clusively for religious, scientific, educational, literary or charitable purposes. The *use* is just as important as the ownership. Without the concurrence of both there may be no exemption. Under §199.02(5), F. S., only such intangible personal property as is held and used exclusively for some religious, charitable, benevolent or educational purpose is exempt from taxation; ownership by some religious, charitable, benevolent or educational association or corporation is not sufficient within itself but there must also be the above use.

Although we find evidence in the file of extensive charitable and educational use of funds of the corporation, we find no direct evidence of the use of the specific intangible in question or the income from the same. It is not specifically shown that either the principal of the note in question or the income therefrom is used exclusively for some of the uses mentioned in §1, Art. IX, and §16, Art. XVI, State Const. We do not think that the rule in the *Simpson v. Bohon* case, 159 Fla. 280, 31 So. 2d 406, has been met in this case so far. It may be that the principal of the note in question as well as the income therefrom is being used for one or more of the purposes mentioned in the above constitutional provisions; however, that fact is not made to appear from the file before us.

The above stated question is answered in the negative; there must be also a use of the property for one or more of the purposes mentioned in §1, Art. IX, and §16, Art. XVI, State Const. We doubt that the above nonprofit corporation has yet brought itself within the said constitutional provisions; however, we feel that it should be allowed to amend its application for exemption and show the required use if it can.

055-319—December 5, 1955

TAXATION

HOMESTEAD TAX EXEMPTION—JOINT TENANCY

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where a parcel of real property, upon which is located a dwelling house, is held by "A" and "B" as joint tenants and "A" makes his permanent home upon the said property, but "B" resides and makes his permanent home elsewhere, what portion of the valuation of the said property may be allowed as a homestead tax exemption to "A" and what portion of said valuation, if any, should be assessed to "B"?

The estates of joint tenancy and by the entireties are distinguished by the nature of the seizin in each case; the seizin in a tenancy by the entirety per tout et non per my (by the whole and not by the moiety) and in a joint tenancy, per my et per tout (by the half and by the whole). A marked, and perhaps the principal, distinction lies in the possibility of severance and destruction (30 C. J. 565-6, §98; 41 C.J.S. 457, §33). In the strict sense a tenancy by the entirety is not a joint tenancy

but a sole tenancy (41 C.J.S. 457, §33). While a tenancy by the entirety cannot be severed by the action of one of the spouse (41 C.J.S. 461, §34) a joint tenancy may (48 C.J.S. 927, §4). "It is settled that a joint tenancy will be terminated by the alienation or conveyance by a joint tenant of his interest in realty to a stranger, for by such act the unity of title is destroyed and the unity of possession is gone" (*Kozack v. Kozack*, 157 Fla. 597, 26 So. 2d 659, text 661). "A joint tenancy may be severed, either voluntarily, as by a partition of the property, or a conveyance of the interest of any joint tenant, or involuntarily, as by an execution sale of any interest that is subject thereto" (14 Am. Jur. 86, §14). These rules do not apply to an estate by the entirety. Although an estate by the entirety may not be severed for the purposes of taxation, we see no reason why a joint tenancy may not be severed for the purposes of taxation; the interest of each of the parties being subject to separate taxation.

There is revealed in the file a contention that in a joint estate each of the owners is seized and possessed of the whole and that one of the owners may claim the entire property as homestead exempt although the other tenant does not reside on the property; we do not think that the authorities bear out this contention. However, accepting the argument as being true, the tax assessor would be at liberty to assess the entire value of the property against the tenant not making his permanent home on the property. This contention we cannot accept.

Answering the above question the exemption may not exceed the interest of the owner residing on the property and making the same his or her permanent home. For this purpose there is little difference between a joint tenant and a tenant in common.

055-320—December 5, 1955

RETIREMENT

TEACHERS RETIREMENT SYSTEM—ELIGIBILITY REQUIREMENTS—FLORIDA HIGH SCHOOL ACTIVITIES ASSOCIATION—§§238.01 AND 238.11, F. S.

To: *K. D. Farris, Executive Secretary, Teachers' Retirement System, Tallahassee*

QUESTION:

May employees of the Florida high school activities association be members of the teachers' retirement system under the provisions of §§238.01(4) and 238.11 (3) (a)?

Section 238.01 (4), F. S., defining "teacher" provides in part, "... any full time employee of any non-profit professional association or corporation of teachers functioning in Florida on a state-wide basis, which seeks to protect and improve public school opportunities for children and advance the professional and welfare status of its members. . . ."

Section 238.01 (6), defining "employer" provides in part,

"... or other agency of and within the state by which the teacher is paid, or any non-profit professional association or corporation of teachers referred to in sub §(4) of this section."

Section 238.11 (3)(a), F. S., provides:

"On April 1, A.D. 1939, and on April 1 of each year thereafter, the board of trustees shall certify to any such nonprofit professional association or corporation of teachers the amounts which will become due and payable during the ensuing fiscal year to each of the funds of the retirement system to which such contributions are payable as set forth in this law."

The Florida high school activities association according to its constitution is state-wide in scope and is composed of member high schools represented by the supervisory principal or principal of the school. Its purpose is to "promote, direct and control all interscholastic activities, both athletic and non-athletic, of member schools; to establish, maintain, and enforce such regulations as may be necessary to provide that all such activities shall be part of and contribute towards the entire educational program of the state; to cooperate closely with the state department of education in the development of that program; to safeguard the physical, mental, and moral welfare of the students of member schools and protect them from exploitation."

In my opinion this association as defined by its constitution does not appear to be a "professional association of teachers" as defined in §238.01 (4), F. S. Its membership is composed of various high schools throughout the state and although the high schools are represented by their principals, the membership is in the school itself rather than its representative.

I therefore believe that although the objectives and method of operation of the association are praiseworthy and beneficial to the schools of Florida, employees of the association could not be brought under the state teachers retirement act under present provisions of the law.

Your question is answered in the negative.

055-321—December 5, 1955

BANKS AND BANKING

MORRIS PLAN BANK—REQUIREMENTS, OWNERSHIP OF STOCK—CORPORATIONS—§656.08, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

May a corporation be a "bona fide resident of this state" within the purview of §656.08, F. S., and its requirements as to stock ownership?

Said §656.08, F. S., requires that "at least $\frac{2}{3}$ of the stock of any Morris plan bank shall be owned by bona fide residents

of this state," and nowhere in said Ch. 656, F. S., do we find the term "bona fide residents of this state" defined. Ch. 656, F. S., was derived from Ch. 16791, 1935, as amended by Ch. 18025, 1937, and nowhere in said acts do we find the said term "bona fide residents" defined.

"A domestic corporation is an artificial person whose residence or domicile is fixed by law within the territorial jurisdiction of the state which created it. That residence cannot be changed temporarily or permanently by the migration of its officers or agents to other jurisdictions. So long as it is an existing corporation its residence, citizenship, domicile or place of abode is within the state which created it. It cannot reside or have its domicile elsewhere; neither can it in legal contemplation be absent from the state of its creation" (Fowler v. Chillingworth, 94 Fla. 1, 113 So. 667, text 669; see also 18 C. J. S. 373 and 583, §§5 and 176, and 20 C. J. S. 17, §1794). Although a corporation's residence may be said to be one in a metaphorical sense, it is a residence in law if not in fact for many purposes.

Although Ch. 656, F. S., provides the procedure for organizing Morris plan banking corporations, such corporations are to be organized by "complying with the procedure provided for the organization and government of ordinary corporations for profit under the laws of this state . . ." and obtaining the approval of the secretary of state and the state comptroller (§656.02, F. S.). Nowhere in the general corporation statutes or Ch. 656, F. S., do we find any prohibition against a corporation owning or holding stock in a Morris plan banking association or corporation, unless the above quoted portion of §656.08, F. S., may be construed as doing so. We do not think that said §656.08 should be so construed in the absence of a positive provision prohibiting corporate ownership of such stock.

The above question is, therefore, answered in the affirmative.

055-322—December 7, 1955

CRIMES

GAMBLING—LOTTERY LAW VIOLATIONS—CENSUS ESTIMATE CONTEST—OPINION NO. 052-33

To: Donald G. MacKenzie, Assistant State Attorney, Miami

QUESTION:

Is the "census estimate contest" run by a Miami newspaper a lottery contrary to the laws of Florida?

Enclosed with your letter was an entry blank published by the newspaper on November 22, 1955, for the use of persons desiring to enter the contest.

It appears from the publication that the U. S. census bureau is taking an official census count of Dade county, to be completed by January 1, and the published rules read as follows:

"1. The . . . (newspaper) is offering \$2,500 in awards for the persons who compute the nearest esti-

mates to the official census figure for Dade county.

"2. Each entry must include a statement of 25 words or less giving the basis for estimated figures.

"3. The contest is open to everybody except employees of the . . . (newspaper) and members of their families.

"4. Entries may be made on blanks published in the . . . (newspaper). One free entry blank may be picked up at the 1st floor office of the . . . (newspaper) building. Copies of the blanks are acceptable. There is no limit to the number of estimates that may be entered.

"5. Awards:

1st prize	\$1,000.00
2nd prize	500.00
3rd prize	100.00
5 prizes	50.00
10 prizes	25.00
40 prizes	10.00

"6. In the event of ties, the winner will be decided upon by the aptness of the accompanying statement of 25 words or less on the reasons for making the estimated figures.

"7. In no event will one person be awarded more than one prize.

"8. Entries are to be mailed to:

Census Estimate
PO Box 3700
The . . . (newspaper)
Miami, Florida

"9. All entries must be postmarked no later than midnight, Saturday, Dec. 3, 1955.

"10. Winners will be announced as soon as possible after the release of the official population figures by the U. S. Census Bureau.

"11. Decision of the judges will be final. All entries become the property of the . . . (newspaper). None will be returned."

A lottery contains 3 elements, viz., (1) a prize, (2) an award by chance, and (3) a consideration.

That a prize was to be awarded by this scheme is apparent.

Even though some judgment and skill are involved in forecasting the results of the census mentioned in said advertisement, I think that chance predominates over skill, and that the contest is essentially a guessing contest. Where chance predominates over skill, the element of chance which is essential to a lottery is present (34 Am. Jur. 649-650, Lotteries, §6; 54 C.J.S. 846-847, Lotteries, §2 b. (2)). And guessing contests are generally held to be lotteries (54 C.J.S. 857, Lotteries, §10 b.;

34 Am. Jur. 655-656, Lotteries, §12). Therefore, it is my opinion that the said contest contained the requisite element of chance, just as much so, so far as the law is concerned, as if the winner were determined by drawing numbers from a hat.

Furthermore although rule 2 of the contest requires that each entry must include a statement of 25 words or less giving the basis for estimated figures, rule 1 stipulates that the awards are offered to the persons computing the nearest estimates to the official census figure for Dade county, and rule 6 contemplates that the statement required by rule 2 is to be considered only in the event of *ties*. The possibility of ties is so remote as to rule out any supposition that "skill" (that is ability to write a winning statement) will predominate over "chance".

This leaves only the element of consideration to be dealt with.

The cases of *Hall v. McWilliam*, 20 Cox C. C. 33; *U. S. v. Wallis*, 58 Fed. Rep. 942; *State v. Mumford*, 73 Mo. 647, 39 Am. Rep. 532, and *Little River Theatre Corp. v. State ex rel Hodge*, 185 So. 855, are all pertinent to the question. Reference is also made to our opinion 052-33 dated Feb. 1, 1952, which discusses a situation not dissimilar to the one here considered.

It is our opinion that in this particular contest the element of consideration is present. The scheme of the contest clearly carries the implication that if a copy of the newspaper is purchased at any time during the contest a blank entry can be taken from such a newspaper. Even if it may be argued that a copy of the newspaper blank can be made, in practical effect it will be more convenient to use the newspaper form. As held in some of the cases cited, newspaper contests where prizes are awarded on the basis of chance or guessing usually result in some benefit to the newspaper in the form of enhanced circulation. As many entries as may be desired during the contest can be entered on blanks taken from the newspaper published daily throughout the contest period.

This office has repeatedly ruled that schemes of this kind are invalid. Our said opinion 052-33 to all intents and purposes covers this situation. Copy of this opinion is attached.

As was indicated in said opinion, even if a particular contest in its practical effect is harmless to public morals no relaxation of legal principles against lotteries is permissible to justify the contest. Any deviation from legal rules against lotteries in favor of any person, group or institution creates a precedent which can be seized upon by the unscrupulous to justify schemes harmful to the public and results in embarrassment to officials who have the difficult duty of enforcing laws against lotteries generally. Moreover, in dealing with the subject of lotteries, flexible rules cannot be made to authorize a particular scheme. The applicable law has not the latitude of a railroad which may stamp a particular ticket "good for this train and day only."

The question is answered in the affirmative.

055-323—December 7, 1955

HIGHWAY PATROL

PENSION OF WIDOW OF PATROLMAN BENDER—ELIGIBILITY UNDER §321.221, F. S. (CH. 29969, 1955)

To: *H. N. Kirkman, Director, Department of Public Safety, Tallahassee*

QUESTION:

Is the widow of patrolman Leroy C. Bender entitled to a pension under the provisions of Ch. 29969, 1955, under the following circumstances:

Patrolman Bender was killed in the line of duty prior to the enactment of Ch. 29969 and prior to Jan. 1, 1954 (mentioned in §1 of the act). A relief act in the amount of \$5,000 was enacted for the benefit of the widow by the 1949 session of the legislature. She has not been paid any benefits under the workmen's compensation law.

Section 1 of Ch. 29969, 1955, provides:

"The widow of any highway patrolman, killed in the line of duty, shall receive a monthly pension equal to $\frac{1}{2}$ the monthly salary drawn by the deceased patrolman at the time of his death for the rest of her life; unless she remarries, in which case the pension shall terminate at the date of her remarriage. The deceased patrolman's wife may select this pension or workmen's compensation, but under no circumstances shall she be entitled to both. Provided, the widow or children of any highway patrolman killed in the line of duty after Jan. 1, 1954, shall be entitled to receive the benefits of this act, whether unemployment compensation payments have been made as a result of the death of such highway patrolman or not. Provided further, immediately upon accepting the provisions of this act the balance of any workmen's compensation when due and payable to such widow or children shall be paid into the general revenue fund as provided in §3."

The question of the retrospective effect of a statute is sometimes difficult to determine.

The general rule expressed on the subject on p. 114, Vol. 2 of Sutherland's Statutory Construction (§2201) is as follows:

"... The Federal Constitution does not prohibit the enactment of retroactive laws, but only forbids the passage of bills of attainder and ex post facto laws, and laws impairing the obligation of contract. Retrospective operation is not favored by the courts, however, and a law will not be construed as retroactive unless the act clearly, by express language or necessary implication, indicates that the legislature intended a retroactive application...."

Again in §2203, Sutherland states:

"In dealing with the problem of retroactivity, it is extremely difficult to establish definite criteria upon

which court decisions can be foretold. A statute must not act unreasonably upon the rights of those to whom it applies, but what is reasonable and what is unreasonable is difficult to state in advance of actual decisions. '... the method to be pursued is not the unerring pursuit of a fixed legal principle to an inevitable conclusion. Rather it is the method of the intelligently balancing and discriminating between reasons for and against.' Particular cases will be decided on their particular facts, though in light of established general principles."

And on p. 963 of Vol. 40, Am. Jur., "It is the general rule that pension statutes are to be liberally construed."

In view of the above authority, the language of §1 of Ch. 29969, 1955, should be clearly examined in order to determine whether or not the widow of a patrolman killed in the line of duty prior to the enactment of the act could benefit from its provisions.

The act was passed in 1955, but makes specific provision to the effect that widows and children of highway patrolmen killed in line of duty after Jan. 1, 1954, shall receive the benefits provided even though "unemployment compensation payments have been made as a result of the death of such highway patrolman. . . ."

In my opinion, the clear and necessary implication of this language must be that the widows and children of patrolmen killed in line of duty prior to Jan. 1, 1954, should receive benefits under the act provided, however, that they have not received "unemployment compensation payments . . . as a result of the death of such highway patrolman . . ." or workmen's compensation benefits.

It should be noted that the language "unemployment compensation" as used in the act may have been an error and that the words "workmen's compensation" was intended. This point, however, is not relevant to the question at hand which deals solely with the retrospective effect of the act with regard to patrolmen killed in line of duty before the law was enacted.

I believe, therefore, that this law must be construed so as to provide benefits to "the widow of any highway patrolman killed in the line of duty . . ." regardless of the time of his death subject to the limitations set forth in the act.

According to the facts set forth in your letter and other correspondence which you have forwarded, the widow of Patrolman Bender was paid \$5,000 by a relief act of the legislature. The last payment under this act was made on Jan. 31, 1955. She has not remarried and has received no benefits under the workmen's compensation act. The act does not exclude Mrs. Bender from further benefits which might accrue under acts of the legislature and it is not in conflict with any provision of Ch. 29969, 1955.

Your question is therefore answered in the affirmative, based on the specific facts above set forth. In other words, Mrs. Bender would be entitled to the pension provided by Ch. 29969.

Benefits received under this provision, however, could not be paid for any period of time prior to the effective date of the act.

055-324—December 7, 1955

ELECTORS AND ELECTIONS

ELECTION PRECINCTS—NECESSITY FOR CONFORMITY WITH JUSTICE OF THE PEACE DISTRICTS— §§37.04 AND 98.091, F. S.

To: *C. Ray Smith, County Attorney, Pinellas County, St. Petersburg*

QUESTION:

Since the board of county commissioners no longer has the authority to change the boundaries of justice of the peace districts, what arrangements are necessary to make the present justice of the peace districts conform with the boundaries of the election precincts of the county as the latter are required to be fixed by the election code of 1951, as amended?

In accordance with §98.141, F. S., Pinellas county has undertaken the adoption of the permanent single registration system provided for in Ch. 98, F. S. Because of the number of municipalities in the county that chose to come under the new county registration system, it was necessary to make extensive changes in the precinct boundaries throughout the county in order to comply with §98.091, F. S., which requires such boundaries to coincide with the boundaries of the municipalities using the system, and to comply with the practical necessity of locating precincts and polling places in relation to the density of population. This process has taken many months of effort. The proposed boundaries have been established with the cooperation of the federal bureau of the census, and the boundaries so located have been adopted by the board of county commissioners with the hope that such extensive changes will not be necessary again for many years.

After the adoption of the precinct boundaries it was brought to the attention of the board that it no longer had the authority to relocate the boundaries of the justice of the peace districts so that, as required by §37.04, F. S., "As near as practicable the limits of said districts shall be coextensive with the limits of one or more election districts." (In regard to the loss of this authority see §21, Art. V, Fla. Const., and *Wilson v. Crews* 160, Fla. 169, 34 So. 2d 114.)

Assuming that the above quoted provisions of §37.04, have some efficacy despite the requirements of §21, Art. V, Fla. Const., such provisions do not require that the boundaries of election precincts and justice of the peace districts coincide exactly. Although such would clearly simplify the conduct of elections of justices of the peace in various districts, this advantage is far outweighed by the advantage of having the precincts and polling places sensibly located with due regard for the service they are expected to render.

Because of the conflict of the new precinct boundaries with the old justice of the peace districts boundaries, some precincts will be in as many as 3 justice of the peace districts. However, the voters who reside in each justice of the peace district may still be restricted to voting for the candidates for justice of the peace in the districts in which they reside. Voting machines are required by §101.28 to be capable of permitting an elector to vote for or against "any question he may have the right to vote upon, but no other." Similarly there is ample authority for the board of county commissioners, the supervisor of registration, and the secretary of state to cooperate in all reasonable and practicable ways in arranging the ballots to conform with the peculiar requirements of each precinct.

Therefore, it is my opinion that the precinct boundaries last adopted by the county commissioners of Pinellas county need not be altered to make them coincide with the previously established and presently unalterable boundaries of the justice of the peace districts in the county. It is suggested, however, that an effort should be made under §21, Art. V, Fla. Const., by subsequent legislation etc., to relocate the justice of the peace boundaries so that they will conform with the election district boundaries.

055-325—December 8, 1955

TAXATION

INTANGIBLE PERSONAL PROPERTY TAX—REVOLVING FUND CERTIFICATES—PLYMOUTH CITRUS PRODUCTS COOPERATIVE—CH. 199, §192.21, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Is the revolving fund certificate, issued by the Plymouth Citrus Products Cooperative to, and held by, the Plymouth Citrus Growers Ass'n and similar certificates, subject to taxation as intangible personal property, under and pursuant to Ch. 199, F. S., in the name of the holder and owner thereof?

The revolving fund certificate.—We have before us the said revolving fund certificate, issued by the Plymouth Citrus Products Coop. to, and now held by, the Plymouth Citrus Growers Ass'n, said certificate bearing the number "first" and providing in part as follows:

"This certifies that Plymouth Citrus Growers Ass'n of Plymouth, Fla., a patron of Plymouth Citrus Products Coop., a cooperative marketing association under the laws of Florida, is entitled to receive the amount of \$658,874.39 from Plymouth Citrus Products Coop. on account of capital and/or property and assets furnished and/or patronage dividends or deductions for Revolving Fund purposes as provided in the by-laws thereof subject to the following conditions:"

Here are stated 4 conditions relating to (1) retirement of the

certificate, (2) interest on the certificate, (3) transfer of the certificate and (4) priority of the certificate issued on dissolution. We gather from the said certificate that all debts and obligations of the cooperative have priority over this revolving fund certificate. The certificate is not payable to "bearer" or words of similar import, is transferable only with the express consent of the issuer, and is not a general obligation, in that the certificate is "junior and subordinate to all debts of said cooperative, both secured and unsecured . . ." The certificate does not appear to be a negotiable instrument.

We feel that the said revolving fund certificate is a valuable asset of the holder and owner thereof (the Plymouth Citrus Growers Ass'n) and intangible personal property within the definition of such property found in §199.01, F. S.; however, the holding that it is an intangible within the purview of said §199.01, F. S., does not ipso facto answer the above question as to its taxability.

The associations in question, that is the issuer of the above revolving fund certificate (The Plymouth Citrus Products Coop.) and the owner and holder of said certificate (The Plymouth Citrus Growers Ass'n), were organized and incorporated under Ch. 619, F. S., or the prior statutes and laws from which the said statutes were derived (Ch. 5958, 1909).

Nature of associations organized under Ch. 619, F. S.—An association organized and existing under said Ch. 619 has no capital stock but is organized as an association "not for profit" and "shall not at any time declare or pay any dividend or other profit." (See Art. 3 of the association's charter.) Such associations may be said to be cooperative marketing associations or corporations, which have been defined as instrumentalities looking to the aid of their patrons and related to the banding together of producers for their common advancement; they are not eleemosynary or charitable organizations. Their sole purpose is pecuniary gain for their members and not for themselves (In Re Wisconsin Coop. Milk Pool, CCA 7th., 119 Fed. 2d 999). These associations are similar in purpose to those organized under Ch. 618, F. S., which are deemed 'nonprofit,' inasmuch as they are not organized to make profit for themselves, as such, or for their members, as such, but only for their members as producers" (§618.01, F. S.). These cooperative associations have many features similar to those of 'corporations not for profit' organized under Ch. 619, F. S., principal of which is that they are not organized for the purpose of making a profit. The supreme court of Minnesota, concerning a similar statute of that state, remarked that "a cooperative association, such as the legislature had in mind in the enactment of the statute under which defendant was incorporated, has been defined to be a 'union of individuals, commonly laborers, farmers or small capitalists, formed for the prosecution in common of some productive enterprise, the profits being shared in accordance with the capital or labor contributed by each.'" (Mooney v. Farmers' Mercantile and Elevator Co., 138 Minn. 199, 164 N. W. 804, text 805)

In the case of Green County Rural Electric Cooperative v. Nelson, 234 Iowa, 362, 12 N. W. 2d 886, text 888, concerning such cooperatives, the court said:

"In Hanna on 'The law of Cooperative Marketing Associations', p. 50, it is stated: 'The essential idea in the term "non-profit" is clearly that such corporations are not designated primarily to pay dividends on invested capital but to provide a system and method by which the member can effect the sale of his products.'

"In 'The Law of Cooperative Marketing', by Evans and Stokdyk, p. 3, it is stated: 'The basic legal and economic principles of the cooperative scheme are limitation upon the voting power and restrictions upon alienation of voting stock or membership interests, thus preserving the dispersion of control and keeping the control within the class affected; limiting the use of proxies, thus fixing the responsibility upon the cooperators; the limitation of earnings upon invested capital, thus insuring the non-profit character of the scheme; and the distribution of earnings or savings upon a patronage basis, that is, according to the quantity or value of products marketed through the association by the respective members.'

"In 90 Univ. of Pa. Law Review, p. 151, it is stated: 'A fundamental principle applicable to all cooperatives is the avoidance in the organization of entrepreneur profit. Patronage refunds, therefore, are not to be considered as a division of the profits. They are rather a return of the over-charge.'

"In U. S. v. Rock Royal Coop., 308 U. S. 533, 564, 59 S. Ct. 993, 1008, 83 L. Ed. 1446, 1465, the court states: 'The producer cooperative seeks to return to its members the largest possible portion of the dollar necessarily spent by the consumer for the product with deductions only for modest distribution costs, without profit to the membership cooperative. It is organized by producers for their mutual benefit.'

In the case of San Joaquin Valley Poultry Protective Ass'n v. Commissioner of Revenue, CCA 9th., 136 Fed. 2d 382, text 385, the court, concerning the question of who owned certain reserves maintained by a cooperative, said that "the fact that the sums were not payable to the members on demand or at any fixed time, does not alter the fact that they were their property and not petitioner's (the cooperative association). *Petitioner held them, not as owner, but as agent or trustee for the members.* Bogardus v. Santa Ana Walnut Growers' Association, 41 Cal. App. 2d, 227, 65 P. 2d 80. Since none of the sums ever belonged to the petitioners, they could not be, and were not, income of petitioner." "The relationship between a cooperative association and its members is that of trustee to his beneficiary or between a principal and his agent" (43 C.J.S. 14, §7).

Plan of operation of cooperative marketing associations.—In our opinion of November 14, 1950 (050-521; 1949-1950 Biennial Report 515) there is set out the plan of operation of an association organized and incorporated under Ch. 619, F. S., from which opinion we quote as follows:

"Growers that constituted the association realized at

the outset that they had to have facilities suitable for the preparation of their own fruit for market. To achieve this, the board of directors of the association, which is elected annually by the growers from among their own number, annually fixes the per box packing charge for each variety of fruit, which charge is customarily estimated to be somewhat in excess of the actual cost of packing. To illustrate: In a given year the per box packing charge for oranges is set at, say 65¢; actually it only cost 61¢ per box to pack oranges that year; instead of remitting to the grower the sales price of his oranges less all items of cost, including the actual cost of 61¢ per box for packing, plus a certificate (called a 'retain certificate') which is admittedly a misnomer, which in effect acknowledges that the grower has the equivalent of 4¢ per box on deposit which the association is holding in trust for him against the particular year when it comes his turn under the revolving plan to have his deposit returned to him. In this way, and it is the way I understand practically all cooperative associations of citrus growers operate their business, the growers were able to build and equip their own plant and facilities, using the association as the agent or trustee of all the growers to collect the funds necessary to pay for such facilities in the first instance, and continuing the plan thereafter in order that those growers who put in their money first would get it back first, and so on through the years, until those who last contribute finally got theirs back. In simplest terms, it is really a revolving plan whereby the growers financed the acquisition of their own facilities, and isn't even remotely connected with any question of profits or surplus or accumulations of the association for its own account.

"The same plan was of course adopted in and in connection with the acquisition of our fertilizer plant, as well as the canning plant.

"Perhaps, in order to be perfectly frank, I should add that if some stranger to our method of operation were to examine our records, he might, as the result of some isolated instances where reference is quite erroneously and inaccurately made to 'profits' for which retain certificates are issued, get confused. There has been something of a tendency on the part of some of our growers and some of our employees to get 'profits' confused with deferred payments of part of the proceeds of sale of the grower's fruit, for that is certainly all that this deposit which is held by the association, as before outlined, amounts to and it must be clear to anyone reading it that the so-called retain certificate itself is quite inartificially drawn. Even so, however, I am sure that what actually takes place is the important thing, irrespective of poor usage or terminology."

Conclusion, as to title to assets of cooperative association under Ch. 619, F. S.—The revolving fund certificate above mentioned is held by the Plymouth Citrus Growers' Ass'n; this seems

to raise the question as to the actual ownership of the said certificate. When we take into consideration the holdings in the above cited cases (*Mooney v. Farmers' Mercantile and Elevator Co.*; *Green County Rural Electric Coop. v. Nelson*; *San Joaquin Valley Poultry Protective Ass'n v. Commissioner of Revenue*; *Bogardus v. Santa Ana Walnut Growers' Ass'n*) and the statement in 43 C.J.S. 14, §7, together with the cases cited in the notes and the plan of operation of cooperative marketing associations, we reach the conclusion that the relationship between the average cooperative marketing association and its members is one of trustee and beneficiary, or principal and agent, so that the property of the association, including its reserved and retained funds, are held by it as trustee, or as agent, for its members either as beneficiary or principal. The assets of the cooperative are held by it as trustee or agent for its members. The relationship between such a cooperative and its members is that of trustee to his beneficiary or between a principal and his agent. The assets of the cooperative are held by it as trustee or owner for its members and not as a separate property of the association. Although it may be that the cooperative holds the bare legal title, the beneficial title is vested in the members of the cooperative.

Nature of revolving fund certificate.—The revolving fund certificate in question is in the nature of a certificate or declaration of trust that the Plymouth Citrus Products Coop. is holding in trust the sum therein mentioned for the Plymouth Citrus Growers' Ass'n, whose property is in turn held in trust for its members (See opinion of Nov. 14, 1950; 050-521). The certificate in question is not a promissory note or a certificate of interest in a corporation but is a certificate that the Plymouth Citrus Products Coop. holds in trust certain property of the Plymouth Citrus Growers' Ass'n, which in turn holds such rights in trust for its members. The certificate in question is not within the purview of the documentary stamp taxing statutes (Ch. 201, F. S.) of this state and not subject to such taxes (opinion of November 14, 1950; 050-521). The Plymouth Citrus Products Coop. holds the funds mentioned in trust for the Plymouth Citrus Growers' Ass'n which in turn holds such credits for its members. The equitable title to the funds is in the members of the Plymouth Citrus Growers' Ass'n as their interests may appear.

Is the revolving fund certificate subject to taxation.—The revolving fund certificate in question shows that the Plymouth Citrus Products Coop. is holding the sum mentioned therein in trust for the Plymouth Citrus Growers' Ass'n, which in turn holds such credits for its members. The funds held, whether deemed money, credits or obligations, are within the definition of "intangible personal property" contained in §199.01, F. S., and within one of the several classifications of intangible personal property contained in §199.02, F. S.; unless exempt from taxation, it is not public property or property of "any religious, charitable, benevolent or educational association," under §199.02(5), F. S. The fund involved in equity belongs to the members of the Plymouth Citrus Growers' Ass'n, but is in the hands of the Plymouth Citrus Products Coop. as trustee for the said Plymouth Citrus Growers' Ass'n.

It is made the duty "of every person, firm or corporation in this state owning or having the control, management or custody of intangible personal property which is subject to taxation under the laws of Florida, including *trustees*, executors, administrators, receivers and all other fiduciaries to file a sworn return of the same with the county assessor of taxes . . ." (§199.07, F. S.). It seems clear that the Plymouth Citrus Growers' Ass'n has the control, management or custody of the revolving fund certificate in question either as *trustee for its members* or as agent for its members. There is authority that under statutes similar to §199.07, above referred to, intangible personal property may be assessed to an agent holding such property for his principal; however, in such cases the agent (as well as a trustee) is probably not personally liable for the payment of the taxes assessed where he has no beneficial interest in the property taxed. (84 C. J. S. 217, §102). The property taxed would probably be liable for the taxes assessed under §192.21, F. S. Upon payment of such a tax the trustee or agent may pay the said tax from funds in his hands belonging to the cestui que trust or principal as part of the expense of the trust or agency.

In conclusion we feel that the above stated question should be answered in the affirmative subject to the limitations above mentioned relative to the personal liability of the cooperative holding the personal property in question for its members as trustee or agent.

055-326—December 8, 1955

STATE AND COUNTY OFFICERS AND EMPLOYEES

RETIREMENT SYSTEM—OFFICERS AND EMPLOYEES OF JACKSONVILLE EXPRESSWAY AUTHORITY— CH. 122, F. S. (CH. 29801, 1955), CH. 349, F. S. (CH. 29996, 1955)

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are the officers and employees of the Jacksonville expressway authority subject to the state and county retirement system established by Ch. 29801, 1955?

State and county officers and employees included within the purview of Ch. 29801, 1955, "include all full time officers or employees . . . who receive compensation for employment or service from any *agency*, branch, department, institution or board of the state, or any county of the state, for services rendered the state or county from funds from any source provided for their employment or services regardless of whether the same is paid by state or county warrant or not . . ." (sub §(1), §2, Ch. 29801, 1955). In the light of the above provisions of the 1955 enactment the answer to the above question seems to depend upon whether or not the Jacksonville expressway authority is an agency of the state or a county.

The Jacksonville expressway authority was "created and established a body politic and corporate and *agency of the state of Florida*, to be known as the 'Jacksonville expressway authority' " by

Ch. 29996, 1955 (See §3 of said Ch. 29996). The authority is given the power of eminent domain (See §4 of said Ch. 29996). The authority is declared, in §13 of said act, to be "in all respects for the benefit of the people of the state," and will be "performing essential governmental functions" This act shows on its face that the legislature intended to create by it an agency of the state within the purview of Ch. 29801, 1955. This office does not pass upon the constitutional validity of legislative acts, leaving such questions to the courts, and for the purposes of this opinion said Ch. 29996 is presumed to be a valid enactment. (Emphasis ours.)

The above question is, therefore, answered in the affirmative.

055-327—December 8, 1955

TAXATION

HOMESTEAD TAX EXEMPTIONS—PARCELS OF LAND JOINED AT CORNERS ONLY—§§1, 5 AND 7, ART. X, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where a person residing in this state owns 3 parcels of land within a municipality, having a combined area of less than $\frac{1}{2}$ acre, joined only at the corners, and makes his permanent home in a dwelling house located upon one of said lots or parcels of land, may he claim the 3 lots or parcels of land as tax exempt under §7, Art. X, State Const.?

The rules previously adopted by the courts in construing §1, et seq., Art. X, State Const., as to what constitutes a homestead and its character is applicable to homesteads for the purpose of tax exemption (*L'Engle v. Forbes*, Fla., 81 So. 2d 214, text 216; *Jacksonville v. Bailey*, 159 Fla. 11, 30 So. 2d 529); this being true if the above described lots or parcels of land would be exempt from execution they would also be entitled to the exemption from taxation provided by §7, Art. X, State Const. Although detached tracts of land, separated from the homestead by other parcels of land neither owned nor occupied by the owner of the homestead, may not be claimed as homestead property, although such detached tracts may be used in connection with the homestead property (*Brandies v. Perry*, 39 Fla. 172, 22 So. 268; *Milton v. Milton*, 63 Fla. 533, 58 So. 718) it was held in *Clark v. Cox*, 80 Fla. 63, 85 So. 173, that 2 parcels of land, separated by a railroad right-of-way, might, under the circumstances there presented, be claimed as homestead property exempt from execution. "While the opposite view has been taken (one Kansas case) it has been held that 2 parcels of land which corner on each other are contiguous within the rule that contiguous lots and tracts not exceeding in extent or value the limit fixed by constitutional or statutory provisions may be selected as a homestead, although the residence and appurtenances are all located on one tract." (40 C. J. S. 504, §64; see also 26 Am. Jur. 26, §36; 73 A. L. R. 143.) These authorities, in the light of

the liberal construction of homestead exemption laws adopted by the Florida courts (*Clark v. Cox*, 80 Fla. 63, 85 So. 173), clearly indicate that 2 or more lots or parcels of land which corner on each other may be claimed as homestead property provided there are no other impediments to the right claimed.

Under the Florida constitution a homestead in an incorporated municipality (except such as may be within the purview of §5, Art. X, State Const.) may not extend to more than $\frac{1}{2}$ acre of land and to more "than the residence and business house of the owner" (§1, Art. X, State Const.). In this state, with one exception hereinafter mentioned, it has been held that rental property of an owner located upon lands contiguous to the dwelling house of the owner (total area being less than $\frac{1}{2}$ acre) is not part of the owner's homestead property (*O'Neal v. Miller*, 143 Fla. 171, 196 So. 478, small residence and store building; *McEwen v. Larson*, 136 Fla. 1, 185 So. 866, apartment house; *Jordan v. Jordan*, 100 Fla. 1586, 132 So. 466, apartment house; *Smith v. Guckenheimer*, 42 Fla. 1, 27 So. 900, store rooms). In none of these cases was it made to appear that the rentals from the rented buildings in question constituted the principal means of the owner's livelihood, as did the facts in *Cowdery v. Herring*, 106 Fla. 567, 143 So. 433, 144 So. 348, where the rental from a small paint shop and garage, erected on an urban homestead, constituted the principal income and means of livelihood of the owner, and upon which facts homestead exemption from execution was allowed and the homestead property was expressly held to include the paint shop and garage. This paragraph has been inserted as a guide should there be rental buildings on any of the parcels of land other than the one upon which the dwelling house of the owner is located.

The above question is, therefore, answered in the affirmative, subject, however, to the possible application of the rule discussed in the last above paragraph hereof.

055-328—December 9, 1955

TAXATION

EXEMPTION—HOUSEHOLD GOODS AND PERSONAL EFFECTS—CONSTRUCTION OF §192.201, F. S. (CH. 29743, 1955)

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Does Ch. 29743, 1955, grant a tax exemption to each member of a family residing in a single dwelling house, or is it limited to the householder only?

Said Ch. 29743, 1955, provides, in so far as here material, that "there shall be exempt from taxation to every person residing and making his permanent home in this state household goods and personal effects to the assessed value of \$1,000." When this statutory provision is read in the light of a similar provision found in §11, Art. IX, State Const., and the constitutional provision for homestead tax exemption, we feel that it is ambiguous and must be construed in the light of said provisions of the constitution.

As this office leaves to the courts the question of the constitutionality of statutes and laws, no attempt is here made to reconcile the said 1955 enactment with the \$500 exemption provision in §11, Art. IX, State Const., and the limitations upon the legislature to grant tax exemptions contained in §1, Art. IX, State Const.

When past history of tax exemptions of household goods and personal effects and constitutional provisions relative to homestead tax exemptions are taken into consideration, and the fact that the statute in question relates to household goods and personal effects, we come to the conclusion that it was the intention of the legislature to grant the exemption to householders maintaining permanent homes in this state. We do not think that both a husband and wife, unless living separate and apart and maintaining separate homes, or the children in a family residing with their parents, constitute householders.

The above stated question is answered in the negative; the exemption is limited to the householder.

055-329—December 9, 1955

REGULATION OF TRADE, COMMERCE AND INVESTMENTS

SECURITIES COMMISSION—SECURITIES REGISTERED BY NOTIFICATION; BY QUALIFICATION—SALE OF SECURITIES—REGULATION OF COMMISSION PERMITTED—§§517.02, 517.03, 517.09 AND 517.28, F. S.

To: *Florida Securities Commission, Tallahassee*

QUESTIONS:

1. Does §517.09(5), F. S., regulate the commissions that may be paid in connection with the sale of securities registered by notification under §517.08, F. S.?
2. If the 1st question above is answered in the negative then may the commission by rule or regulation fix the commissions that may be paid in connection with the sale of such securities registered by notification?

Said §517.09(5), F. S., provides that

"With respect to securities required to be registered by qualification under the provisions of this section, the Commission may by order duly recorded fix the amount of commission or other form of remuneration to be paid in cash or otherwise, not to exceed 20%, directly or indirectly, for or in connection with the sale or offering for sale of such securities in this state." (Emphasis supplied.)

The italicized portion of this subsection seems clear and needs no construction and limits its application to sales of securities registered by qualification under the provisions of §517.09, F. S. The language of said sub §(5) being clear and not subject to construction, the 1st question is answered in the negative.

The Florida securities commission is an administrative board

created with the power and duty to supervise those who are engaged in the issuance and handling of securities as defined in §517.02, F. S. The main purpose of the said board is the enforcement of Ch. 517, F. S., which was designed to protect the investors in securities in this state from fraud, not from financial loss in the absence of fraud (See *State v. Minge*, 119 Fla. 515, 160 So. 670). Any exercise of the power of the commission for the enumerated purpose, or for any other purpose within the scope of its duties, is a proper function.

The Florida securities commission has general supervisory powers over the sale of securities in this state and "*may prepare all necessary regulations and blank forms for the conduct of its business.*" (§517.03, F. S.) (Emphasis supplied.) It is ground for the revocation of a registration of a security if the issuer "does not conduct its business in accordance with law," or "has its affairs in an unsound condition" (§517.11, F. S.). The Florida commission may make and adopt rules and regulations deemed necessary for cooperation with federal agencies regulating the interstate sale of securities (§517.28, F. S.). In §2911, of the Commerce Clearing House, Inc.'s Blue Sky Law Reporter, it is stated that the "Securities Commission has general supervisory powers and is enabled to adopt reasonable rules and regulations governing the sale of securities. One valid exercise of this power is the supervision of the amount or percentage of commissions legally permitted, the loading charges, and other expenses which may be incurred in connection with the sale of securities."

Sub §(5) of §517.09, F. S., seems to determine as a matter of law that a commission paid in connection with the sale in this state of securities registered in this state by qualification would in effect amount to a fraud upon the purchaser. The commission is authorized by said subsection to fix a maximum of commission, by rule; however, no such rule may fix a commission in excess of said 20% of the selling price. We are of the opinion that the Florida securities commission has the power and authority by rule or regulation to fix the maximum commission which may be paid in connection with the sale of securities registered in this state by notification; however, there does not appear to be any statutory limitation upon the maximum to be fixed by the commission. The commission has by practice, if not by rule, adopted a maximum of 20%, which amount doubtless was suggested by the limitations contained in said sub §(5) of §517.09, F. S. This power to fix a maximum commission seems to be necessary to prevent fraud upon the purchasers of securities in this state. The payment of a commission equal to 100% of the sales price of stock sold by a corporation as an original issue would amount to a fraud upon the stockholders in that the value of their stock would be reduced.

We, therefore, answer the 1st question in the negative and the 2nd question in the affirmative.

055-330—December 9, 1955

HIGHWAYS, BRIDGES AND FERRIES

STATE TURNPIKE AUTHORITY—FOOD SERVICE ON TURNPIKE—CONSTRUCTION OF ACCESS ROAD TO FOOD COMMISSARY OFF TURNPIKE—\$340.04(2), F. S.

To: Florida State Turnpike Authority, Dania

QUESTIONS:

In construing the last sentence of §340.04(2) which reads: "The Authority is specifically prohibited from granting concessions or selling any services or products along the project covered by this act or subsequent projects except the sale of motor fuel with attendant towing and maintenance facilities and the sale of food prepared and ready for consumption with attendant non-alcoholic beverages" the following questions are posed:

1. We have determined that a very desirable restaurant facility can be maintained under a system whereby all kinds of food usually served in good restaurants can be pre-cooked at some central commissary located off the turnpike. The food is then frozen and delivered to the turnpike restaurant where it is then heated to the desired temperature and served to the patron. For all practical purposes the food is prepared and ready for consumption when it arrives on the premises except for the reheating operation, which would necessarily involve some further cooking of the food to make it ready for serving. To carry on this kind of operation it would be necessary that the restaurant be designed with full kitchen facilities.

2. An alternative operation would be to have a central commissary located off the turnpike where the food is completely cooked and ready for serving. It is then transported to the turnpike restaurant in some kind of a mobile unit equipped with steam tables to keep the food at a desired temperature and then delivered to the turnpike restaurant where it is kept hot by means of steam tables and other modern heating devices. We should like to know particularly:

(a) whether a facility constructed along these general lines would be permissible under the turnpike act,

(b) whether or not a cafeteria style of serving would be permissible,

(c) whether or not the turnpike authority would be within its rights in building an access road to a central commissary located near the restaurant to provide speedy delivery of the food by the mobile unit to the restaurant facility. (The commissary kitchen would be owned, or leased and maintained by the concessionaire on private property not owned by the turnpike).

3. Does the turnpike act prohibit the concession operator from cooking, preparing and serving on the premises hot coffee, hot tea, hot chocolate and hot drinks except alcoholic beverages?

4. Our present plans contemplate the construction and maintenance of two snack bars on the so-called Bob-tailed turnpike in addition to the restaurant described above. We should like to know whether or not in your opinion the turnpike act prohibits either the snack bar operator or the restaurant operator from cooking on the premises and serving "short orders" such as hamburgers, hot dogs, eggs and bacon, and other foods which can be cooked and served in the matter of a few minutes.

You say, in your 1st question, that the plan there proposed "would necessarily involve some further cooking of the food to make it ready for serving." If further cooking is necessary, then obviously the food is not ready for consumption and the suggested procedure would violate the statute.

Your 2nd question presents a very different case because the food is ready for serving when transported to the turnpike service area. It is "ready for consumption", to use the language of the statute. The fact that it is kept hot by means of steam tables and other modern heating devices does not violate the statute. The statute does not concern itself with the manner of serving, and the food may be served cafeteria style if so desired.

Answering your question 2.(c), I do not think the turnpike authority would have the right to build an access road to a central commissary under the circumstances set up in your question. The matter of transporting the food from the privately-owned commissary off the turnpike to the service area on the turnpike is the concern of the concessionaire, as is the location of the commissary kitchen. There might be a different question in the unlikely event that essential food service on the turnpike were supplied by the turnpike authority itself. I do not understand that such procedure is involved in your question. The section authorizes sale of food "prepared and ready for consumption with attendant non-alcoholic beverages." I think there can be no serious doubt that the words "with attendant non-alcoholic beverages", as used in the statute, refer to hot coffee, hot tea, hot chocolate, etc., and therefore the act does not prohibit the concession operator from preparing and serving those hot drinks on the premises.

In your 4th question you inquire about the restaurant operator cooking on the premises and serving "short orders" such as hamburgers, hot dogs, eggs and bacon, and other foods which can be cooked and served in a matter of a few minutes. These foods must be prepared and made ready for consumption after being ordered, and clearly violate the provision of the statute.

055-331—December 14, 1955

REGULATION OF TRADE, COMMERCE AND INVESTMENTS

MILK COMMISSION—AUDIT REPORTS OF BOOKS, RECORDS
AND ACCOUNTS AS PUBLIC RECORDS—§§501.01, 501.04,
501.05, 501.06, 501.17 AND 501.19, F. S.

To: *LeRoy Collins, Governor of Florida, Tallahassee*

QUESTION:

I would like an opinion from you as to whether or not under the law the milk commission has the authority to release to the public information obtained in an audit by said commission of accounts and records of persons engaged in the milk industry.

The general purpose of Ch. 501, F. S., was the protection of the health, safety and welfare of the public using milk and milk products. This chapter declares the business of producing and distributing milk to be a business affecting the health, safety and welfare of the public (See §501.01, F. S.). The regulation of the business of producing and distributing milk and milk products is a police regulation in so far as it establishes sanitary and other safety regulations for the protection of public health, safety and welfare. We do not here pass upon the question of whether the price fixing feature of the chapter is a health, safety and welfare regulation. The powers of the milk commission under §§501.04, 501.05, 501.06 and 501.19, F. S., are broad in their scope and primarily police regulations. The milk commission is primarily charged with the policing of the milk industry in so far as it affects the health, safety and welfare of the state.

Section 501.17, F. S., provides as follows:

"No member of said commission, nor any officer, agent or employee thereof, shall divulge to any person the contents of any document, paper or record examined by him in the performance of his duties hereunder, or any information obtained by him in the course of his investigations, except as may be required to carry out the purposes of this chapter. Any person violating the provisions of this section shall be guilty of a misdemeanor and shall be punishable by a fine not exceeding \$500 or imprisonment not exceeding 1 year."

Although this section of the statutes is directed to the milk commission, its officers, agents and employees, it indicates a legislative design to establish a class of state secrets which the legislature may have deemed necessary to the proper administration and enforcement of Ch. 501, F. S.

The right to inspect public records is not an absolute right but is one subject to a number of limitations, and may be denied where their disclosure would be detrimental to the public interest (76 C. J. S. 113-4, §35; 45 Am. Jur. 433, §26). In *Lee v. Beach Pub. Co.*, 127 Fla. 600, 173 So. 440, text 442, it was stated that the appellant contended that "there are certain records in

the police department of a city which must be kept secret and free from common inspection as a matter of public policy. This is true." Doubtless in the administration of a regulatory statute, such as Ch. 501, F. S., it is necessary to keep information received in connection with investigations secret, otherwise such information will not be forthcoming if its source is revealed. In this connection see 5 Jones Commentaries on Evidence, 2nd Ed., Revised and Enlarged, 4198-4202, §§2201-2203; 1 Greenleaf on Evidence, 16th Ed., 387-389, §§250 and 251; 4 Wigmore on Evidence, §2375; 5 Chamberlyne's Modern Law on Evidence, 5317, §3708; 1 Elliott on Evidence, 744, §639. It seems clear from §501.17, F. S., that the contents of any document, paper or record, examined by the commission and its officers, agents and employees, may not be revealed, although extracts be taken therefrom for administration and enforcement purposes. Any such information obtained by the commission, its officers, agents and employees, although a matter of record in the files and records of the commission would seem to constitute state secrets under said §501.17, F. S., and should not be revealed even by an audit of the books, records and accounts of the commission taken by or at the direction of the commission.

It is our information that the audit forming the subject matter of your above request for opinion was either made by the Florida milk commission, or under its direction, and that no audit by the state auditing department made pursuant to Ch. 21, F. S., is here involved. This being true, this opinion is limited to the above stated question posed in your request for opinion and has no application to audits and audit reports made by the state auditing department pursuant to said Ch. 21, F. S.

Answering the above stated question, we are of the opinion that an audit report made by or under the direction of the Florida milk commission is subject to public inspection and the taking of copies only when it does not divulge the "contents of any document, paper or record," referred to in §501.17, F. S. If it divulges the contents of any such document, paper or record, it may not be opened to public inspection. The documents, papers and records mentioned and embraced in said §501.17, F. S., seem to be treated as state secrets by said section which may not be divulged even by the commission.

These observations answer the above question as well as the same may be answered upon the information before us.

055-332—December 14, 1955

LABOR

LABOR ORGANIZATIONS—RIGHT-TO-WORK AMENDMENT —DUTIES OF HOTEL AND RESTAURANT COMMISSIONER—§§447.09(11), 447.14, CH. 509, F. S.

To: *Richard Edgerton, Commissioner, State Hotel & Restaurant Commission, Tallahassee*

QUESTION:

Does the hotel and restaurant commissioner have any particular duty with respect to violations by hotels

of the "Right-to-Work" amendment to §12, Declaration of Rights, Florida constitution?

The pertinent part of §12 is as follows:

"... The right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer."

Section 447.09(11), F. S., in a chapter dealing with labor organizations, makes it unlawful for any person "to coerce or intimidate any employee in the enjoyment of his legal rights..." §447.14, F. S., makes it a misdemeanor for any person to violate any of the provisions of Ch. 447.

There is no doubt that the proper prosecuting officials in a given area of the state have the authority to enforce this law against any hotel or labor union that coerces or intimidates any hotel employee in the enjoyment of the rights defined in §12 of the Declaration of Rights.

It is my opinion, however, that the administrative authority of the hotel and restaurant commission is limited to Ch. 509, F. S., to the rules and regulations lawfully adopted by the commission within the limits of such law, and to any other provisions of law that are specifically applicable to the hotel and restaurant commissioner; and that the hotel and restaurant commissioner has no particular duty with regard to the violation by a hotel's management of any other laws, since the hotel and restaurant commissioner's power to suspend or revoke a hotel's license is limited to violations included in the above cited chapters of Florida statutes and other pertinent laws or regulations.

055-333—December 15, 1955

TAXATION

HOMESTEAD EXEMPTION—SPECIAL ASSESSMENTS—CH. 31330, 1955, §7, ART. X, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

May the "special assessments" provided for in Ch. 31330, 1955, be levied and assessed against homesteads within the purview of §7, Art. X, State Const.?

This act sets up a special assessment district for the operation of a fire, water and sewer facility in a certain area in Volusia county and provides for the levy and assessment of a sewer service charge, water rates and other services (§§7 and 8 of said act) and for certain assessments designated by the act as special assessments (§9 of the act). These special assessments are designed to pay part of the expenses of maintaining and operating the facility, to pay interest and sinking fund on

the bonded indebtedness, and other purposes. The amount of these assessments is to be determined by the board and "the amount so determined shall be specially assessed upon all real property within the district (*including homesteads*) in proportion to the assessed valuation of said property." These assessments are referred throughout the act as "special assessments." It seems evident from the enactment that it was the intention of the legislature to levy the so-called special assessments against the homesteads of the district.

Section 7, Art. X, State Const., as amended in 1938, exempts the homesteads therein described from "all taxation, except the assessments for special benefits . . ." The said section of the constitution, prior to the said 1938 amendment, exempted homesteads "from all taxation, other than special assessments for benefits . . ." The said 1955 enactment provides for "special assessments," while §7, Art. X, State Const., permits only assessments for special benefits against homesteads. For the above stated question to be answered it is necessary that we determine whether the *special assessments* mentioned in the said 1955 enactment are in fact *assessments for special benefits* within the purview of the state constitution; to determine this is to pass upon the constitutionality of said Ch. 31330, 1955, in so far as it provides for said special assessments.

It has been the constant policy of this office for many years and during the administration of many past attorneys general to leave constitutional questions to the courts and decline to pass upon the same. In line with this policy of the office we feel that the above question should not be passed upon by this office but should be left to a court of competent jurisdiction.

055-335—December 16, 1955

AGRICULTURE, HORTICULTURE AND ANIMAL INDUSTRY

AGRICULTURE—MARKETING BUREAU AND BOARD—AGRICULTURAL AND LIVESTOCK BUILDINGS—§§603.20-603.23, F. S. (CH. 29832, 1955)

To: *Sinclair Wells, Land Agent, Dept. of Agriculture, Tallahassee*
QUESTION:

May benefits provided by Ch. 29832, 1955 (§§603.20-603.23, F. S.) be conferred in a case in which the construction of the building or buildings authorized by the act were completed prior to effective date of the act?

Section 3 of said chapter reads as follows:

"Section 3. In the construction of buildings as authorized by §1 of this act the money to be expended therefor from said appropriation shall be matched by the county, city or fair association for which such buildings are to be constructed on the basis of 50% from the county, city or fair association to 50% from said appropriation, and the contribution from the county, city or fair association for such construction shall be provided and made available before such construction is begun.

In no event shall an amount greater than \$20,000 be expended from said appropriation for the construction of a building for any county, city or fair association."

The cardinal rule to be applied in the construction of a statute is, that it be determined from the words employed in the drafting of the act what was the intention of the legislature with regard to the objects and purposes to be achieved. The subject statute presents no difficulty in this respect. It is clearly apparent from the preamble of the act that its purpose is to encourage the development of agriculture and livestock industries of all sections of the state in the interest of the general public and for the welfare of the inhabitants of the state at large.

The subject statute is remedial in its nature and is subject to liberal construction that its beneficent purpose may be accomplished. Remedial statutes should always be construed to afford relief rather than to deny it.

It is noted that the particular question presented is whether under the provisions of §3 the benefits of the act may be conferred in a case in which the construction of the building or buildings authorized by §1 of the statute, were fully completed prior to the effective date of the act. Applying the accepted doctrine of statutory construction to the question presented, I conclude that where a retroactive operation of the statute is creative and tends to alleviate harsh or unfair consequences without injury to vested rights, the presumption is in favor of the statute and the benefits conferred thereby. There is no other provision of the act, which would indicate legislative intention in conflict with such a construction.

Accordingly it is my opinion that the provisions of §3 apply equally to cases where the construction of the building by a qualified beneficiary under the statute was fully completed upon the effective date of the act, as where the building or buildings were commenced or completed after such date, conditioned, however, that the particular recipient has available funds to meet its obligation under the act before construction is commenced.

It is my further opinion that once the site for the establishment of an enterprise within the terms of the statute has been purchased in fee, from that point the county, city or fair association can make its contribution of 50% of the cost of the enterprise either in money or other things of value which are acceptable to the committee created by the act. The committee would be under the duty of determining a bona fide value of the contribution and be assured that its value is 50% of the cost. This might include contribution in the form of obligations paid on behalf of the construction, work performed by county or city forces on force account, which the committee finds to be of reasonable value. A reasonable and sound discretion should be allowed the committee in making the determinative value of the contribution, provided always that it is bona fide.

Per exempla in lieu of constructing a building one might be purchased if that would answer the purposes intended.

055-336—December 21, 1955

COURTS

SMALL CLAIMS COURTS, PROCESS, JURISDICTION—§§42.10, 42.19, 47.08, F. S., §1, ART. V, STATE CONST.

To: *Theodore C. Houk, Judge, Small Claims Court, Martin County, Stuart*

QUESTIONS:

1. Where a cause of action over which a small claims court has jurisdiction arises within that jurisdiction, but the defendant is a resident of another county of the state, is notice served by registered mail pursuant to the provisions of §42.10, F. S., sufficient to give said court jurisdiction?

2. Is the notice set forth in §42.19, F. S., legally sufficient to give a small claims court jurisdiction?

AS TO QUESTION 1:

The methods of service of notice upon a defendant are: service by sheriff or constable; registered mail with return receipt or by any person not a party to or in anywise interested in the suit appointed by the judge for that purpose (§42.10 (2), F. S.).

The crux of the question is whether or not the process of a small claims court runs throughout the state. At common law, or in the absence of a statute, service of process cannot be had on a defendant outside the county where it issued (72 C. J. S., Process, §32b). This common law rule has been modified by statute, insofar as the same may be applicable to the circuit courts in Florida, by the provisions of §47.08, F. S. In *Linger v. Balfour*, 102 Fla. 591, 136 So. 433 the court, referring to the common law rule, in the Syllabus, in part said: "However, as service could not be had on a defendant outside of the county where it was issued, the plaintiff necessarily had to bring his suit in the county where he could serve the defendant."

While there is nothing in the small claims court act modifying the common law rule, we must consider *State ex rel Vetter v. McCall*, 107 Fla. 596, 145 So. 841. The case holds that where civil jurisdiction of the circuit court is affected by creation of an inferior court (civil court of record) that such inferior court "has exclusive jurisdiction of the cause." That §1, Art. V, Florida Const. "does not contemplate that a portion of the constitutional jurisdiction of the circuit courts can be taken away and conferred upon an inferior court with statutory restriction as to process, which in effect denies jurisdiction to the inferior courts in cases taken from the jurisdiction of the circuit court whose process runs throughout the state." (Emphasis supplied).

The court proceeded to hold that a statutory restriction attempting to limit the process of the civil court of record to the county was unconstitutional. If we follow this case it is logical to conclude that where an inferior court is created the

circuit court is divested of jurisdiction to the extent of the jurisdiction granted the inferior court. So in the case of the small claims court of Martin county, it, upon creation, would have exclusive jurisdiction in so far as the circuit court is concerned of cases "at law in which the demand or value of the property involved does not exceed" \$250. That being so, it would appear that the process of the small claims court of Martin county, by reason of *State ex rel Vetter v. McCall*, supra, runs throughout the state and the question should be answered in the affirmative.

AS TO QUESTION 2:

The statutory form of notice to a defendant is specifically set forth in §42.19, F. S. It is the established practice of this office not to pass upon constitutional questions. However, the form of notice seems to be sufficient to notify the defendant of the nature of the proceeding against him and of all other pertinent data in connection therewith.

055-337—December 22, 1955

BEVERAGE LAW

ALCOHOLIC BEVERAGE LICENSE—HOTELS AND RESTAURANTS—§561.20, F. S. AS AMENDED BY CH. 29786, 1955

To: J. D. Williamson, State Beverage Director, Tallahassee

QUESTION:

May a hotel or restaurant under the provisions of §561.20(2), as amended by Ch. 29786, 1955, secure a special alcoholic and intoxicating beverage license to be used and operated in conjunction with the said hotel or restaurant, and subsequent to obtaining such license lease the alcoholic dispensing business of the hotel or restaurant, as the case may be, to another party and thereupon eliminate from the said hotel or restaurant any and all responsibility for the operation of the alcoholic beverage portion of the business as between the hotel or restaurant and the state?

The statute, §561.20(2), as amended by Ch. 29786, which deals specifically with this problem, provides as follows:

"No such limitation of the number of licenses as herein provided shall prohibit the issuance of a special license to any hotel, motel, or motor court of not less than 50 guest rooms or to any restaurant containing all necessary equipment and supplies for, and serving full course meals regularly and having accommodations at all times for service of 200 or more patrons at tables and occupying more than 4000 sq. ft. of space; provided, however, that any licenses heretofore, or hereafter issued to any such hotel, motel, motor court, or restaurant under the provisions of any law shall not be moved to a new location, such licenses being valid only on the premises of such hotel, motel, motor court, or restaurant; provided, further, that licenses issued to hotels, motels, motor courts, or restaurants under the general law and

held by such hotels, motels, motor courts, or restaurants on May 24, 1947, shall be counted in the quota limitation contained in sub §(1) herein; and provided further, that licenses issued for hotels, motels, motor courts or restaurants under the provisions of this law shall be issued only to the owner of said hotel, motel, motor court or restaurant, or, in the event the hotel, motel, motor court, or restaurant is leased to the lessee of the hotel, motel, motor court, or restaurant and the license shall remain in the name of said owner or lessee so long as the license is in existence. Any special licenses now in existence heretofore issued under the provisions of this law cannot be renewed except in the name of the owner of the hotel, motel, motor court, or restaurant, or, in the event the hotel, motel, motor court or restaurant is leased, in the name of the lessee of the hotel, motel, motor court, or restaurant, in which the license is located and must remain in the name of said owner or lessee so long as the license is in existence. Any tax collector shall mark 'Special' any license issued to a hotel, motel, motor court, or restaurant under the provisions of this law, or any renewal of such license."

This law prohibits a hotel, motel, motor court or restaurant, which secures a special liquor license from the state to be used in conjunction with the serving of intoxicating liquors to the guests of the hotel, motor court or restaurant, from transferring such license to a 3rd party, and this provision, in my opinion, is inconsistent with a lease of the bar of a hotel or restaurant which has been issued a special license where the hotel or restaurant owner or the lessee of the entire premises of the hotel or restaurant attempts to shift all responsibility of the operation and management of the bar business of such hotel or restaurant to a 3rd party to whom he may lease the bar business.

In *City of Miami Beach, et al v. State, ex rel Patrician Hotel Company, Fla.*, 200 So. 213, our court said:

"It must be recognized that the acquiring of a license to sell intoxicating liquor is a matter of privilege and not a matter of right.

"It was also elementary that a license to sell intoxicating liquor is a personal license to the licensee and that the provision of §4, supra, prohibiting the transfer or assignment from one to another person is valid."

In the light of the statute and this authority your question is answered in the negative.

By the above holding, however, we do not wish to infer that a hotel or restaurant is prohibited from entering into a managerial agreement with a 3rd person to operate the alcoholic and intoxicating beverage dispensing business of such hotel or restaurant, but as between the state and the applicant and licensee, the hotel or restaurant must of necessity see to it that the bar is conducted in an orderly, decent manner and in compliance with the statutes of the state.

The knowledge that a large hotel or restaurant for self-protection and other reasons would take great care in seeing that its bar was properly operated was undoubtedly one of the matters considered by the legislature as forming a reasonable basis for the classification of hotels and restaurants of a certain size and character as being eligible for a *special* liquor license.

In the case of *State v. Noel*, 124 Fla. 852, 169 So. 549, the supreme court had under consideration an ordinance of the city of St. Petersburg which provided in effect that it was unlawful for any person to sell, offer for sale, serve or dispense intoxicating beverages in the city of St. Petersburg, in any place or establishment licensed by the state or the city of St. Petersburg for the sale of intoxicating beverages between the hours of 10:00 P.M. and 6:00 A.M. of the following day, but provided that hotels having 100 rooms or more for the accommodation of guests were exempted from the ordinance to the extent that the hotels should be permitted to sell, serve and dispense intoxicating beverages until 12:00 P.M. to registered guests.

The question before the court was whether the ordinance was invalid in the light of the discrimination created by the exception. The court said: "We think the question must be answered in the negative," and cited with approval from the case of *Ex Parte Lewinsky*, 66 Fla. 324, 63 So. 577, as follows:

"We may suggest that a reasonable basis for the classification, that in very large hotels the bar is an *incident merely*, and that the *hotel management*, under constant supervision of the State *will see to it*, by reason of self-protection, that the bar is conducted in an orderly, decent manner; whereas, in the smaller hotels the liquor business may be the principal, and the hotel the incident. Where the dividing line may be placed is primarily for the decision of the legislature, and it is not, nor from our knowledge of Florida as a state, much frequented by winter tourists, can it decently be claimed, that the line is so placed as to apply to but few hotels."

The reasoning of our court in this case is that where a discrimination has been created by the legislature in favor of a hotel or restaurant which operates a liquor dispensing business in conjunction with the hotel or restaurant and merely incidental to the main business of the hotel or restaurant, that such discrimination is valid only because the state can reasonably depend upon the larger hotels or restaurants to see to it that the business is operated in an orderly and decent manner.

055-338—December 22, 1955

PUBLIC HEALTH

CRIPPLED CHILDREN'S COMMISSION—EXPENSES AUTHORIZED—\$§391.01, 391.04, 391.05, 391.07, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. Is the Florida crippled children's commission

authorized to defray transportation expenses of an indigent parent who, in the best interests of the child and upon recommendation of the commission, accompanies such indigent child to the center where surgery is to be performed on such child?

2. When an indigent child, in the custody and under the care of the Florida crippled children's commission, dies, is the commission authorized to pay the expenses incurred by preparation of the body for shipment and the return of the body to the parents' home?

3. Is the commission authorized to pay actual funeral expenses of an indigent child who dies while under care of the commission?

The crippled children's commission is authorized (See §391.05, F. S.) to "pay reasonable costs to such orthopedic centers for surgical or medical care or treatment of crippled children placed therein by said commission."

Section 391.07, F. S., authorizes the commission to "provide for the surgical and medical care or treatment of indigent crippled children, provided, however, that no child shall be entitled to such care and treatment unless the juvenile courts . . . shall certify to the commission, upon sworn petition of the parents of such child, or persons standing in loco parentis, proven to the satisfaction of said court or judge, that the parents of such child . . . are financially unable to provide for said care and treatment. . . . Children whose parents or those in loco parentis and financially able to pay in part for such treatment may be cared for and treated by the commission under such rules and regulations as may be prescribed by said commission."

The general powers and duties of the commission are set forth in §391.04, F. S., which provides, among other things, that the commission shall be a "body corporate". . . shall "formulate and adopt general policies and adopt an annual budget and plan. . . ."

The language of the legislature in enacting Ch. 391, F. S., indicates an intent to provide state medical aid and assistance to indigent crippled children (as defined in the act, §391.01). The powers of the commission in this regard are rather broad and specific application of the act in terms of the kind and degree of aid to be provided in individual cases is left, to a large extent, to the discretion of the commission and its executive secretary.

The payment of medical fees and hospital expenses by the commission are provided and the payment of essential transportation costs of the patient to an out-of-town clinic or hospital are clearly implied in my opinion in individual cases where such transportation is necessary to provide proper medical treatment.

Obviously a crippled child could not travel alone in many cases and a necessary part of the transportation costs would have to include the cost of providing a suitable companion for the child to and from the clinic or hospital where the surgery or other medical treatment is to be provided.

I believe that the commission is authorized to use its discretion in such cases and if the commission considers it necessary to pay the transportation costs of a companion or attendant for the child in providing necessary care, that it is authorized to do so and that the companion could be in some cases either a nurse or an indigent parent of the child if the commission considers it necessary and in the best interest of the child to provide such care.

Your 1st question is therefore answered in the affirmative, subject to the above comments and if the facts are such as to clearly require the care of a parent for the child in making a trip away from home for medical treatment and if the parent in question is shown to be indigent and unable to pay such transportation costs personally.

In cases where an indigent child has been sent away from home for medical treatment the commission is authorized to pay the child's transportation both to and from the hospital. I believe it would be unreasonable to take the position that the commission is under no duty to return the child's body to its home if the child dies while away from home in a hospital while in the care and custody of the commission. Here again I believe that such cases must be left to the discretion of the commission within its broad statutory powers which contemplate charitable actions in the best interests of indigent children and their parents. Obviously, a dead body cannot be transported unless reasonable preparation has been made. Your 2nd question is therefore answered in the affirmative, subject to the above observations.

Your 3rd question is answered in the negative, since the commission has no statutory authority either expressly provided or implied to provide a funeral for the child of an indigent family and such action would not be within the scope of the commission's authority or duty. I suggest that in such cases where it appears that the dead child's family is unable to provide a decent funeral, the matter be promptly reported to the local health and welfare authorities in the county where the parents of the child reside and arrangements made for a proper funeral and burial through the cooperation of local charitable agencies.

055-339—December 22, 1955

TAXATION

ASSESSMENTS—LANDS—GOVERNMENT SURVEYS—
§§193.06, 193.11, 193.14, 192.21, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are the tax assessors bound by the areas of subdivisions and lots of governmental surveys as fixed by the government surveyors in their notes and plats?

This question seems to relate to all lands in the state which were surveyed by either the federal government or the state

and the field notes and township plats became public records. Where the lands surveyed border on navigable waters the rules of accretion, reliction, erosion, alluvion and avulsion must be taken into account. Under these rules gradual and imperceptible changes in the highwater mark and course of the navigable waters may extend or contract land boundaries (56 Am. Jur. 892, et seq., §§477, et seq.; *Martin v. Bush*, 93 Fla. 535, 112 So. 274; *Merrill-Stevens Co. v. Durkee*, 62 Fla. 549, 57 So. 428). A similar change in boundaries may occur where the thread of a non-navigable stream is the boundary and such stream gradually and imperceptibly changes its course. These authorities demonstrate that the boundaries and areas of such lands may not remain the same from time to time; present areas may be more or less than that stated in the government survey thereof.

Doubtless government surveyors made errors in their notes and plats in stating areas of land; and although we are bound by the boundaries as fixed by them, we doubt that we are bound by the areas as stated by them, where clearly erroneous.

Parcels of real property, without regard to the areas thereof, are required to be assessed at their full cash value (See §§193.06, 193.11, 193.14, etc., F. S.) without regard to their areas; this being true, the use of the areas in assessing lands for taxes is more in the nature of a convenience to the assessor in fixing the value of the lands, and failure to state the area would not invalidate the assessment (§192.21, F. S.). We feel that the area of a parcel of land is a secondary question in the assessment of real property for taxes.

The above question is, therefore, answered in the negative.

055-340—December 27, 1955

STATE OFFICERS AND EMPLOYEES

RETIREMENT—PART-TIME EMPLOYEE—§112.05, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Will a state employee who reaches the age of 70 years, who has been employed by a state agency for about 35 years, working entirely on approximately half time basis, be permitted to retire under §112.05, F. S.?

Under said §112.05, F. S., any state employee who has attained the age of 70 years, and who has served the state for 30 or more consecutive years, or for 35 or more in the aggregate but not consecutive, may retire from his or her employment "with the right to be paid and shall be paid monthly on his own requisition during the remainder of his natural life $\frac{1}{2}$ of the amount of the average monthly salary received during the last 10 years of such service"; provided such person was employed and on the state payroll on June 30, 1953, and has remained on said payroll continuously since said date. This employee seems to meet the above requirement of the statute; unless the fact that she was on an "approximately half time basis" and paid on such a basis, sometimes such payments were made on a weekly and sometimes on a semi-monthly basis.

This employee has been employed as a maid in the dormitories of the university of Florida, and doubtless such employment was by its nature only a part-time employment when compared with other state employees who have worked approximately 8 hours per day during the same period of time. Stating the proposition in another way, the nature of her employment required a shorter day than did other employees, and in consequence thereof her per diem pay was also proportionately less. We feel that her employment was within §112.05, F. S., although her work day was less than regular employees and her per diem pay proportionately less. Her case seems different from regular employees who work only half the work day of other employees doing the same type or kind of work.

We, therefore, feel that the above question should be answered in the affirmative.

055-341—December 27, 1955

TAXATION

HOMESTEAD EXEMPTIONS—PERSONAL PROPERTY, AMOUNT, PROOF—§192.201, (CH. 29743, 1955), §11, ART. IX, STATE CONST.

To: E. Glenn Hennig, City Tax Assessor, Orlando

QUESTIONS:

1. Does Ch. 29743, 1955, allowing a tax exemption of household goods and personal effects up to an assessed value of \$1000 to householders in this state, grant said exemption in addition to the constitutional exemption provided by §11, Art. IX, State Const., for like property?

2. What evidence should a householder present to the tax assessor to show that he is entitled to the exemption provided by said Ch. 29743?

When Ch. 29743, 1955, is read as a whole and in connection with §11, Art. IX, State Const., and considered in connection with its purposes to be accomplished, we are of the opinion that the legislature never intended that there be both a constitutional exemption of \$500 and a statutory exemption of \$1000. The statutory exemption of \$1000 is sufficient in amount and in similar species of property exempted to embrace the constitutional amount of \$500. To this extent there is no conflict and the statute carries out the intent of the constitution. There is nothing in the statute to indicate it is an additional exemption of the total amount of \$1000 and since it must be construed against the taxpayer we think it must be considered to embrace the constitutional \$500 exemption. The 1st above question is, therefore, answered in the negative.

The evidence necessary to show that a person claiming the exemption allowed to household goods and personal effects under Ch. 29743, 1955, is entitled thereto is the same evidence as to permanent residence as is required for homestead tax exemptions under §7, Art. X, State Const., in addition to showing own-

ership of the household goods and personal effects. This answers the 2nd question.

We hand you herewith a copy of each of our opinions 055-213 and 055-328 for your information.

055-342—December 27, 1955

STATE OFFICERS AND EMPLOYEES

MERIT SYSTEM—AGENCIES QUALIFYING—GAME AND FRESH WATER FISH COMMISSION—CH. 110, F. S. (CH. 29933, 1955), §30, ART. IV, STATE CONST.

To: *LeRoy Collins, Governor of Florida, Tallahassee*

QUESTION:

May the game and fresh water fish commission of the state be placed under the merit system of personnel administration of the state, created by Ch. 29933, 1955?

Chapter 29933, 1955, provides a merit system for certain designated agencies and allows others to be placed under the system on a voluntary basis. Employees placed under the system are subject to rules and regulations for employment established by the state personnel board.

The game and fresh water fish commission is, in some respects, in a different category from other state agencies in that it was created by the state constitution (§30, Art. IV) and the constitutional provision in question prescribes a method for the employment, remuneration or discharge of employees of the agency. Clearly the legislature could not by statutory enactment alter the constitutional powers of the agency.

Paragraph 5 of §30 of Art. IV of the constitution, however, provides that the director of the commission "shall, *subject to the approval of the commission*, appoint, fix the salaries of, and at pleasure remove, assistants, and other employees who shall have such powers and duties as may be assigned to them by the commission or the director." (Emphasis supplied)

Although this provision would preclude the commission from making a complete and total delegation of its constitutional authority and responsibility to its employees to the merit system or any other statutory agency, I know of no reason why the commission could not by appropriate resolution relieve its director of the responsibility for personnel administration and in lieu thereof request the merit system to administer its personnel program in accord with rules, regulations and procedures prescribed by the state personnel board, subject, of course, to final approval of the commission of each action pertaining to one of its employees.

This of course would be entirely a voluntary arrangement on the part of the commission and there would be no legal means of preventing the commission at some future date from withdrawing its affiliation with the merit system.

In all likelihood, as a practical matter, however, it is doubtful that the commission would withdraw from the operation of the merit system, once it was included for reasons of public policy and the obvious benefits to be derived from uniformity with other state agencies in personnel administration. It should be noted that such an arrangement could not apply to the director of the commission since he must be employed directly by the commission itself.

Stated more succinctly, I believe that there is no valid objection expressed in the constitution which would expressly or by implication prohibit the commission from voluntarily extending to its employees (with the exception of the director) the benefits to be derived under Ch. 29933, 1955, although the commission would always retain its right to rescind said action.

As qualified above, your question is answered in the affirmative.

055-343—December 28, 1955

PUBLIC LANDS

DEFINITION—INTERNAL IMPROVEMENT FUND—STATE SCHOOL FUND—§§270.12, 270.13, F. S., §4, ART. XII, STATE CONST.

To: *Trustees Internal Improvement Fund, Tallahassee*

QUESTION:

Is the state school fund entitled to 25% of the rentals received by the trustees of the internal improvement fund from lands purchased and held by them for the use and benefit of the state in carrying out its Capitol Center plans and projects?

Specifically there are involved certain rentals received from persons renting portions of the area now known as "Gray Park," and the Rose Printing Co. and Whitfield properties heretofore purchased by the trustees with internal improvement funds to be held by them for and in behalf of the state to be used in connection with the capitol center development and its long range program. Although internal improvement funds were used in the acquisition of these lands, they were never held by the trustees as property for sale or as rental property; the rental of the property was an incident and not the main purpose for which the property was and is now held. Funds used by the trustees in the purchase of these lands were derived from the sale of internal improvement swamp and overflowed lands, 1931 settlement lands, and other lands, title to which was vested in the said trustees for purpose of general sale. The 25% of sales price, as required by §4, Art. XII, and §270.12, F. S., had been deducted and paid to the state school fund prior to the deposit of the remainder of the sales price in the internal improvement fund.

Under §4, Art. XII, State Const., the state school fund is entitled to "25% of the sales of *public lands* which are now or may

hereafter be owned by the state." Section 270.13, F. S., provides that the "trustees of the internal improvement fund shall, pursuant to constitutional provision, set aside and pay into the state school fund 25% of the proceeds derived from the sale of all state lands vested in said trustees." Section 270.13, F. S., shall "pay into the state school fund 25% of the proceeds derived from the lease or rental of said lands and from the sale, lease or rental of any products in, on or under all state lands vested in said trustees." (Emphasis supplied)

Only those lands coming to the state from the federal government and designated as the internal improvement lands, the swamp and overflowed lands, the 16th sections or school lands, and probably others; tax forfeited lands, such as the Murphy act lands, are not public lands (State v. Holland, 151 Fla. 806, 10 So. 2d 577). Lands purchased by the trustees for capitol center purposes are not public lands and are not within the purview of §4, Art. XII, State Const.

This leads to the question of the application of §§270.12 and 270.13, F. S.; as §270.12 relates to the sale of lands and not the rental thereof, it has no application to the above question, except in so far as it may assist in construing §270.13. It is evident that §270.13 has application to the same type of lands embraced within §270.12. These sections were derived from Ch. 15638, 1931, which act, according to its title, related "to the disposition of the proceeds from state lands." We find the following sentence in an opinion of this office under date of Oct. 15, 1947 (047-335; 1947-8 Biennial Report 363), to wit: "Sections 270.12 and 270.13, F. S., 1941, concern lands which are referred to in said §4, Art. XII, of the constitution," however, no authority for this statement is referred to. In addition to the "public lands" mentioned in State v. Holland, supra, the trustees hold for sale certain sovereignty lands (§§253.06-253.15 and 253.36-253.38, F. S.), 1931 settlement lands (Ch. 14717, 1931) and probably not acquired by purchase, which were not acquired with internal improvement funds as were the lands referred to in the above question. If §§270.12 and 270.13, F. S., apply to lands held by the trustees other than "public lands" it may well be that the legislature had this type of lands in mind.

We, therefore, do not think that the legislature, when it enacted what now appears as §§270.12 and 270.13, F. S., intended to include lands purchased with internal improvement funds in said sections.

The above stated question is, therefore, answered in the negative.

055-344—December 28, 1955

ARRESTS

WARRANTS—MISDEMEANORS OR VIOLATION OF MUNICIPAL ORDINANCE—§901.15, F. S.

To: Cale H. Jones, Chief of Police, Naples

QUESTION:

May a police officer lawfully arrest without a war-

rant a person involved in a traffic accident upon the basis of physical evidence, where the accident did not occur in the presence of the officer?

For the purposes of this opinion, it is assumed that the arrest is for a misdemeanor or for the violation of a municipal ordinance and not for a felony. The governing statute, §901.15, F. S., allows a peace officer to arrest without warrant for a misdemeanor or violation of a municipal ordinance when the offense is committed in the officer's presence but not otherwise; it does not authorize an arrest without warrant for a misdemeanor or municipal ordinance violation not committed in the officer's presence, regardless of how much physical evidence there may be. As to when a misdemeanor is committed in the presence of an officer, we quote what the supreme court of Florida had to say in *Malone v. Howell*, 192 So. 224, as follows:

"An arrest without a warrant for a misdemeanor, to be lawful, can only be made where the offense was committed in the presence of the officer—that is it must have been within the presence or view of the officer in such a manner as to be actually detected by the officer by the use of one of his senses. See *Brown v. Wallis*, Tex.Civ.App., 101 S. W. 1068, 1070, wherein the court said: 'It is not sufficient that the officer is within seeing or hearing distance of the criminal act and thereby obtains knowledge of the fact, but he must also be able to detect it by sight or hearing as the act of the accused.' See also *People v. Johnson*, 86 Mich. 175, 48 N.W. 870, 13 L.R.A. 163, 24 Am. St. Rep. 116; *Baldwin v. State*, 175 Miss. 316, 167 So. 61; *Kennington-Saenger Inc. v. Wicks*, 168 Miss. 566, 151 So. 549."

Therefore your question is answered in the negative.

055-345—December 29, 1955

ELECTORS AND ELECTIONS

**POLITICAL OFFICES—EXPENSE REPORTS—CANDIDATES
FOR DELEGATES TO NATIONAL PARTY CON-
VENTIONS—§99.161, F. S.**

To: R. A. Gray, Secretary of State, Tallahassee

QUESTION:

Are candidates for delegate to national party conventions required to file reports of contributions and expenditures as provided for under §99.161, F. S.?

In opinion 053-333, found on p. 87 of the Biennial Report of the Attorney General, 1953-1954, I made the following statement:

"Candidates for election to membership on county, state and national party executive committees and candidates for election as delegates to a party's national convention are subject to the provisions of §99.161, F. S., as amended, from the time that they announce their can-

didacies for such positions and should file all reports and in all other respects comply with the provisions of the statute in the same manner as other candidates for political office in the state."

Although there may be some question as to whether a delegate to a party's national convention holds a political office in this state within the meaning of §99.161, it is my opinion that until the question is answered by the courts, there is ample reason to conclude that the term "political office in this state" applies to all party offices filled through the state election processes and that all candidates for such offices should file the reports required by §99.161.

There are enclosed copies of the above cited opinion and of opinion 052-302 which is found on p. 162 of the Biennial Report of the Attorney General, 1951-1952. The latter opinion concludes that §99.161 does not apply to candidates for president and vice president of the U. S. The conclusions reached in these opinions raise the question of whether a contribution on behalf of a candidate for nomination as president will result in an indirect contribution in the furtherance of the didacies of a slate of candidates for delegates who are pledged to vote in the party's convention for the nomination of that candidate for president. If such were the case each candidate for delegate would have to report at least all contributions made in this state in behalf of the presidential candidate whom he is pledged to support at the national convention.

I feel, however, that candidates for delegate are required to report only the expenditures which are incurred to secure his election, as distinguished from expenditures made in an effort to secure the election of a particular candidate for president.

Your question is, therefore, answered in the affirmative.

055-346—December 30, 1955

COUNTY FINANCES

FIRE CONTROL—FLORIDA BOARD OF FORESTRY AGREEMENT—AMOUNT TO BE PAID BY COUNTY—§§125.23-125.29, 129.03 AND 129.05, F. S.

To: *Loran L. Cook, Clerk of the Circuit Court, Washington County, Chipley*

QUESTIONS:

1. By what method is the computation to be made to arrive at sums to be paid by a county for fire control under agreement with the Florida board of forestry?
2. Is the sum payable by the county to the Florida board of forestry subject to the provisions of §129.05, F. S., relative to computing 95% of the assessed valuation as the budgeted amount, to be received from taxes?

AS TO QUESTION 1:

Sections 125.23-125.29, F. S., provide the machinery by which

a county may levy taxes for fire control. The formula is set forth in §125.26, F. S.

Section 129.03, F. S., makes it the duty of the county tax assessor to certify to the county auditor (circuit clerk) "his estimate of the total valuations against which taxes may be levied, reasonably to be expected by him to be spread upon the general tax roll of the current year . . ." It is upon this estimate that the county budget is compiled and it should be used to compute the sums to be paid by the county under its contract with the Florida board of forestry, subject to the maximum of 2 mills fixed by §125.26, F. S.

This answers the 1st question.

AS TO QUESTION 2:

The pertinent portion of §129.05, F. S., reads:

" . . . The board shall determine the millage to be levied for each fund by dividing the applicable assessed valuation into an amount, 95% of which is the amount budgeted to be received from taxes, using the nearest $\frac{1}{4}$ of a mill or other fraction or decimal ordinarily used in the county."

Section 125.26, F. S., contemplates an item in the general revenue fund of the county to pay the expense of the county fire control unit, it authorizing a special levy for such purpose.

The mechanics for the levy are found in the language reading:

" . . . provided, however, that the gross annual proceeds of such tax shall not in any year exceed a sum in dollars equal to the total number of acres embraced and comprised within such county multiplied by 3 cents; and provided, further, that if a sum in dollars equal to the total number of acres embraced and comprised within said county multiplied by 3 cents cannot be obtained by multiplying the total assessed valuation of all taxable property by 2 mills, then shall the said county commissioners pay the sum in dollars equal to multiplying the total assessed valuation of all taxable property by 2 mills."

We are informed that the Florida board of forestry has, by departmental construction, interpreted §125.26, F. S., as requiring payment by a county under contract for fire control of the sum equal to 3¢ per acre on forest lands within the county or 2 mills of the total assessed valuation *on all taxable property* within the county, whichever is the lesser. For example, let us assume that there are 400,000 acres of forest lands out of a total acreage of 700,000 in taxable property in the county. The forest lands figured at 3¢ per acre amount to \$12,000 whereas 2 mills on *all taxable property* amount to \$14,000. The forestry service, then, would expect to receive \$12,000, but if less than that figure were collected in taxes, the amount actually collected would be used as the sum due the forestry service.

In view of the provisions of §129.05, F. S., quoted above

what sum is properly due where tax collections exceed 95% of the budgeted item for fire control?

Said Ch. 129, F. S., was revised except for the last 2 sections thereof by Ch. 26874, 1951. I can see no difference between the fire control item which is a part of the general fund than other items that may be included within the general fund. Statutes must be construed in *pari-materia* with all the laws on the same or similar subjects. (State ex rel. McClure v. Sullivan, Fla., 43 So. 2d 438; Sparkman v. State, 71 Fla. 210, 71 So. 34; Amos v. Conkling, 99 Fla. 206, 126 So. 699, and other cases).

Reading these statutes together, it appears to me that the budgeted sum for the fire control unit is subject to §129.05, F. S. That is to say that the county should pay a maximum of 95% of the budgeted amount received from taxes.

055-347—December 30, 1955

GAMBLING

RAFFLES—TURKEY SHOOT—§§849.09, 849.11, F. S.

To: M. S. Linton, Sheriff, Taylor County, Perry

QUESTIONS:

1. Is it a criminal offense to hold raffles?
2. Is it a criminal offense to hold turkey shoots?

AS TO QUESTION 1:

A lottery is operated contrary to §849.09, F. S., where a prize is disposed of by chance in a raffle to one of the persons *who have purchased chances*, because each of the elements necessary to constitute a lottery is present, viz., (1) a prize, (2) a consideration for the chance to win it, and (3) an award by chance.

A raffle in its ordinary sense is a disposal by chance of a single prize *among purchasers of separate chances* and is generally held to be within the usual definition of a lottery. 54 C. J. S. 859, Lotteries, §10.

A raffle is also a gambling game (24 Am. Jur. 473, Gaming and Prize Contests, §100), and is a game of chance (38 C. J. S. 36, Note 19, Gaming, §1-b(2)), and whoever sets up, promotes or plays thereat commits a crime in violation of §849.11, F. S.

There are certain types of prizes or awards such as door prizes which may be donated to an organization by a merchant or merchants purely for advertising or good will purposes, which may be given away by the organization by means of chance or a "drawing" which do not constitute a lottery, there being no consideration present. Many times at large conventions merchants will make donations of merchandise to the convention committee who in turn may give it to persons attending the convention, either as favors or door prizes, and even though the awards are made by chance or a "drawing," it is not a lottery because there is no consideration involved.

AS TO QUESTION 2:

This office has followed a circuit court ruling of the Leon county circuit holding that turkey shoots are legal. Question 2 is therefore answered in the negative.

056-2—January 3, 1956

CORPORATIONS

MINIMUM CAPITAL STOCK OF PROPOSED INSURANCE CORPORATIONS—§§608.03, 625.02, F. S.

To: R. A. Gray, Secretary of State, Tallahassee

QUESTION:

In view of the provisions of §608.03(2)(d) and (i), as amended, and §625.02, F. S., with respect to a proposed insurance corporation, what minimum amount of capital with which the corporation will begin business must be evidenced in articles of incorporation to justify approval thereof by the secretary of state?

Section 608.03(2)(d) provides: "The amount of capital with which the corporation will begin business, which shall be not less than \$500 *unless, by reason of the special purposes of such proposed corporation a greater amount may otherwise be required by law.*" (Emphasis supplied.)

Section 608.03(2)(i), as amended by §2, Ch. 29886, 1955, provides: "The name and post office address of each subscriber of the articles of incorporation and a statement of the number of shares of stock, and the value of the consideration therefor, which he agrees to take. The sum of the values of the consideration for subscribers' stock shall not be less than the amount of capital with which the corporation will begin business."

Section 625.02 provides: "Every insurance or surety company incorporated under the laws of this state, unless otherwise expressly provided, shall have not less than \$100,000 capital stock, which shall be divided into shares having a par value of not less than \$1 nor more than \$100 each payable in lawful money of the U. S."

Attention is directed to §608.16, F. S., which in effect provides that the certificate of incorporation may authorize the issue of the whole or any part of its shares as partly paid subject to calls thereon until the whole consideration therefor shall have been paid.

It is well known that after a domestic insurance company has been duly incorporated in pursuance of the provisions of Ch. 608, F. S., it must obtain a certificate of authority to engage in the insurance business in this state (§626.02, F. S.); and certain conditions precedent must be met by such corporation to entitle it to such certificate. Among these conditions is the requirement that such corporation shall not begin business

until "it is possessed of and (has) \$100,000 actually invested" in certain specified securities (§626.04, F. S.).

In view of the foregoing, in my opinion the question is answered as follows:

The provisions of §625.02 fall within the purview of the above italicized quoted provisions of §608.03(2)(d). Hence, prior to approval of the articles of incorporation of a proposed insurance company, the secretary of state should determine from the provisions thereof that the par value of the stock meets the requirements of §625.02; that such stock is "payable in lawful money of the U. S.", and that the consideration therefor is payable when such stock is issued to the subscribers of said articles; and that the total amount of such stock so subscribed is not less than \$100,000.

056-3—January 4, 1956

ELECTORS AND ELECTIONS

CAMPAIGN EXPENSES PRIOR TO QUALIFICATION— ANNOUNCEMENT OF CANDIDACY—§§99.061, 99.161, 99.172, F. S.

To: *C. H. Bourke Floyd, State Senator, Apalachicola*

QUESTIONS:

1. Can a candidate for political office in this state announce his candidacy prior to the date upon which he is permitted by §99.061, F. S., to qualify for the office he seeks?

2. If the foregoing question is answered in the affirmative, to what extent may such a candidate carry on a campaign prior to the date upon which he is permitted to qualify for the office he seeks?

The election code does not prohibit a candidate from announcing his candidacy at any reasonable time before an election, but sub §(2)(d) of §99.161, F. S., as amended by Ch. 29936, 1955, limits the period within which a candidate may make expenditures for campaign purposes. The cited subsection reads as follows:

"No candidate for nomination or any committee, organization or person on his behalf shall, prior to noon of the 1st filing date for the nomination which said candidate seeks, make any expenditures for campaign purposes or for the promotion of his candidacy other than for personal travel and incidental expenses, and all expenditures as defined in this section shall be reported as required by this section from the date of public announcement of his candidacy or from the date of filing of his qualification papers, whichever date shall occur first, provided that such candidate or committees or organizations shall be permitted to reserve but make no use of advertising time and space and office facilities prior to qualification."

Section 99.011, F. S., reads as follows:

"The word 'candidate' shall mean any person who has announced to any person, or to the public, that he is a candidate for a certain office."

Section 99.061, F. S., provides that candidates for the state offices listed in sub §§(1) and (2) "are required to file their qualification papers, pay the qualification fees and party assessment, if any has been levied, to the secretary of state at any time after noon of the 1st filing date, which shall be the 77th day prior to the 1st primary, but not later than noon of the 63rd day prior to the date of the 1st primary in the year in which any primary is held."

Subsection (3) of §99.061, F. S., is as follows:

"Candidates for nomination to a county office shall file their sworn statement and receipt for party assessment with and pay their filing fees to the clerk of the circuit court of the county . . . at any time after noon of the 1st filing date, which shall be the 63rd day prior to the 1st primary, but not later than noon of the 49th day prior to the date of the 1st primary in the year in which any primary is held."

Subsection (3) (a) of §99.161, F. S. is as follows:

"Each candidate for nomination for, or election to, political office in the state, upon or before, and as a condition precedent to, qualifying as such candidate, shall appoint one campaign treasurer and shall designate one campaign depository and shall file the name and address of each with the office before whom such candidate is required by law to qualify. The candidate may designate himself or any other elector to act as such campaign treasurer and may designate as his campaign depository any bank authorized by law to transact business in the state."

In view of the foregoing statutory provisions it is my opinion that your questions should be answered as follows:

1. Within the limits of reasonableness a person may announce his candidacy for a political office at any time he desires, but such announcement should be immediately followed, if not preceded, by the appointment of a campaign treasurer, who can be himself or any other elector, and the designation of a campaign depository as required by sub §(3) (a) of §99.161, F. S. Thereafter the candidate may receive contributions for deposit in his campaign depository, and he must make the periodic reports required by sub §(8) of §99.161.

2. No candidate, and no person in his behalf, can make any expenditures for campaign purposes or for the promotion of his candidacy, other than for personal travel and incidental expenses, prior to noon of the day set by §99.061 upon which the candidate can lawfully file his qualification papers. A candidate may reserve space in a newspaper, or time for radio or television broadcast, or for office space, prior to the mentioned qualifi-

cation date, provided he makes no expenditures in securing such reservations. His only legitimate expenditures before the 1st qualifying date are those made for his own individual travel and for costs incidental thereto. After the 1st qualifying date applicable to the office sought by the candidate he may make campaign expenditures for the purposes listed in §99.172, regardless of whether he qualifies on the 1st day of the qualifying period. All campaign contributions and expenditures, whenever made, must be reported as required by sub §(8) of §99.161, F. S.

056-4—January 3, 1956

STATE AND COUNTY OFFICERS AND EMPLOYEES

RETIREMENT—CONSTRUCTION OF §9(4), CH. 29801, 1955 (§122.08(4), F. S.)—RIGHTS UNDER PRIOR STATUTES

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. May a state or county employee, who was a member of either the state (Ch. 121, F. S.) or the county (Ch. 134, F. S.) retirement system prior to the merger of said retirement systems by Ch. 29801, 1955, into a single retirement system, and who has 30 or more years of state or county service, but who is less than 55 years of age, make the election provided in sub §(4) of §9, Ch. 29801, 1955, prior to his retirement?

2. If the above question is answered in the affirmative, may such person presently retire under the prior statutes and upon his attaining the age of 55 or 60 transfer from the prior statutes to the combined statutes with reduced benefits for himself and wife after death?

Section 1 of said Ch. 29801 provides that "Ch. 121, F. S., the state officers and employees compulsory retirement system, and Ch. 134, F. S., the county officers and employees compulsory retirement system, are hereby consolidated and shall be known as the 'State and County Officers and Employees Retirement System,'" and in subsequent sections sets out what is clearly a consolidation and revision of the prior state and county retirement systems. The 1955 enactment covers the whole subject matter and it clearly appears that it was intended as a substitute for Chs. 121 and 134, F. S., and to prescribe the only rule with respect to the subject matter after its enactment (82 C. J. S. 496, §292). The 1955 enactment revises the whole subject matter of the former statutes and evidently was intended as a substitute for them, thereby repealing portions thereof not included in the 1955 enactment or recognized therein (82 C. J. S. 499, §293). It follows from these authorities that provisions in Chs. 121 and 134, F. S., not included in the 1955 enactment or preserved by reference therein, have been repealed.

Under §§121.05 and 134.05, F. S., any state or county employee with an accumulated state or county service or employment of 10 years or more was permitted to retire upon attaining the age of 60 years or more; and any such officer or employee

with an accumulated service or employment of 30 or more years was permitted to retire regardless of age. When said chapters were merged by the 1955 enactment into a single retirement system the provision for retirement after 30 years of service or employment regardless of age was deleted, although the provision for retirement at age 60 or more with 10 years or more of service or employment was retained. This omission had the effect of repealing the provision for retirement after 30 years of service regardless of age, except insofar as the same may have been preserved by the 1955 enactment. In lieu of the provision for retirement after 30 years of service or employment without regard to age, it was provided in the 1955 enactment that persons with an accumulated state and county service or employment of 10 years may retire between the ages of 55 and 60 with reduced benefits. Section 25, Ch. 29801, 1955, provides that "the rights of members of the retirement systems established by Chs. 121 and 134, F. S., shall not be impaired, nor shall their benefits be reduced by virtue of any part of this act," that is by Ch. 29801 or any part thereof. The effect of this section was to permit members of the prior systems to elect to retire under either the prior systems or under the consolidated system, but not partly under one of said systems and partly under the other, except insofar as may be permitted by the consolidated system.

Subsection (4) of §121.05 and 134.05, F. S., contained a provision that any state or county officer or employee had "the right, at any time prior to the receipt of his or her 1st monthly installment of retirement compensation to elect to receive a reduced retirement compensation with the provision that the surviving spouse shall continue to draw such reduced retirement compensation (or $\frac{1}{2}$ thereof if so designated) so long as he or she shall live. The amount of such reduced retirement compensation shall be the actuarial equivalent of the amount of such retirement otherwise payable to such officer or employee." A substantially identical provision is contained in sub §(4) of §9, Ch. 29801, 1955, *to which the said 1955 act adds* that "any state or county officer or employee who becomes eligible for retirement may select one of the options provided in this subsection and continue to hold office or be employed. Should such officer or employee die before retiring, his surviving spouse shall be entitled to receive either the accumulated contributions of such officer or employee at the date of death or the reduced retirement compensation to which the surviving spouse would have been entitled to under such option, calculated on the assumption that such officer or employee retired on his date of death. Any officer or employee shall have the right at any time prior to actually retiring to change the option selected . . ." This provision was new in the 1955 enactment and no like or similar provision was contained in either of Chs. 121 or 134, F. S. Although there are many identical or substantially identical provisions in the 1955 enactment that were in Chs. 121 and 134, F. S., the 1955 enactment is a new and separate enactment and not merely an amendment of the prior statutes.

We construe sub §(4) of §§121.05 and 134.05, F. S., prior to the adoption of the 1955 enactment, as permitting a person

with 30 years of service or employment under said statutes, although less than 60 years of age, to retire and elect "to receive a reduced retirement compensation with the provision that the surviving spouse shall continue to draw such reduced compensation . . . so long as he or she shall live," however, under such sections of the former statutes the election could not be made prior to actual retirement. There is no provision in the 1955 enactment for the retirement of persons with 30 years of service or employment regardless of age. The right of persons with 30 years of service or employment to retire regardless of age as derived from Chs. 121 and 134, F. S., is preserved by §25 of Ch. 29801, but is not added to by the said 1955 enactment. There being no provision in the 1955 enactment for the retirement of persons with 30 years of service or employment without regard to age, and there being no provision in Chs. 121 and 134, F. S., for making the election provided in sub §(4) of §§121.05 and 134.05, F. S., prior to actual retirement, we feel that the 1st question must be answered in the negative. We do not mean, by this answer, to hold that a state or county officer or employee with 30 or more years of service or employment may not retire as provided by §§121.05 and 134.05, F. S., as preserved by §25 of Ch. 29801, at any time with an election "to receive a reduced compensation with the provision that the surviving spouse shall continue to draw such reduced retirement compensation . . . so long as he or she shall live," but merely hold that election may not be made prior to actual retirement.

As the 1st question is answered in the negative, we do not deem it necessary that we answer the 2nd question; however, we feel that under the present state of the statutes and laws that a person retiring under prior statutes, as preserved by §25 of Ch. 29801, is bound by that election and may not subsequently change to another plan.

056-5—January 3, 1956

CONSERVATION

WATER—USE OF ABANDONED OIL AND GAS WELLS AS FRESH WATER WELLS—§§377.22, 381.251, CH. 387, F. S.

To: *Florida State Board of Conservation, Florida Geological Survey, Tallahassee*

QUESTION:

May abandoned oil and gas wells, dry holes and core holes, drilled in connection with the search for oil and gas in this state, be completed as fresh water wells for the benefit of the owner of the lands upon which drilled?

In drilling for oil and gas (both wells and core holes), the well or hole often passes through one or more water strata where fresh water may be obtained for personal, stock or commercial use. Under §377.22, F. S., the state board of conservation is authorized to "make, adopt, promulgate, amend and repeal reasonable rules, regulations and orders as may be necessary . . . for the following purposes: (a) to require the drilling, casing and plugging of wells to be done in such a manner as to prevent the escape of oil and gas out of one stratum to another;

to prevent the intrusion of water into an oil or gas stratum from a separate stratum; to prevent the pollution of fresh water supplies by oil, gas or salt water . . . (d) to prevent the drowning by water of any stratum, or part thereof, capable of producing oil or gas in paying quantities, and to prevent the premature and irregular encroachment of water which reduces or tends to reduce the total ultimate recovery of oil or gas from any pool . . ." Chapter 387, F. S., provides certain regulations, to be enforced by the state board of health, concerning the drainage of surface waters or sewage into underground waters in this state; making the violation of such statute a misdemeanor. Section 381.251, F. S., as adopted by Ch. 29834, 1955, gives the state board of health "general control and supervision over *underground waters*, lakes, rivers, streams, canals, ditches and coastal waters . . . in so far as their pollution may affect the public health." (Emphasis supplied.) This jurisdiction of the state board of health may be exercised through rules and regulations (§381.031, F. S., as adopted by Ch. 29834, 1955, *supra*).

Rules B-1 to B-12 of the state board of conservation, governing the conservation of oil and gas in Florida, appears to have been adopted pursuant to §377.22, F. S., above mentioned. Of these rules we note rule B-6, relating to the protection of fresh and artesian waters and the confining of them to their specific strata, which provides in part that "before any oil or gas well is completed as a producer, all oil, gas and *water strata* above and below the producing horizon shall be sealed or separated in order to prevent their contents from passing into other strata . . ." (Emphasis supplied.) Under rule B-10 holes drilled for exploratory purposes must be plugged in such a manner as to protect "all water bearing formations." Rule B-11 provides that when "the well to be plugged may safely be used as a fresh water well and such utilization is desired by the landowner, the well need not be filled above the required sealing plug set below fresh water; provided, that written authority for such use is secured from the landowner and filed with the board."

We are inclined to the view that said rule B-11 is applicable only when applicable rules and regulations of the state board of health, if any, are complied with; the abandoned well or hole is properly filled and plugged up to the fresh water stratum to be used as a water supply; and proper precautions are taken to prevent the mixing of strata of fresh water if more than one. This rule must be read in connection with rule B-6, specifically, and generally with other rules of the board, including rule B-10. We do not think that rule B-10 is so complete within itself that the holes or wells drilled under it may not be plugged in accordance with rule B-11. We see no reason why the term "well" used in rule B-11 may not embrace the holes mentioned in rule B-10; unless the board should determine that they are of such a nature that they may not be used for fresh water purposes or are of such a nature that plugging under rule B-11 is not practicable.

Where a well or hole is plugged in the manner provided in rule B-11, in a safe and proper manner, and care is taken to prevent the mixing of fresh water strata, if more than one, we do not think that the driller is liable for damage arising from

the failure to completely fill the well or hole; so long as the filling and plugging, in accordance with said rule B-11 is properly and sufficiently done, otherwise there would probably be liability for failure to properly fill and plug the water strata to be used and to prevent the mixing of water strata if more than one.

The above question is answered in the affirmative; subject, however, to our observations made in last above paragraphs.

May we suggest that the board of conservation and the state board of health re-examine the applicable rules and consider the preparation and adoption of joint rules in this connection.

056-6—January 4, 1956

STATE INSTITUTIONS

MEDICAL PERSONNEL—FLORIDA INDUSTRIAL SCHOOL FOR BOYS—§394.031, F. S.

To: *Arthur G. Dozier, Superintendent, Florida Industrial School
for Boys, Marianna*

QUESTION:

Is the Florida industrial school for boys authorized to employ a physician who is not licensed to practice in Florida but is licensed in another state, provided he does no private practice and confines his work solely to the state institution?

Section 394.031, F. S., provides:

"Medical personnel for state institutions.—

"(1) The superintendent of the Florida state hospital and any other institutions under the direction of the board of commissioners of state institutions when in need of additional medical personnel and unable to obtain such medical personnel residing in the state, the superintendent, with the approval of the board of commissioners of state institutions, may employ competent, experienced medical personnel from without the state.

"(2) That so long as any medical personnel employed under the provisions of sub §(1) of this section is engaged exclusively on the medical staff of such institutions and does not engage in private practice within the state, such medical personnel shall be exempt from existing requirements of law as to time of residence in the state and also as to requirement as to passing examination in basic science.

"(3) It shall be the duty of the superintendents of state institutions before employing any medical personnel under the provisions of this section to make a thorough investigation as to qualifications, experience, character and ability of such medical personnel."

Your question is answered by the above quoted act. The Florida industrial school for boys is of course an institution under the direction of the board of commissioners of state institutions.

Your question is therefore answered in the affirmative, subject to the provisions of §394.031, F. S.

056-7—January 5, 1956

TAXATION

ASSESSMENT OF WATER BOTTOM LANDS SOLD BY THE STATE UNDER §253.12, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are water bottom lands heretofore sold by the state pursuant to §253.12, et seq., F. S., and similar laws, which are covered by navigable waters, subject to taxation in this state?

The particular submerged lands in question were a part of several acres of land heretofore sold by the state under and pursuant to §253.12, F. S., or prior or similar statutes, a portion of which lands have been bulkheaded and filled in with sand, soil and other materials taken from the remainder of the lands so sold. When the sand, soil and other materials were taken from a portion of the lands sold to fill in other portions of said lands, the waters over the dredged lands increased in depth until now they are covered by water ranging in depth from .4 to 10, and in certain locations in excess of 10, feet in depth. Although the waters covering the dredged lands are of sufficient depth for commercial navigation, the title to the lands are vested in the purchasers from the state or those claiming under them; they have not been reconveyed to the state.

The lands under the navigable waters of Florida became vested in the said state upon its admission into the Union on March 3, 1845 (*Minnesota Mills Co. v. St. Paul Water Co.*, 168 U. S. 349, 18 S. Ct. 157, 42 L. Ed. 497; *Appleby v. New York*, 271 U. S. 364, 46 S. Ct. 569, 70 L. Ed. 992), which lands may by statute be sold into private ownership when substantial rights of the public in the use of the navigable waters are not unlawfully invaded and the authority of congress as to navigation is not interfered with (*State v. Gerbing*, 56 Fla. 603, 47 So. 353; *Broward v. Mabry*, 58 Fla. 398, 50 So. 826; *Hardee v. Horton*, 90 Fla. 452, 108 So. 189). Chs. 6451 and 6960, 1913 and 1915 (now appearing as §§253.06-253.11, F. S.) and Ch. 7304, 1917 (now appearing as §253.12, et seq., F. S.) provides for the sale of certain of the said sovereignty lands which came to the state as aforesaid. The lands in question appear to have been sold and conveyed by the trustees of the internal improvement fund under §253.12, et seq., F. S., or prior laws, which conveyances, for the purposes of this opinion, shall be considered valid and binding upon the state. This presumption of validity will con-

continue to obtain unless and until in an appropriate suit the contrary is made to appear. To hold otherwise in this opinion would be to collaterally question the validity of the deed. Although upland bordering upon navigable waters, including natural islands existing in the navigable waters upon the date of the admission of the state into the Union, under the rules applicable to accretion, reliction, erosion, alluvion and avulsion, may change boundaries (56 Am. Jur. 892, et seq., §477, et seq.; *Martin v. Bush*, 93 Fla. 535, 112 So. 274; *Merrill-Stevens Co. v. Durkee*, 62 Fla. 549, 57 So. 428) such changes must be gradual and imperceptible natural changes and may not be artificial changes made by dredging from water bottoms and the dumping of the spoils obtained by such dredging upon other lands. We do not think that the deepening of navigable waters covering lands sold under and pursuant to §253.12, et seq., F. S., may transfer the title to such lands to the state by operation of law. The title to such lands acquired under and by virtue of said §253.12, et seq., remains in the grantee of those claiming by, through or under them. We see no reason why the grantee or those claiming by, through or under him may not, with the consent of the trustees of the internal improvement fund, convey such lands to the state under such terms as may be agreed to by the said trustees or as a gift to the state.

"This is a democracy in which every parcel of property is expected to bear its due portion of the burden of government, unless exempted by the legislature in the manner provided by §1, Art. IX of the constitution," or otherwise as may be provided by the state constitution (*Bancroft Investment Corp. v. City of Jacksonville*, 157 Fla. 546, 27 So. 2d 162, text 171). "Under Florida taxing statutes the levy and assessment is on the realty itself, at its full cash value," and not on the owner thereof (*Bancroft Investment Corp. v. City of Jacksonville*, supra, So. text 167). Although the statutes (§§193.06, 193.11, etc., F. S.) require that real property be assessed at its full cash value, the question of what is full cash value is largely one of fact to be ascertained by the tax assessor.

The above question is, therefore, answered in the affirmative so long as the title to the lands acquired under §253.12, et seq., F. S., remains in individuals or corporations.

056-8—January 9, 1956

TAXATION

LICENSES AND LICENSE TAXES—DEALERS IN LIQUEFIED PETROLEUM GASES—§§205.59, 526.12, 526.13, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where an importer or distributor of liquefied petroleum gases, whose home office is in another state, maintains places of business in this state, designated by it as "filling stations," where it makes delivery of liquefied petroleum gases to dealers selling at retail to a select group of consumers, is such importer or dis-

tributor required to obtain an occupational license for each such filling station under §205.59, F. S.?

Section 205.59, F. S., standing by itself would require that the importer or distributor and the dealer above mentioned obtain licenses and pay license taxes for each place of business maintained in this state, in that liquefied petroleum gases are tangible personal property within the purview of said §205.59. The license taxes imposed by §526.13, F. S., have been held by this office to be an occupational license tax and not a regulatory fee (Opinion of October 13, 1947; 1947-8 Biennial Report 259); therefore, §205.59, in so far as it covers the same field covered by §526.13, has been superseded by §526.13, it being the later statute. Said §526.13, F. S., requires "dealers in liquefied petroleum gas" to obtain a license and pay a license tax thereunder. These dealers are defined, by sub §(3) of §526.12, F. S., as "any person selling or offering to sell any liquefied petroleum gas to the ultimate consumer for industrial, commercial or domestic use." This definition embraces retail dealers only but not wholesale dealers and distributors. This being true, retail dealers are required to obtain occupational licenses and pay license taxes under §526.13, F. S., and wholesale dealers and distributors are required to obtain such licenses and pay license taxes under §205.59, F. S.

We have examined your file, in connection with your said request for opinion, in which we find letters from the tax collector and from the liquefied petroleum importer or distributor relative to the status of the said importer or distributor. The said importer or distributor contends that it is in effect a "dealer in liquefied petroleum gas" within the definition contained in sub §(3) of §526.12, F. S., quoted from above. The tax collector in his letter states that the said importer or distributor, although it may maintain a list of users of its liquefied petroleum gases and limits sales by its dealers to such users, makes delivery of its said gases to its dealers at its said filling stations for delivery to users on its list above; however, such dealers are charged with the gases delivered and are responsible for payment whether such gases are delivered to the users or not and whether the dealers are paid by the users or not. The dealer and not the user or consumer of the gases is responsible to the importer or distributor for payment. This in our opinion is a wholesale transaction and not a retail transaction. If the transaction is between the importer or distributor, with the so-called dealer acting as the delivery agent of the said importer or distributor, then the dealer should not be charged for all gas obtained by him for delivery to the customers, but the charges should be against the said consumers. Under the circumstances we feel that the said importer or distributor makes wholesale sales to the dealer and not retail sales to the consumers.

The above question is answered in the affirmative.

056-10—January 10, 1956

TAXATION

OCCUPATIONAL LICENSES—PHYSICAL THERAPISTS—REQUIREMENTS FOR ISSUANCE—§205.051, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

May an occupational license be issued, under Ch. 205, F. S., to a person to practice physical therapy in this state, without requiring that such person submit proof of his or her qualification and competency, as required by §205.051, F. S.?

Section 205.051, F. S., prohibits the issuance of an occupational license to any person "to practice medicine in any of its branches unless and until proof of current qualification and competency, as established by certificate or license issued by state boards duly constituted and legally authorized to determine qualification and competency, be exhibited at the time of making such application."

If the practice of physical therapy is the practice of medicine then the above statute is applicable and the required proof of qualification and competency must be exhibited to the tax collector before an occupational license may be issued, but if not then no such proof is required. This brings us to the question of whether the practice of physical therapy (not limited by the definition contained in §486.02, F. S.) is the practice of medicine in one or more of its branches.

The term "practice of medicine in any of its branches," as used in §205.051, F. S., is not defined; it, therefore, is necessary that we construe the said section. The first attempt to regulate the practice of medicine in this state seems to have been an act of Feb. 10, 1831, which statute, although meager in detail, remained in force until the adoption of Ch. 3881, 1889. These statutes appear to have regulated the practice of all schools of medicine in this state. From time to time since 1889 separate regulation has been provided for the different schools of medicine until now separate regulation is provided for osteopaths (Ch. 459, F. S.), chiropractors (Ch. 460, F. S.), chiropodists (Ch. 461, F. S.), naturopaths (Ch. 462, F. S.), optometrists (Ch. 463, F. S.), and dentists (Ch. 466, F. S.), in addition to Ch. 458, F. S., which regulates the practice of medicine generally. The statutes regulating the practice of midwifery (Ch. 457, F. S.), nurses (Ch. 464, F. S.), and physical therapists (Ch. 486, F. S.), may also relate to sectors of the practice of medicine. The history of the said statutes indicates that Ch. 458, F. S., relates generally to the practice of medicine, and that the other statutes above mentioned relate to specific fields of the practice of medicine. Ch. 458, F. S., regulates all fields of the practice of medicine not embraced in some other specific statute. It might be said that those practicing under Ch. 458, F. S., are general practitioners and those practicing under other statutes limited practitioners.

Herzog in his *Medical Jurisprudence*, p. 89, §112, defines limited practitioners of medicine as "those licensed to practice one or more branches of medicine or surgery, or some special system or method of treating disease. Various states grant licenses and recognize different varieties of limited practitioners, as for example . . . physio-therapists . . ." Physical therapy is defined in Webster's International dictionary, as "the treatment of disease by physical and mechanical means, as by massage, regulated exercise, water, light, heat, electricity, etc.; also the branch of medicine concerned with such treatment." The new Gould and the Maloy's medical dictionaries, as well as the American Illustrated medical dictionary (Dorland, 8th Ed.) have definitions substantially the same as Webster's above. It was stated in *Stewart v. Rabb*, 55 Minn. 20, 56 N. W. 256, that "therapy is the treatment of disease, and surgery is therapy of a distinctive kind." In *O'Neal v. Board of Regents*, 272 App. Div. 1086, 74 N. Y. S. 2d 762, the court remarked that "Physiotherapy in its general sense is 'the treatment of disease by physical remedies rather than drugs,' and its practice is the practice of medicine in that limited field." To the same effect see also *People v. Mari*, 360 N. Y. 383, 183 N. E. 858, text 859; *Swift v. Graves*, 173 Misc. 1085, 19 N. Y. S. 2d 686, text 688; and *People v. Dennis*, 271 App. Div. 526, 66 N. Y. S. 2d 912. The term "therapy," as a medical term, is defined, in Webster's International dictionary, as "treatment of disease; therapeutics." The word is defined in 86 C. J. S. 773 in substantially the same language. Webster defines the term "therapeutics" as "that part of medical science which treats of the application of remedies to disease; therapy." The word is defined in 86 C. J. S. 773 in substantially the same language. The above New York cases may have been influenced by a statute very similar to Ch. 486, F. S., in proceedings involving practice by unlicensed persons. In *People v. Dennis*, supra, the court, after defining the term "massage" as used in a New York statute providing for the licensing of masseurs and masseuses, seemed to be of the opinion that a person using massage in connection with some human disease, pain, injury or physical condition, would be practicing medicine within the purview of the medical practice act.

Under §458.13, F. S., any person "shall be deemed to be practicing medicine within the purview of this chapter, who holds himself out as being able to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity, or physical condition, or who shall offer or undertake, by any means or method, to diagnose, treat, operate or prescribe for any human disease, pain, deformity or physical condition." The said section then goes on to exempt osteopaths, chiropractors, chiropodists, naturopaths, optometrists, nurses, pharmacists, dentists and midwives from the statute when duly licensed under their respective statutes. It may well be that the legislature was of the opinion that the above listing would have been within the medical practice act except for the exemption. It is evident that under Ch. 458, F. S., any attempt to treat any human disease, pain, injury or physical condition, which would embrace human disability, by any means whatsoever, which would seem to include massage, therapeutic exercises, and the physical, chemical and other properties of heat, light, water and elec-

tricity, will constitute the practice of medicine in this state, and any unlicensed person so practicing will be guilty of a misdemeanor, unless within the above exemption or is otherwise exempt from the operation of the statute. In so far as massage and physical therapy may be within the above definition of the practice of medicine, it is exempt when done under and pursuant to Chs. 480 and 486, F. S., and by persons duly registered under said chapters.

Sections 486.09 and 486.10, F. S., prohibit unregistered persons holding themselves out as "registered physical therapists" or using any word, letter or insignia, in connection with their names, indicating that they are registered physical therapists; however, these sections do not expressly prohibit the practice of physical therapy by unregistered persons. Section 486.12, F. S., makes it unlawful for any registered physical therapist "to treat human ailments by physical therapy except under the prescription, direction and supervision of a person licensed by the state to practice medicine." Sub §(5) of §486.08, F. S., provides that the board may refuse to register, or revoke the registration of, any person who undertakes to practice physical therapy "independently of a prescription, direction or supervision of a person licensed by the state to practice medicine." When Ch. 486, F. S., is read and construed as a whole, we find that its operation is limited to the treatment of human "disability, injury and disease," by the use of "massage, therapeutic exercises, and the physical, chemical and other properties of heat, light, water and electricity" with certain exceptions mentioned in the statute. For the physical therapy to be within the purview of Ch. 486, F. S., it must be used in the treatment of some human disability, injury or disease. As we have noted above the term "therapy" relates to the treatment of disease, injury and disability. There is a difference between a statute prohibiting a person holding himself out as a registered physical therapist, and prohibiting the practice of physical therapy by unregistered persons (Annotations in 39 A. L. R. 1530, 42 A. L. R. 777, and 43 A. L. R. 1095). Even though it be said that Ch. 486, F. S., does not prohibit the practice of physical therapy by unregistered persons, Ch. 458, F. S., prohibits such practice when done as a treatment for human disability, injury, disease, pain or physical condition.

It, therefore, appears that any attempt by any person to treat or prescribe for any human disease, pain, injury or physical condition, by any means whatsoever, constitutes the practice of medicine within the purview of Florida's medical practice statutes, unless there is a statute exempting the same from such medical practice statutes. When we take note of the above definitions of physical therapy, physio-therapy and therapy, found in the dictionaries and reported cases, we must conclude that the term "physical therapy," even independent of Ch. 486, F. S., relates to the treatment of human disease, pain, injury and physical condition by drugless means, and is within the definition of the practice of medicine contained in sub §(1), §458.13, F. S. We are, therefore, of the opinion that the above question must be answered in the negative, in that physical therapy exercised for the treatment of human disease, pain, injury or physical condition is the practice of medicine, of which Ch. 486, F. S., is a branch and physical therapists are limited practitioners.

Doubtless there are persons in this state who give certain massage and similar treatments, which they designate as physical therapy, which are not given as treatments of human disease, pain, injury or physical condition and are, therefore, not within the medical practice acts so as to constitute the practice of medicine in this state. The definition of the term "physical therapy" does not bear out the use of the term for these services and the term so used is a misnomer. Such services not being the practice of medicine are not within the purview of §205.051, F. S., and no proof of current qualification and competency may be required under said §205.051; however, such services are not and should not be designated as physical therapy. Any service or practice designed as a treatment for human disease, pain, injury or physical condition, either as a cure, alleviation of pain or swelling, or otherwise, constitutes the practice of medicine.

Doubtless there are persons in this state, who erroneously refer to themselves as physical therapists, who give massage and similar treatments not as treatments of any human disease, pain, injury or physical condition so that they are not within the purview of our medical practice acts. When we consider the definitions of "physical therapy" in the dictionaries and cases hereinabove mentioned, we find that the term "physical therapy" has no application to such treatments and is, therefore, erroneously used by such persons. Such services not constituting the practice of medicine are not within the purview of §205.051, F. S., and no proof of current qualification and competency should be required under said §205.051. Any service or treatment designed to cure, alleviate or otherwise treat the effects of human disease, pain, injury or physical conditions would seem to constitute the practice of medicine under the medical practice acts, even if no drugs be given or used.

Any attempt by any person to treat or prescribe for any human disease, pain, injury or physical condition, constitutes the practice of medicine within the purview of Florida's medical practice statutes. We feel, in the light of the above definitions of physical therapy, that the term "physical therapy" is a medical term relating to certain treatments for human disease, pain, injury or physical condition and has no non-medical meaning that we should recognize.

We have serious doubt as to the correctness of the holding of the Dade county circuit court in the proceeding mentioned in your request for opinion and do not think that it should be followed in other circuits until the question is finally settled by the supreme court.

We feel that the above stated question should be answered in the negative; however, we do not hold that §205.051, F. S., has any application when no human disease, pain, injury or physical condition is being treated or corrected by massage or other practices short of medical practices as defined in §458.13, F. S. As the term "physical therapy" does not seem to extend to any practices other than medical treatment or the treatment of human disease, pain, injury and physical condition, we do not think

that any occupational license should be issued for the practice of physical therapy unless and until §205.051 is complied with, in the light of the definition of the term given in the reference books.

056-12—January 13, 1956

PROFESSIONS AND VOCATIONS

PRACTICE OF MEDICINE—ACCEPTANCE OF FEES BY CONSULTING COMMISSIONED MEDICAL OFFICER IN ARMED FORCES NOT LICENSED IN FLORIDA—PSYCHOSOMATIC THERAPY AND MEDICAL HYPNOSIS

To: *Homer L. Pearson, Secretary-Treasurer, Florida State Board of Medical Examiners, Miami*

QUESTIONS:

1. May a physician stationed with the Navy and not licensed in Florida serve as consultant in a nongovernment hospital situated in Florida, and accept a fee for his services?

2. Does the practice of "psychosomatic therapy" and "medical hypnosis" constitute the practice of medicine?

The practice of medicine is defined in §458.13, F. S., as amended by Ch. 29867, 1955.

The Florida statutes relating to the practice of medicine are inapplicable to any lawfully qualified physician, of some other state or country, when meeting legally registered and qualified physicians of this state in consultation (§458.13 (2) (b), F. S., as amended by Ch. 29867, 1955). Therefore, §458.05, F. S., as amended by Ch. 29867, 1955, which relates to the application for license and qualifications of any person wishing to practice medicine in Florida, does not apply to lawfully qualified physicians of another state, when meeting in consultation with a Florida physician who is lawfully registered and qualified, and such consultant is not required to be licensed in Florida.

The Florida statutes relating to the practice of medicine are also inapplicable to commissioned medical officers of the armed forces of the U. S. and of the public health service of the U. S. while on active duty for the U. S. and such medical officers are exempted from the provisions of Ch. 458 (§458.13 (2) (h), F. S., as amended by Ch. 29867, 1955). A physician stationed with the navy and not licensed in Florida, who serves as a consultant in a hospital not owned by the government, apparently would not come within the purview of the exemption provided for in §458.13 (2) (h), F. S., as amended. However, it would appear that such physician could meet in consultation with Florida physicians lawfully registered and qualified if he were a lawfully qualified physician of some other state or country (§458.13 (2) (h), F. S., as amended).

The acceptance of fees for consultation services by out-of-state physicians and medical officers of the armed forces of the U. S. is neither provided for nor prohibited by our Florida statutes.

Section 458.13(2)(h), F. S., as amended by Ch. 29867, 1955, which exempts from the provisions of Ch. 458, F. S., "commissioned medical officers of the armed forces of the U. S. on active duty for the U. S." should be construed to mean that such doctors are exempt from rules and regulations defining the practice of medicine in Florida, only while they are exercising their authority, rights and privileges in the course of, and in matters arising out of active duty for the U. S. This construction would preclude such medical officers from accepting fees for their services in hospitals or privately from any source except when called in consultation as authorized by §458.13(2)(h), F. S., as amended.

The foregoing analysis of the relevant statutes leads to the conclusion that a commissioned medical officer of the armed forces of the U. S., while on active duty for the U. S., though not licensed to practice medicine in Florida, unless prohibited by rules and regulations of the branch of the armed forces in which he is serving, may serve as a consultant in a hospital not owned by the government and accept a fee for such services, provided he is a lawfully qualified physician of some other state or country and meets in consultation with legally registered and qualified physicians of this state.

It is our opinion that question 1 should, subject to the foregoing limitations, be answered in the affirmative.

The fact that standard and medical dictionaries fail to define "psychosomatic therapy" as a profession, indicates that "psychosomatic therapy" is a relatively new phrase arising in the field of psychology which has developed very rapidly over the last few years. Therefore, it is necessary to define the two words separately.

Psychosomatic is defined as: "Of or pertaining to the interrelationships of mind and body, with especial reference to disease; designating a branch of medicine which investigates the reciprocal influences of body and mind in the cause, prevention, treatment, and cure of disease." (Funk & Wagnall's New College standard dictionary.)

Psychotherapy is defined as: "The treatment of nervous and mental disorders, especially by psychological methods, as hypnosis, reeducation, psychoanalysis, etc." (Funk & Wagnall's New College standard dictionary.)

The word "psychosomatic" indicates the interrelationship of *psychotherapy* and *physiotherapy* which is "the treatment of disease by physical remedies rather than drugs, and its practice is the practice of medicine in that limited field." *People v. Mari*, 260 N. Y. 383, 183 N. E. 858, (1947).

Therapy is defined as: "Therapeutics; healing or curative quality", and *Therapeutics* as: "The department of medical science that treats of remedies for disease and of their application. The art and science of healing." (Funk & Wagnall's New College standard dictionary.) It was stated in *Stewart v. Rabb*, 55 Minn. 20, 56 N. W. 256, that "therapy is the treatment of disease, and

surgery is therapy of a distinctive kind." In *People v. Dennis*, 271 App. Div. 526, 66 N. Y. S. 2d 912, the court, after defining the term "massage" as used in a New York statute providing for the licensing of masseurs and masseuses, seemed to be of the opinion that a person using massage in connection with some human disease, pain, injury or physical condition, would be practicing medicine within the purview of that state's medical practice act.

Under §458.13(1), F. S., as amended, any person "shall be deemed to be practicing medicine within the purview of this chapter, who holds himself out as being able to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition, or who shall offer or undertake, by any means or method, to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition." The said section then goes on to exempt osteopaths, chiropractors, chiroprodists, naturopaths, optometrists, nurses, pharmacists, dentists and midwives from the statute when duly licensed under their respective statutes. It may well be that the legislature was of the opinion that the above listing would have been within the medical practice act except for the exemption.

It is evident that under Ch. 458, F. S., any attempt to treat any human disease, pain, injury or physical condition, which would embrace human disability, by any means whatsoever, which would include massage, therapeutic exercises, and the physical, chemical and other properties of heat, light, water and electricity, will constitute the practice of medicine in this state, unless exempt from the operation of the statute.

The term "medical hypnosis" like the term "psychosomatic therapy" is not found in the available authorities, including the medical and standard dictionaries. Therefore, a determination of the meaning of "medical hypnosis" requires that the words be separated and defined individually.

Hypnosis is defined in Webster's dictionary as: "A state resembling normal sleep, differing in being induced by the suggestions and operations of the hypnotizer, with whom the hypnotized subject remains in rapport responsive to his suggestions. Anesthesia, blindness, hallucinations, and paralysis may be induced by suggestion in this state, and suggestions of curative value may also be accepted. Suggestions made under hypnosis to be carried out after the subject has been awakened are called post hypnotic suggestions. Often the awakened subject does not remember what occurred during hypnosis, though he may still execute the post-hypnotic suggestions. Hypnosis is induced by suggesting sleep to the subject, or by applying monotonous sensory stimulation as by having him look steadily at a bright object held before his forehead, and by stroking his limbs, while the hypnotizer maintains rapport by oral suggestion. Very susceptible subjects who have been frequently hypnotized may spontaneously drop into self-hypnosis or autohypnosis. The lightest degree of hypnotic sleep is called lethargis hypnosis, and deeper degrees cataleptic and somnambulistic hypnosis. Hence a similar sleeplike condition."

Rapport, in a psychological sense, means: Confidence of the

subject in the operator, with willingness to cooperate, as hypnotism, psychoanalysis, mental testing, etc.

The word "medical" has a broad meaning, and is defined by Webster's and Words and Phrases, Vol. 26A, as:

"Of, pertaining to, or having to do with the art of healing diseases, or the science of medicine; as the medical profession, medical services, a medical dictionary, medical jurisprudence. Containing medicine; used in medicine; medicinal, as the medical properties of a plant."

The court said in *Territory v. Newman*, 13 N. M. 98, 79 P. 706, 68 L. R. A. 783, that:

"The use of the expression 'practicing medicine' to mean the art of healing is by no means new, but is rather a return to the original meaning of the word 'medical.' The phrase may be properly used by the legislature as one under which to group healing methods of all kinds, and is broad enough to include a person who claims to be a practitioner of a system of drugless healing." (Words and Phrases, Vol. 26A, p. 608.)

When discussing the statute regulating the practice of medicine, in *Page v. State Board of Medical Examiners*, 141 Fla. 294, 193 So. 82 (Fla. 1940), the supreme court of Florida said:

"The legislature, in protecting the health and general welfare of the people, has a right to prescribe reasonable rules and regulations that shall control the practice of medicine. In the medical profession are found men of the highest character, integrity and those who are well educated in medicine and skilled in surgery * * *. The Act encourages learning, skill, ability, and the attainment of the highest qualifications on the part of the practitioners and is the instrumentality for the removal of the black sheep from the honorable profession of medicine, thereby promoting the health, happiness, comfort and welfare of the people."

When consideration is given to the above definitions of "psychosomatic", "psychotherapy", "therapy", "medical", and "hypnosis", we must conclude that "psychosomatic therapy" and "medical hypnosis" may be used in the treatment of human disease, pain, injury, or physical condition and when so used are within the definition of the practice of medicine as contained in §458.13 (1), F. S., as amended by Ch. 29867, 1955. Therefore, to constitute the practice of medicine, any such service or practice must be clearly designated as treatment of human disease, pain, injury, or physical condition.

Accordingly, where "psychosomatic therapy" and "medical hypnosis" treatment is applied for the purpose of attempting to cure a specific disease or ailment, it is our opinion that such treatment constitutes either the practice of medicine, or one of the branches of the healing arts exempted from the requirements of the medical practice act, but regulated by some other act or board.

However, it must be remembered that some of these practices are not applied for treatment of human disease or ailment. By law or custom these practices are not prohibited.

Those charged with the enforcement of this state's medical practice act are authorized to prevent unlicensed medical practice of "psychosomatic therapy" and "medical hypnosis" where such treatment invades the field of medical practice. However, discretion should be used to avoid attempting to prohibit practices which may not be considered an invasion of the medical profession.

Your question is answered accordingly.

056-13—January 17, 1956

INSURANCE

FIRE, CASUALTY AND SURETY AGENTS—LICENSING OF NONRESIDENT AGENTS, RECIPROCITY—DIVISION OF COMMISSIONS—§627.85, F. S. (AM. CH. 29619, 1955)

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*

QUESTION:

A policy was issued prior to April 29, 1955, for a term of 5 years with the premium payment plan endorsement attached. Countersigning agent received commission on the original policy as required by law at the time the policy was issued. The question is, does the agent receive commission under the annual payments on the original basis, or does the new law of April 29, 1955, apply?

We assume there is here involved a provision of §627.85, F. S. (relating to licensing of nonresident agents) as same existed prior to amendment thereof by §1 of Ch. 29619, 1955, and as same now stands amended. The provision prior to amendment was as follows:

"All insurance policies on risks or property located in this state must be countersigned by a resident local agent and such agent shall be entitled to the same commission as allowed by the state of residence of the nonresident, but in no event less than 25% of the usual Florida local agents commission, or 25% of the nonresident producer's commission, whichever is less."

The provision as amended now reads:

"All insurance policies on risks or property located in this state must be countersigned by a registered local agent and such agent shall receive the same commission as allowed by the state of residence of such nonresident agent, but in no event shall he receive, accept or retain less than 50% of the usual Florida local agent's commission, or 50% of the nonresident producer's commission, whichever is less, on policies of insurance covering in whole or in part real property and/or tangible personal property, including property floater policies. On all

other policies of insurance, including insurance covering motor vehicles, plate glass, burglary, robbery, theft, larceny, boiler and machinery, workmen's compensation, fidelity and surety, bodily injury liability, and property damage liability, in no event shall he receive, accept or retain less than 25% of the usual Florida local agent's commission, or 25% of the nonresident producer's commission, whichever is less."

This amendment became effective April 30, 1955. A policy of the nature evidently here contemplated provides, in effect, that an insured pays the first year's premium at the full rate, but that the policy is renewable for each of 4 successive years by the insured paying on the anniversary date of the policy 80% of the annual rate.

For the purposes of discussion and comparison, a 5-yr. term policy payable in annual instalments is described: The policy is written for a 5-yr. term. The insured pays the first year's premium at the full rate, and engages to pay on each anniversary date during the remainder of the term 80% of the annual rate. Failure to pay an instalment terminates the policy.

Technically, each year there is a renewal of a 5-yr. annual renewal policy. There is no occasion for "renewal" of a 5-yr. instalment term policy until expiration of the term. As far as an insured is concerned, the operation of the two plans is identical. The insured obtains 5-yr. coverage at the same reduced rate; and he maintains the coverage for the full 5-yr. period by annual payment of the required premium. We are advised that the insurance commissioner of Florida requires the same unearned premium for the two plans. Furthermore, the reduced premium rate for each of the plans can be justified under Ch. 629, F. S., only by demonstrated savings to the insured in handling, as against issuance of yearly policies for the same period; and that experience to justify the reduced rate reasonably requires the demonstrated fulfillment of such agreements, save in those instances where circumstances normally demand the dropping or cancellation of the coverage.

We do not attempt to inquire into the matter of agent's commissions in relation to payments of premiums under these plans subsequent to the first premium; nor do we deal in any way with the regularity of division of such subsequent premiums with a nonresident broker or agent. We assume that such is recognized and approved by the insurance department. The above question is dealt with conditioned upon such assumption. Hence, conceding that an agreement between a Florida countersigning agent and a nonresident producer relating to such division of premiums was valid prior to the amendment of §627.85, the change in the law at this past session reasonably could not have disturbed the agreement in relation to a 5-yr. term contract payable on the instalment plan. The position that a different rule would apply to a 5-yr. renewal contract could be premised only upon the theory that such a contract is not a 5-yr. one but is a succession of separate annual contracts. For the reasons above stated, we consider it a 5-yr. contract with option to renew.

Again, conceding the validity of the agreement which was entered into between this nonresident producer and the Florida agent concerning division of commissions when the coverage was placed, respectable argument can be made that such an agreement constitutionally may not be disturbed by subsequent legislation. It is recognized that when public welfare demands it, a police regulation may validly interfere with contract rights. *Southern Utilities Co. v. City of Palatka, Fla.*, 99 So. 236, decree affirmed, 268 U.S. 232, 69 L. Ed. 930. However, a police regulation such as here found is subject to strict construction in connection with its enforcement; and the law here involved does not on its face warrant the assumption that it should be construed to affect existing contract rights.

In view of the foregoing, in my opinion the question is answered as follows:

Conceding that a valid agreement was entered into between the nonresident producer and Florida countersigning agent at the time this coverage was placed relative to division of premiums during the 5-yr. period of coverage, as contemplated by the question, such agreement was not disturbed by the mentioned amendment of said §627.85 at the 1955 session of the legislature.

056-15—January 17, 1956

EDUCATION

PERSONNEL—RULES AND REGULATIONS—HEALTH CERTIFICATE—§231.17, F. S.

To: *Thomas D. Bailey, State Superintendent of Public Instruction,
Tallahassee*

QUESTIONS:

1. Is the present state board of education regulation prescribing the health certificate to be furnished by persons making application for teaching positions contrary to existing law?

2. Does the state board of education have authority to specify a particular type of physician for this work?

Section 231.17, F. S. provides, in part:

"... To be eligible for a certificate to serve in an administrative or instructional capacity, the applicant shall be a citizen of the U. S., shall have attained the age of 20 yrs., shall meet such academic and professional requirements based on credentials certified to by standard teacher-training institutions of higher learning as may be prescribed by the state board, shall be free from malignant, communicable, or mental diseases, and shall pass such physical examination as may be prescribed jointly by regulations of the state board of education and the state board of health..."

In my opinion, the present state board regulation as quoted above is clearly authorized by §231.17, F. S., and is within the

meaning and intent of said act. Your 1st question is therefore answered in the negative.

With regard to your 2nd question, §231.17, F. S., does not prescribe any definite type of physical examination or prescribe any qualifications for the individual who is to make the examination. It merely provides that the applicant "shall pass such physical examination as may be prescribed jointly by regulations of the state board of education and the state board of health."

Your 2nd question is therefore answered in the affirmative, assuming that the state board of health concurred in such action by appropriate resolution.

056-16—January 18, 1956

INSURANCE

EMPLOYEE PROTECTION—INDIVIDUAL INSURANCE POLICIES WITH PROVISIONS CHARACTERISTIC OF GROUP INSURANCE—§§625.19, 625.20, 635.02; 635.05, 635.24, 635.25, 643.04(8) (b) 3. F. S.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTION:

Is it permitted under Florida Statutes to issue a policy on an individual basis to an employee or any member of a group or association which policy is on the yearly renewable plan at reduced rates and contains minimum requirements as to the size of the group and as to the privilege of conversion to a permanent plan of insurance if the company or employer cancel their administrative arrangement which deviates from the minimum requirements of the group life section of our statutes?

The policy here is designated, "New York Life Employee Protection Plan." Among other things it provides: "This policy will be automatically renewed on any anniversary date if its terms and conditions are satisfied. However, if on any such anniversary date the number of the Employer's employees insured by New York Life under its Employee Protection Plan is less than 10 or is less than 75% of the Employer's employees, New York Life may terminate the insurance under this policy as of such anniversary date, by giving written notice at least 31 days before such anniversary date of intent not to renew and there will be no further insurance under this policy after such anniversary, except as may be provided under the Continuance of Insurance provisions."

Under "Conversion Provisions" it is provided: "If your active full-time employment with the Employer terminates, you will be entitled to convert all or part of your insurance under this policy to another policy of individual life insurance, on another plan, without being required to furnish evidence of insurability, subject to the following conditions:", followed by such conditions.

A "Table of Premium Rates per \$1,000 of Face Amount" for

various ages from 16 to 80 is set forth. At the bottom of the 1st page of the policy appears the following: "Employee Protection Plan. Term Life Insurance to Next Anniversary Date. Annual Participation. Special Renewal Provision. Conversion Privilege . . ." While it is not apparent from the policy form that the premium rates are less than for term insurance issued to an individual dissociated from an employee-group as here contemplated, the question mentions "reduced rates"; hence, it is assumed that the rates here provided are less than for such individual coverage.

The premium for this insurance is transmitted for the covered employees by the employer.

Sections 625.19 and 625.20, F. S., prohibit insurers offering certain inducements and rebates. Section 635.02, F. S., provides: "No life insurer doing business in this state shall make or permit any distinction or discrimination between insureds of the same class and equal expectation of life as to the amount or payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contracts it makes . . ."

Section 635.05(3), F. S., provides: "Nothing in §§625.19, 625.20 and 635.02 shall be construed as prohibiting: . . . (3) Any life insurer, doing business in this state, from issuing policies of life or endowment insurance with or without annuities at rates less than the usual rates of premiums for such policies, insuring employees of any employer, who, through their secretary or employer, take out insurance in groups of not less than 25 persons and pay their premiums through such secretary or employer." The last amendment of §635.05 was in 1945.

Chapter 643, F. S., deals with the regulation of trade practices in the insurance business. §643.04(8)(b) 3., relating to rebates and discrimination, excludes the following from the effects thereof: "Readjustment of the rate of premium for a group insurance policy based on the loss or expense experience thereunder, at the end of the 1st or any subsequent policy year of insurance thereunder, which may be made retroactive only for such policy year." Ch. 643 with this provision was adopted in 1947.

Sections 635.24 and 635.25, F. S., originally adopted in 1949, set forth in detail circumstances under which group life coverage may be issued in this state and policy provisions in connection with such coverage. §635.24(1), as amended by §1 of Ch. 29740, 1955, provides: "No group policy shall be delivered in the state which provided (sic) group life insurance unless the provisions of the policy applicable to group life insurance (hereinafter referred to as 'policy' or 'insurance' unless the context clearly indicates otherwise) shall conform to one of the following descriptions: (1) A policy issued to an employer, or to the trustees of a fund established by an employer, which employer or trustee shall be deemed the policyholder, to insure employees of the employer for the benefit of persons other than the employer, subject to the following requirements:", followed by conditions related thereto. Among these conditions is the following: "The policy must cover at least 25 employees at date of issue."

Reasonably it appears to have been the legislative intent as found in §§625.19, 625.20, 635.02, 635.05, 635.24, 635.25 and 643.04 (8) (b)3., all read in *pari materia*, that insurance may be issued to a group of employees, at a less rate than applicable to any of such individuals dissociated from such group, if the coverage meets the requirements and conditions of said §§635.24 and 635.25, as amended; and there are no specific statutory standards setting forth the permissible difference between rates charged under group coverage and rate for the same coverage to an individual. Sections 635.24 and 635.25 describe conventional group life coverages; and for a rather extended discussion of such group insurance, see Appleman, *Insurance Law and Practice*, Vol. 1, Ch. 2, beginning at p. 36.

An examination of the policy form here under consideration will demonstrate that it has several characteristics not found in conventional group life coverage. It apparently is a type of wholesale (employee) insurance. A general description of this latter type of insurance is quoted from *Guide to Life Insurance*, Osler and Robinson, 2nd Ed., p. 80: "Where the number of employees is too small to come within the legal definition of a group, Wholesale insurance is written. This insurance is similar in principle to group except that individual policies (usually one-year Term) are issued, a health history and statement are taken, and a medical may be required." Within certain limits this type of insurance may be issued in this state. However, the policy form here issuable to an individual is made dependent for renewal upon a specified group coverage of an employer's employees. This form of policy so dependent upon group coverage reasonably offends the intent of §§635.24 and 635.25, F. S. Hence, in my opinion you should not approve same.

056-17—January 19, 1956

WELFARE

AID TO PERMANENTLY AND TOTALLY DISABLED PERSONS —QUALIFICATIONS OF RECIPIENTS—§409.40(9), F. S.

To: *Grace H. Stewart, Director, Division of Public Assistance,
State Department of Public Welfare, Jacksonville*

QUESTION:

In view of the provisions of §409.40(9), F. S., may the department of public welfare of the state grant assistance to permanently and totally disabled persons in cases where information made available to the department indicates that the applicant has a parent or parents, spouse, child or children residing in this state who jointly or individually are able to provide for the applicant?

In order for an applicant to qualify for assistance, as a permanently and totally disabled person, he or she must meet the conditions set forth in §409.40, F. S. One of those conditions is that the applicant "has no parents, spouse, child or children residing in the state who jointly or individually are able to provide reasonable subsistence compatible with decency and health." (§409.40(9), F. S.) (Emphasis supplied.)

Section 409.40(9), F. S., appears to be clear and not in need of construction. Therefore, an applicant for assistance as a permanently and totally disabled person would seem to be not entitled to assistance from the department in those cases where it has been determined by the department that such applicant has parents, a spouse, child or children in this state who are able to provide the applicant with subsistence. Whether an applicant does have a parent, spouse, child or children residing in the state who jointly or individually are able to provide him with assistance is a question of fact which must, in every case, be resolved by the department.

The application of a person seeking assistance as a permanently and totally disabled person creates the presumption that the applicant has no one who is able to or will provide for him. This presumption may be rebutted. However, it would seem that the applicant should not be required to establish conclusively that he has no relatives able to support him. The department should, it would seem, seek information from the applicant's relatives, as well as other persons, in an effort to determine whether the applicant has one or more persons designated in the statute who is able to provide the applicant with support.

In Florida, a wife is not responsible for the support of her husband, children are not responsible for the support of their parents, and parents are not responsible for the support of their adult children. Furthermore, there does not appear to be any law in Florida which requires a wife to divulge her ability to support her husband, a child to divulge his ability to support his parents, or a parent to divulge his ability to support his adult child. Therefore, it is obvious that in many instances the department of public welfare may be seriously handicapped and, as a practical matter, find it impossible to obtain information which would indicate that these classes of persons are financially able to support a particular applicant.

It is our belief that the legislature did not intend that an applicant be denied assistance in those cases where the department has been unable to obtain information necessary to determine whether the applicant has parents, a spouse or child residing in this state who are able to provide for his support. However, in those cases where the department does secure information with respect to an applicant's circumstances which indicates that a relative designated in the statute is able to contribute to the applicant's support, the department does not have authority, under the statute, to grant assistance to such applicant.

The question should, subject to the foregoing observations, be answered in the negative.

056-18—January 19, 1956

CRIMINAL PROCEDURE

JUDGMENT AND SENTENCE—VALIDITY

To: John U. Bird, Circuit Judge, Clearwater

QUESTIONS:

1. Is a sentence to imprisonment in the county jail

legal and effective when the governing statute makes no provision for imprisonment in the county jail but requires either imprisonment in the state prison or a fine?

2. When the governing statute makes no provision for imprisonment in the county jail but requires either imprisonment in the state prison or a fine, would a completely served county jail sentence be binding on both the state and the defendant so as to preclude a further sentence?

AS TO QUESTION 1:

Where the governing statute requires imprisonment in one place and the court sentences a defendant to be imprisoned in another place, the sentence is void for lack of jurisdictional power to impose it (*In re Bonner*, 151 U. S. 242); it is without authority of law and is subject to being struck down on habeas corpus and the jurisdiction of the sentencing court continues until a lawful sentence is entered (*Kiser v. Mayo*, 190 So. 246). Therefore, when a statute requires either imprisonment in the state prison or a fine and the court imposes a county jail sentence, that sentence is not valid but is void.

AS TO QUESTION 2:

This is a question which I cannot answer authoritatively and it will have to be settled by the supreme court before we can be certain of the correct answer. However, I am inclined to the view that the imposition and full service of a county jail sentence, when the penal statute provides only for imprisonment in the state prison or a fine, would not legally stand in the way of vacating that completely served sentence and imposing a new sentence to either serve a term in the state prison or pay a fine. The law requires that the penalty for first degree murder be death or life imprisonment, depending upon whether mercy is recommended by the jury. Could it be successfully contended that the imposition and payment of a fine or the imposition and service of a 5-day county jail sentence for first degree murder would bar the later imposition of the penalty required by law, viz., either death or life imprisonment? I think not and, if I am correct in this thought, then, by the same token, I believe that the imposition and service of an unauthorized county jail sentence would not bar the later imposition of a sentence in accordance with law.

056-19—January 25, 1956

REGULATION OF TRADE, COMMERCE AND INVESTMENTS

HOTEL AND RESTAURANT COMMISSION—LICENSING OF COUNTRY CLUB SERVING MEALS TO MEMBERS ONLY—

§509.241(2) (FORMERLY §511.02), F. S.

To: *Richard Edgerton, Hotel and Restaurant Commissioner, Tallahassee*

QUESTION:

Is a country club required to obtain a license from the hotel and restaurant commission when its regularly sells

and serves meals only to club members and their guests for consumption on the premises of the club?

Section 511.02, F. S., as amended by §6 of Ch. 29821, 1955, requires that any place "maintained and operated as a place where food is regularly prepared and sold for immediate consumption on or in the vicinity of the premises . . . shall be licensed as a public food service establishment" unless it comes within the definition of one of the following exempted eating places:

"(a) Places maintained and operated by public or private schools, colleges, or universities primarily for the use of students and faculty.

"(b) Eating places maintained and operated by churches and religious or fraternal organizations primarily for the use of their members and associates.

"(c) Eating places located on airplanes, trains, buses, or watercraft which are common carriers.

"(d) Eating places maintained in hospitals, nursing homes, sanitariums and other similar places."

The only one of the exempted categories in which a country club might fall is that defined in (b) above. But the term "fraternal organization" does not seem broad enough to include the usual type of country club, consisting of a club house, usually situated on a golf course, and having various recreational facilities of other kinds.

All the authorities consulted with respect to the definition of the term "fraternal organization" indicate that it means something more than a social club organized and maintained for the recreation and entertainment of its members. The general consensus evidenced by *Words and Phrases* in the volume including the various definitions of "fraternal organization," is that such an organization must have some altruistic or beneficent motive that extends beyond its membership. The grouping of the words "churches and religious or fraternal organizations" indicates that the legislature was using the word "fraternal" in this sense.

It is, therefore, my opinion that your question should be answered in the affirmative.

056-20—January 25, 1956

GAMBLING

LOTTERIES—OPERATION BY FRATERNAL ORGANIZATION FOR BENEFIT—§§849.01, 849.08, 849.11, F. S.

To: *John A. Madigan, Jr., Attorney for Sheriffs Association, Tallahassee*

QUESTION:

Is it lawful for a fraternal organization to stage for benefit of a crippled children's home a "Las Vegas party" according to the following proposed plan? "When a person purchases a ticket at the door, he or she will be given a certain amount of play money. With this play money he

or she will be able to participate in the various games of chance conducted such as Bingo, Craps, Chuck-A-Luck, Black-Jack, etc. At about midnight or thereabouts, an auction of prizes will be held which only can be bidden on with this play money. The only place any real money will be used will be at the door for admission."

I am inclined to the view that this scheme is a lottery with an extra twist thrown in in an effort to disguise its true character.

Prizes are awarded to those winning enough play money to bid them in. These prizes are awarded by chance, since the prize which a participant receives, and the value thereof, mainly depend upon the amount of play money won by him in a game of chance. There is a consideration for the chance, since each person who purchases a ticket at the door not only pays for the ticket but also pays for the opportunity to participate in the games of chance which may or may not result in his being able to bid in one of the prizes.

As is said in 54 C. J. S. 850, Lotteries, §3:

"Where the essential elements of a lottery, as discussed supra §2, are present, a plan or scheme is, under the law, a lottery, no matter how it may be guarded or concealed by cunningly devised conditions or screens."

But even if the scheme were not a lottery, I think that the operators would be keeping a gambling house within the purview of §849.01, F. S., which provides in part as follows:

"Whoever by himself, his servant, clerk or agent, . . . in any place of which he may directly or indirectly have charge, control or management, either exclusively or with others, procures, suffers or permits any person to play for money or other valuable thing at any game whatever . . ." shall be punished as by said statute provided.

The operators of such a scheme would necessarily have charge, control or management of a place in which to put on the "Las Vegas party." They would procure, suffer and permit people to play for valuable things at a game. A "thing of value" (which is the same as a "valuable thing"), for the purposes of the gambling laws, may be anything affording the necessary lure to indulge the gambling instinct (24 Am. Jur. 408, Gaming and Prize Contests, §14). The play money for which the participants gamble at games of chance is a valuable thing or thing of value under this definition; it represents value to the participants because they can use it to pay for valuable prizes and it matters not whether the play money is collectible by law (See 38 C.J.S. 151-152, Gaming, §88(b)(2)). The result is that the operators would be guilty of keeping a gambling house contrary to said §849.01, F. S.

And even if the scheme were not a lottery, those who participate in it would be guilty of gambling contrary to §849.08, F. S., because they would engage in a game of chance for things of value. Also the operators and the players would be guilty of a violation of §849.11, F. S., which makes it unlawful for anyone to set up, promote, or play at any game of chance by lot or with dice,

cards, numbers, hazards or any other gambling device whatever for the disposal of a thing of value.

The gambling laws make no exceptions in favor of fraternal orders or persons who participate in gambling schemes operated by such orders, even when the ultimate beneficiary is a worthy one. Said laws bear upon everybody equally and take no cognizance of who is to benefit from the operation of gambling schemes.

Therefore your question is answered in the negative because in my opinion the described "Las Vegas party" would violate the criminal laws of Florida.

056-21—January 26, 1956

LABOR

EMPLOYMENT AGENCIES—RESIDENCE REQUIREMENTS OF OFFICERS OF CORPORATE APPLICANTS—§§449.02(2), 449.02(6), F. S. AS AMENDED BY CH. 29943, 1955

To: *Rodney Durrance, Director, Workmen's Compensation Division, Florida Industrial Commission, Tallahassee*

QUESTIONS:

1. Does the requirement in §449.02(2), F. S., that "each such person" shall have had 3 years of experience, etc., apply to each and every officer of a corporate applicant for license as an employment agency?

2. With respect to a foreign corporation holding a permit under Ch. 613, F. S., to transact business in this state, does the requirement that "each such person" shall have had 3 years of experience, etc., apply to each officer of the corporation or only to those officers who actively transact the business of the corporation in this state?

3. If each officer of a corporate applicant is required to have had such 3 years of experience, may "the equivalent thereof in related fields", as such words are used in said §449.02(2), be met by establishing that each such officer has had 3 or more years of experience in arranging employment contracts or engagements with Florida employers by telephone and mail from an out-of-state office? In other words, must the corporate officer have been physically present in Florida for 3 years in order to qualify as having had "3 years of experience as an employment clerk in the state, or the equivalent thereof in related fields?"

4. Within the meaning of the new language added to §449.02(6) by Ch. 29943, 1955, is the requirement of "3 years of experience in the State of Fla. in connection with the operation of a theatrical employment agency" met by a foreign corporation which had been booking artists and entertainers with Florida "purchasers" during the past 3 or 4 years by telephone and mail from its New York office but has not heretofore had a permit to transact business in this state pursuant to Ch. 613, F. S.?

5. If the answer to question 4 is in the negative, is the said requirement of "3 years of experience in the state in connection with the operation of a theatrical employment agency" applicable to a foreign corporation (now seeking a permit under said Ch. 613 to transact business in Florida) when such corporation has had more than 3 years of experience in operating a theatrical employment agency in interstate commerce, in connection with which it has made many bookings with Florida "purchasers"?

In my opinion the above questions are answered as follows:

AS TO QUESTIONS 1, 2 and 3:

"Every corporation applying for license as agents hereunder must be *organized and authorized* to do business under the laws of the state, and shall have capacity to make valid contracts and sue and be sued in this state. All applicants for agents' licenses who are natural persons, and *all officers of corporate applicants*, shall be competent, honest, truthful, trustworthy, of good character and bear a reputation for fair dealing. *Each such person* must also be a citizen of the U. S. and have had 3 years of experience as an employment clerk in the state, or *the equivalent thereof in related fields*, which experience must have been continuous and immediately preceding the date of such application, or in lieu of the required experience must have been a previously licensed owner or operator of an employment agency in the state . . . Any applicant who was actively engaged as employment clerk or its equivalent at the time of his entry into military service may, for the purpose of this section, count as part of such experience the time spent by him in active military service." (§449.02(2), F. S.—emphasis supplied.)

The following excerpt is quoted from §449.02(3), F. S.: "After filing application no employment agency shall permit any person not named in said application for license to become . . . an officer of the corporation, if such agency is a corporation, unless the written approval of the commission shall first be obtained."

Qualified as to theatrical employment agencies, the following is apparent in the light of the above-quoted law: (a) The italicized words "organized and authorized" appearing in said §449.02(2) are construed to mean "organized or authorized"; the reason for this being that otherwise "authorized" is surplusage, and it is presumed that the legislature intended that the word be given significance and meaning. (b) The above italicized words "Each such person" at the beginning of the 3rd sentence in above-quoted §449.02(2), clearly and without ambiguity refer to those persons described in the sentence immediately preceding such words; hence, it follows that the "3 years of experience" etc., in said 3rd sentence is applicable to each and every officer of a corporate applicant. (c) In our former opinion 050-417 (1949-1950 Biennial Report 446) we construed the above italicized words in said §449.02(2), "or the equivalent thereof in related fields", as equivalent experience of a

person in Florida. Hence, without further laboring the practical aspects of a foreign corporation as an applicant, it follows that such "equivalent" experience is not met by establishing that the nonresident officer of a foreign corporation, not admitted to engage in business in this state, has had 3 or more years of experience in arranging employment contracts or engagements with Florida employers by telephone and mail from an out-of-state office.

AS TO QUESTIONS 4 and 5:

Section 449.02(6), F. S. relates to fees for and certain conditions and characteristics of licenses issued in pursuance of Ch. 449. This section was amended by Ch. 29943, 1955, by adding thereto the following:

"Notwithstanding the language of any other part of this chapter no licensee shall be authorized to engage in the business of conducting a theatrical employment agency as contemplated by §8 of this chapter unless such licensee shall have furnished to the commission satisfactory evidence that such licensee has had 3 years of experience in the state of Florida in connection with the operation of a theatrical employment agency as contemplated by §8 of this chapter." (Emphasis supplied.)

At the outset, quite obviously the words "Section 8 of this chapter" refer to §449.08, F. S. (originally §8 of Ch. 24080, 1947, as amended by §7 of Ch. 25265, 1949). For further reference to theatrical employment agencies, see definitions (4) and (5) in §449.01, F. S.

The italicized word "experience" in the above-quoted amendment is to be given the same significance as the "experience" mentioned and described in said §449.02(2), viz., in relation to a corporate applicant, the "experience" of the corporate officers. Reasonably the amendment is to be construed as contemplating experience by individuals actually in Florida during the period of that experience. On the point, we do not see any difference in the wording in §449.02(2), "3 years of experience as an employment clerk in the state of Florida" and the wording in the amendment, "3 years of experience in the state of Florida in connection with the operation of a theatrical employment agency." It follows, without further discussion, that each of these questions is to be answered in the negative.

While the wording of §449.02(2), F. S. appears so clear and unambiguous as not to be subject to application of rules of statutory construction, such is not true of the wording of the mentioned amendment. Hence, since uncertainty does exist with respect to the construction of the latter, the provision could be tested by suit for declaratory decree.

056-22—January 26, 1956

TAXATION

HOMESTEAD EXEMPTION—MEMBERS OF THE CAMPING TOURISTS OF AMERICA, A NONPROFIT CORPORATION

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are the members and certificate holders of The Camping Tourists of America, a corporation, of Manatee county, residing upon lands of the corporation leased to them, entitled to homestead tax exemption?

The Camping Tourists of America appear to be a nonprofit corporation with its principal office located "at Braden Castle, Florida, where the business of the association shall be conducted." Certificate holders (members) "have the right to build and maintain, on the lot designated in said certificate, a cottage and a private garage, *which said building or buildings shall be the property of the holder of said certificate* and may be sold, transferred or assigned by such certificate holders . . ." The by-laws of the corporation provide that "the transfer of certificates of membership shall not be made except to *bona-fide tourists . . .*" These certificates of membership are made upon a corporate transfer book and are evidenced by the issuance of a new certificate of membership. They do not seem to be subject to transfer by deed or other conveyance. The annual dues of the association may not exceed \$10 "plus a proportionate share of any taxes that may be assessed against the association as a whole, instead of against the individual members, *because of buildings or other improvements owned by the individual members, and located on land belonging to the association . . .*" Members of the association are entitled to "a building site . . . for the erection and maintenance of a cottage as a residence, and one so building may retain the use of said lot for himself, his heirs or assigns *during the chartered life of the corporation*" (see the by-laws of the corporation).

Under the certificate issued to members of the association it appears that the corporation is the 'record title holder of the property' upon which application for homestead tax exemption has been filed. Although the member's certificate, issued by the corporation, recites that the member is the equitable owner of said property and has the beneficial title in equity to said real property, we find nothing in the by-laws or other papers and documents submitted to us vesting such a title in the member. The above recitation in the so-called "declaration and agreement" seems to be merely an expression of opinion by the corporation issuing the same that the member has the beneficial title in equity to the property in question without any support in the record showing the vesting of such a title in the member.

Upon the evidence before us at this time the above stated question must be answered in the negative.

056-23—January 26, 1956

TAXATION—NEGOTIABLE INSTRUMENTS

INTANGIBLE PERSONAL PROPERTY TAX—LIABILITY OF PRODUCTION CREDIT ASSOCIATION FOR TAX ON NOTES SOLD—§§674.36, 674.68, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where all the stock of a production credit association located in Florida held by the Federal Intermediate Credit bank of Columbia, S. C., has been retired, are the notes evidencing loans made by such a production credit association which have been discounted or purchased by the said Federal Intermediate Credit bank subject to assessment as the intangible personal property of the production credit association?

The stock in the production credit association, located in Florida, owned by the federal government or its agency, having been retired, we feel that such association is no longer exempt from state taxation but is subject to state taxation. The question then becomes one of whether or not the notes evidencing loans made by the local production credit association which were discounted or purchased by the intermediate credit bank (which is a federal agency exempt from state and local taxation) are now owned by the intermediate credit bank or by the local production credit association. If the said notes (intangible personal property) are owned by the local production credit association, then they would appear to be subject to taxation by the state under its intangible personal property taxing statutes. This question is one of fact to be determined from the facts and circumstances surrounding the so-called discount or purchase by the intermediate credit bank, which is a non-taxable federal agency. If title to the notes in question passed to the intermediate credit bank, and is no longer in the local production credit association, the notes are not subject to state taxation under Florida's intangible personal property taxing statutes.

We gather from the file handed us with the request for opinion that the notes in question were negotiable and were in legal effect negotiated to the intermediate credit bank with recourse and were not merely pledged with the intermediate credit bank as security for a loan or other indebtedness. Every indorser who indorses without qualification warrants to all subsequent holders in due course that on due presentment the negotiable instrument will be accepted or paid or both, as the case may be, according to its tenor and that if dishonored and necessary proceedings on dishonor are taken, he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it (§674.68, F. S.). An indorsement without recourse is a special, restrictive or qualified indorsement (see §§674.36, et seq., F. S.) and an indorsement with recourse is an endorsement without qualifications (see §§674.68, et seq., F. S.); however, either type of indorsement passes title to the instrument. We know of no statute or court decision holding

that an indorsement with recourse passes no title to the indorsee; title passes to the indorsee, although the indorser contracts that he will pay the same if dishonored. We gather from the request for opinion and the file handed us therewith that we are here dealing with an indorsement with recourse and not a transaction amounting to a mere pledge or lien, and our opinion is based upon a mere indorsement with recourse.

The above question, upon the facts and circumstances before us, is answered in the negative.

056-24—January 27, 1956

CORPORATIONS

CEMETERY CORPORATIONS—REMEDY TO ENFORCE REGULATION PROMULGATED BY COMPTROLLER UNDER PROVISIONS OF §608.60, F. S.—MANDAMUS

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

What remedy is available to enforce regulations issued under authority of §608.60, F. S., governing cemetery corporations formed under authority of Ch. 608, F. S., when such cemetery companies refuse or fail to make the annual report to you, as required by such regulations?

Corporations may be formed under Ch. 608, F. S., for the purpose of owning or operating cemeteries, alone or in connection with other purposes. However, all such corporations (1) shall be subject to the supervision of the state comptroller and shall make reports to him from time to time as he shall require, and (2) no profits shall be distributed by such corporations by way of dividends or otherwise to their stockholders without the written consent of the comptroller first had and obtained, which shall not be granted unless the comptroller is satisfied that adequate provision has been made to provide for future maintenance (§608.60(1), (2), F. S.).

Regulations effective Jan. 1, 1954, relating to cemetery associations formed under Ch. 608, F. S., have been issued by you, as authorized by §608.60, F. S. This office has held that such regulations appear to be entirely within your authority (AGO 053-194, Aug. 7, 1953).

Mandamus will lie to enforce a continuing duty, and is an appropriate remedy to compel the observance of a valid regulation of the railroad commissioners imposing specific public duties upon railroad companies (*State v. Atlantic Coast Line R. Co.*, 48 Fla. 114, 37 So. 652). The common law writ of mandamus may be issued to specifically enforce the performance of a duty imposed by law upon a railroad corporation; however, the writ of mandamus does not supersede legal remedies but rather supplies the want of a legal remedy and for the writ to issue it must appear (1) that the relator has a clear legal right to the performance of the particular duty by the respondent, and

(2) that the law affords no other adequate or specific remedy to secure the performance of the duty which it is sought to coerce (State v. Atlantic Coast Line R. Co., 53 Fla. 650, 44 So. 213).

It appears to us that cemetery associations formed under Ch. 608, F. S., are under a clear duty to furnish you with the reports required by the regulations which have been issued by you as authorized by §608.60, F. S. It further appears that no adequate remedy at law has been provided for the enforcement of such regulations. Therefore, in the light of the foregoing observations we are of the opinion that the common law writ of mandamus may be used as a remedy to compel cemetery companies or associations to make the annual report required by your rules and regulations relating to such associations.

As a general rule before a writ of mandamus will issue to compel performance of a duty by a corporation, there must have been a demand and refusal of performance or conduct on the part of the corporation which is equivalent to refusal. However, according to some authorities a demand is not necessary if the duty is strictly public and enjoined by law and no person is charged by law with the duty to make demand (55 C.J.S. §229, p. 435). In order that there may be no doubt that cemetery associations formed under Ch. 608, F. S., have been accorded every procedural right to which they may be entitled, it is recommended that, prior to the institution of proceedings to compel them to make reports in accordance with rules and regulations promulgated by you pursuant to §608.60, F. S., you request the corporations to furnish you with the said reports.

056-26—January 27, 1956

STATE AND COUNTY OFFICERS AND EMPLOYEES

RETIREMENT—BENEFICIARY UNDER §122.08(4), F. S.— APPLICABILITY OF §122.16, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

May a surviving spouse, receiving benefits provided in §9, Ch. 29801, 1955, based upon the employment of a deceased spouse by the state or county, be employed by the state or a county without suspending receipt of such benefits?

Section 9 of Ch. 29801, 1955, contains provisions under which a member of the state and county retirement system may designate his or her spouse as beneficiary to receive a designated monthly payment, under the state and county retirement system, after the death of such member of the said state and county retirement system. Under this plan the member of the retirement system elects to take a reduced benefit during his or her life with a specified benefit to go to his or her spouse after the death of the retired officer or employee of the state or county. The question is whether or not such a beneficiary, whose payment is based upon the previous state or county employment of his or her spouse, may be employed by the state or

a county without having his or her monthly payments suspended during such employment.

Under §17 of said Ch. 29801, 1955, any person receiving retirement compensation under said enactment "shall have such compensation suspended during any period of *reemployment* in any capacity whatsoever by the state or any political subdivision or any department, branch or agency thereof." Any person receiving retirement compensation under said enactment "who becomes *reemployed* by the state or any political subdivision, branch or agency thereof," is required to give notice thereof. Other references are made in said §17 to "*reemployment*." Although the provisions of sub §§(2) and (3) of §121.14, and sub §§(1) and (2) of §134.14, F. S., 1953, appear to have been brought into said Ch. 29801, 1955, as a part of §17 thereof, we do not find any provision in the said 1955 enactment identical with or similar in substance to sub §(1) of said §121.14, F. S., which provided for the suspension of retirement compensation when the person receiving the same "*accepts employment or receives any other compensation from the state, or any county of the state, or any political subdivision, branch or agency thereof . . .*" (Emphasis supplied.)

The prohibition against "*reemployment*" contained in §17, Ch. 29801, 1955, is directed to the employment of a person retiring under said chapter after such retirement and not to the employment of the spouse of a retired member of the retirement system after the death of the retired employee. The employment of such spouse is not a *reemployment* within the purview of said §17.

The above question is answered in the affirmative.

056-27—February 1, 1956

STATE AND COUNTY OFFICERS AND EMPLOYEES

RETIREMENT—APPLICATION OF CHAPTER 122, F. S. TO CERTAIN COUNTY HOSPITALS

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. Are the officers and employees of the Lake Shore hospital, at Lake City, covered by the state and county officers and employees retirement system?
2. Are the officers and employees of the Jackson Memorial hospital, at Dade City, covered by the state and county officers and employees retirement system?

The state and county officers and employees retirement system embraces "all full time officers and employees, who receive compensation for services rendered from state or county funds . . . or who receive compensation for employment or service from any agency, branch, department, institution or board of the state, or any county of the state, for service rendered the state or county from funds from any source provided for their employment or service regardless of whether the same be paid by state or county warrant or not, provided that such

compensation in whatever form paid shall be specified in terms of fixed monthly salaries" (§2, Ch. 29801, 1955).

AS TO QUESTION 1:

Chapter 30264, 1955, established a hospital district in each county of the state having a population of not less than 17,500 and not more than 18,500, said districts to embrace the entire area of such counties (§1 of said act). Non-profit corporations were established in each of such hospital districts and directed to operate and maintain hospitals at the county seat in said districts, each such hospital to be known and designated as the "Lake Shore hospital" (§2 of said act). Such hospitals were established and incorporated for public purposes, such purposes to be the maintenance and operation of a public hospital at the county seat (§5 of said act). Twenty thousand dollars is appropriated toward the operation and maintenance of the said hospitals from race track funds received by the county commissioners of such counties (§4 of said act). These funds are either state or county funds. Unless the above non-profit corporations be construed as public corporations and agencies of the state, or of the county wherein located, serious constitutional questions arise by reason of §25, Art. III, State Const., which requires that corporations, within certain exceptions not here material, be organized under general law only. These facts and circumstances indicate that the hospitals in question are either state agencies or county agencies, and that they are maintained and operated largely with race track funds which are either state or county funds. This indicates an affirmative answer to the 1st above question.

AS TO QUESTION 2:

We are informed that the Jackson Memorial hospital, at Dade City, was purchased by the board of county commissioners for Pasco county in 1934. We presume the authority of the county board to purchase this hospital and that county funds were used in its purchase. Ch. 20053, 1939, authorized and empowered the board of county commissioners for Pasco county to purchase and maintain a county hospital and provided a board of trustees therefor. We are informed that the Jackson Memorial hospital is maintained and operated pursuant to this enactment. Doubtless this hospital is maintained and operated as a county hospital with county funds. This indicates an affirmative answer to the 2nd question upon the information now before us.

Each of the above questions is answered in the affirmative based upon the information before us.

056-28—February 1, 1956

CRIMINAL PROCEDURE

PROCEEDING TO DETERMINE MENTAL CONDITION OF DEFENDANT—ALLEGED SEXUAL PSYCHOPATH— CH. 29881, 1955 (§§917.04-917.11, F. S.)

To: *Richard H. Cooper, County Solicitor, Orlando*

QUESTIONS:

Can an alleged psychopath be compelled to answer

the questions of the examining psychiatrist, after the court has entered its order for the examination of a person accused of a criminal offense, pursuant to this chapter, and the alleged psychopath has appeared before the psychiatrist and refused to answer his questions on the grounds that he cannot be compelled to incriminate himself?

If an alleged psychopath cannot be compelled to answer the questions of the psychiatrist, what disposition shall be made of the proceedings?

If an alleged psychopath can be compelled to answer the questions propounded by such psychiatrist, what would be the procedure for requiring him to answer?

A few days ago, Circuit Judge Stanley, of Jacksonville, in a carefully reasoned opinion held the said law invalid on the ground that its title failed to comply with constitutional requirements, and it might be that the criminal court of record of your county will make a like ruling if you should raise the same constitutional question in a case where an attempt is made to invoke said law. The comments which are hereinafter made will therefore be applicable to a case pending in said criminal court of record only in the event that said court elects to follow said law as written instead of holding it unconstitutionally invalid.

Section 3 of said law provides for the filing in a criminal case before sentence of a statement in writing setting forth facts tending to show that the defendant is a criminal sexual psychopathic person within the meaning of said law.

Section 4 provides, among other things, that upon the filing of such statement the court shall appoint 2 psychiatrists to make a personal examination of the alleged criminal sexual psychopathic person and file report in writing of the results of their examination together with their conclusions, and also provides as follows:

"Said alleged psychopath shall be required to answer the questions propounded by such psychiatrists under penalty of contempt of court; provided, that such examination shall not violate common law privileges or constitutional privileges against self-incrimination."

As indicated by the above quoted provision of §4 of said law, an alleged criminal sexual psychopathic person may be required to answer the questions propounded by the psychiatrists under penalty of contempt of court if such examination does not violate common law privileges or constitutional privileges against self-incrimination.

When an alleged criminal sexual psychopathic person refuses to answer the questions of the psychiatrists on the ground of self-incrimination, he is not the final judge of the matter but it is for the determination of the trial court upon the basis of the principles of law laid down by the supreme court of Florida

to govern the determination of a witness' claim of privilege against self-incrimination. This question is dealt with at length in *Ex parte Senior*, 19 So. 652, 655, from which we quote as follows:

"It has never been recognized that he (referring to a witness) alone has the right in all cases to decide whether his answer will tend to criminate him. Such a rule would be mischievous, and enable unscrupulous witnesses to defeat the ends of justice in many cases. The privilege must be claimed in good faith, and not as a shield to defeat justice. It was held in *Reg. v. Boyes*, 1 Best & S. 311, that, to entitle a witness to the privilege of silence, 'the court must see from the circumstances of the case, and the nature of the evidence which he is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. Moreover, the danger to be apprehended must be real and appreciable, with reference to the ordinary operations of law in the ordinary course of things.' The New York court, in *People v. Mather*, 4 Wend. 229, stated the right of privilege to be that, when the witness 'claimed to be excused from answering, the courts are to determine whether the answer he may give to the question can criminate him directly, or indirectly, by furnishing evidence of his guilt, or by establishing one of many facts which together may constitute a chain of testimony sufficient to warrant his conviction, but which one fact of itself could not produce such result; and, if they think the answer may in any way criminate him, they must allow his privilege, without exacting from him to explain how he would be criminated by the answer which the truth may oblige him to give.' To require the witness to explain how his answer would criminate him would, of course, expose him to the very danger against which the privilege was designed to protect him. In *People v. Forbes*, supra, it is said that 'the weight of authority seems to be in favor of the rule that the witness may be compelled to answer when he contumaciously refuses, or when it is perfectly clear and plain that he is mistaken, and that the answer could not injure him, or tend in any degree to subject him to the peril of prosecution. But the courts have recognized the impossibility in most cases of anticipating the effect of the answer. Where it is not so perfectly evident and manifest that the answer called for cannot incriminate, as to preclude all reasonable doubt or fair argument, the privilege must be recognized and protected.' While the witness must judge of the effect of his answer, and should not be required to explain how it will criminate him, yet the court must determine, under all the circumstances of the case, whether such will be its tendency from the question asked; and where, from the nature of the investigation and the character of the testimony sought, it reasonably appears that the answer may criminate, or tend to criminate, the witness has the right to claim his privilege, and is not bound to answer. *State v. Duffy*, 15 Iowa,

425; *Kirschner v. State*, 9 Wis. 140; *Chamberlain v. Willson*, 12 Vt. 491; *Ex parte Boscowitz*, 84 Ala. 463, 4 South. 279." (Parenthetical matter supplied.)

Along the same line, see also *State ex rel. Mitchell v. Kelly*, 71 So. 2d 887, 897; *Lorenzo v. Blackburn*, 74 So. 2d 289, 291; and *State ex rel. Feldman v. Kelly*, 76 So. 2d 798, 801.

Therefore, if in your opinion the answers to the questions put to the alleged criminal sexual psychopathic person by the psychiatrists would not create a reasonable fear that criminal charges would be filed against him and that such answers would not tend to incriminate him, then I think that the proper course of action would be to lay the matter before the trial court for its determination.

If after due notice and hearing the trial court rules against such person's claim of privilege on the ground of self-incrimination then the said court may require him to answer the questions under penalty of being adjudged in contempt of court if he refuses to do so.

If such person persists in his refusal to answer even though adjudged in contempt of court and sentenced therefor, then I suggest that the psychiatrists make such personal examination of him as they can make under the circumstances and file a written report of the results of their examination together with their conclusions.

If the trial court sustains the claim of privilege against self-incrimination, I suggest that the psychiatrists should follow the same procedure, that is, make such personal examination of said person as they can make under the circumstances and file their written report and conclusions.

056-29—January 31, 1956

CRIMINAL PROCEDURE

ARRESTS—AID BY MUNICIPAL POLICE OFFICERS AT REQUEST OF HIGHWAY PATROL—§§321.05, 901.18, F. S.

To: *K. C. Alvarez, Chief of Police, Ocala*

QUESTION:

What are the rights of the municipal police in assisting to make an arrest at the request of the highway patrol?

You describe a situation where at the request of the highway patrol and to cooperate your department set up a road block at the city limits for the purpose of intercepting an automobile. The driver of a car avoided the road block, ran through red lights at a speed of 90 miles in the city with police officers in hot pursuit. The pursuit ended at Micanopy in Alachua county where the driver wrecked the car and was killed. The officers later learned the car was stolen but did not have that knowledge when in pursuit. Based on these facts, you wish to be advised

of the officers' right to assist in an arrest without warrant under the foregoing conditions.

This situation involved one in which the Florida highway patrol through an authorized patrol officer was endeavoring to make an arrest pursuant to and under the authority of §321.05, F. S. He summoned the aid of your policemen and was properly authorized to do so by §901.18, F. S., which provides:

"Any officer making a lawful arrest may orally summon as many persons as he deems necessary to aid him in making the arrest. Every person when so requested by an officer shall aid him in making such arrest."

Under §321.05, F. S., members of the Florida highway patrol are declared to be conservators of the peace of the state with full power to bear arms and to apprehend without a warrant any person in the unlawful commission of any acts over which the members of the Florida highway patrol are given jurisdiction.

The municipal police of Ocala under the authority of §901.18, supra, and at the request of the Florida highway patrol officer would have been authorized to make the arrest even though the pursuit extended into Alachua county. Our opinion, 055-24, which relates to hot pursuit made by municipal officers from cities for violation of local ordinances does not apply to this situation.

056-30—February 2, 1956

CORPORATIONS

CORPORATIONS NOT FOR PROFIT—APPLICABILITY OF PROVISIONS OF §§617.22-617.25, F. S. (CH. 29992, 1955) TO THE AMERICAN RED CROSS

To: *George C. Crawford, Clerk of Circuit Court, Leon County, Tallahassee*

QUESTION:

Is the American National Red Cross exempt from the provisions of Ch. 29992, 1955, which provides that no non-profit corporation, organization or association (with certain exceptions) may solicit funds or anything of value for charitable purposes in any county in the state, unless a permit shall have first been secured from the clerk of circuit court in the county where such solicitation is to be made?

Chapter 29992, 1955, relates to the solicitation of funds for charitable purposes and, among other things, requires that any non-profit corporation, organization or association, prior to soliciting funds in this state for charitable purposes, shall obtain a permit from the clerk of circuit court of the counties in this state in which solicitations are to be made (§1, Ch. 29992, 1955), and to file with the clerks of the circuit court financial statements and reports concerning such solicitations (§4, Ch. 29992, 1955). Certain classes of organizations, etc., are exempted from the requirements

of said Ch. 29992, but I do not feel that the American National Red Cross comes within such specific exemptions.

While the statute in question may, on its face, appear to apply to the Red Cross as it does to other organizations within its terms, I believe the Red Cross has a special status which clearly distinguishes it from such other charitable groups and requires a negative answer to your question.

The Red Cross is not a private voluntary organization but rather a quasi-official agency of the federal government. Chartered under an act of congress approved Jan. 5, 1905 (amended from time to time—see 36 U. S. Code, Ch. 1), its primary purpose is to furnish voluntary aid to the sick and wounded of the armed forces in time of war and to perform all the duties devolved upon a national society by each nation acceding to certain treaties of Geneva dealing with mitigating the evils inseparable from war and to which the U. S. has given adhesion (*ibid.* §3). To be sure, one of its purposes is to “carry on a system of national and international relief in time of peace” in matters of pestilence, famine, fire, floods, etc. (*ibid.* §3, paragraph 5th, but I do not regard this offshoot of its principal functions as in any way affecting the character of the Red Cross as an agency under federal supervision and outside the reach of the statute under discussion.

Another compelling feature of the position of the Red Cross as an arm of the federal government is the fact that 8 of the 50 members constituting the board of governors are appointed by the president of the U. S., that one of such 8 is designated by the president of the U. S. to act as the principal officer of the corporation and that the remaining 7 are required to be federal officials whose positions qualify them to promote Red Cross programs (*ibid.* §5(a)). In addition, and of singular as well as cumulative significance, is the fact that the Red Cross is required to submit to the secretary of defense an annual report of its proceedings, including a “full, complete, and itemized report of receipts and expenditures of whatever kind,” to be audited by the department of defense which is required to transmit a copy of the report to congress (*ibid.* §6).

In short, as an organization subject to federal supervision and control, created by an act of congress for the declared purpose of effectuating an international treaty of national and international relief, I do not believe the Red Cross is amenable to Ch. 29992, 1955.

056-31—February 2, 1956

REGULATION OF TRADE, COMMERCE AND INVESTMENTS
DOG RACING AND HORSE RACING—ISSUANCE OF STATE
AND COUNTY OCCUPATIONAL LICENSES—§550.10, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Should county tax collector issue state and county occupational licenses under provisions of §550.10, F. S. to

persons selling printed information or leads to winners in certain races outside race track grounds under the following statement of facts?

These circulars will be distributed without charge outside of the Sunshine racing park at Oldsmar to the persons entering the race track grounds. Apparently the idea is to give racing information along with advertising to the patrons at the race track. However, please note the 6th and 7th races on the enclosed circular, which we have enclosed in red, which refer to "code horse." The "code horse" refers to 2 races on which these persons will sell an envelope containing their opinion of the best horses that will run in the 6th and 7th races to the patrons for \$2. We are also enclosing a sample of one of these envelopes which contains the "code horse" information. These envelopes can be obtained at the places of business whose advertisements appear in the circular for \$2, \$1 of which is retained by the place of business and \$1 of which is given to the publishers of the circular, or they may be obtained from persons selling these envelopes outside the racing park for \$2.

If these persons were subject to be licensed under any law they would be required to obtain an occupational license under §550.10, F. S., which provides in part as follows:

"All persons connected with race tracks, including the gate keepers, announcers, ushers, starters, officials, drivers, owners, sellers of racing forms or bulletins, attendants in connection with the wagering machines, managers of tracks, or other persons directly employed by any track, shall pay an occupational license tax of \$3 annually for those persons receiving \$8 or less per day; \$5 annually for those persons receiving more than \$8 and not more than \$15 per day; \$15 annually for those persons receiving more than \$15 per day and not more than \$30 per day; \$25 annually for all persons receiving more than \$30 per day; and \$25 for those persons not receiving a daily salary but under contract to said track and shall be so licensed by the commission."

A distinction is to be noted as between a situation where a publication indicates a best selection or favorite and one where compensation is paid for a tip on a horse entered in a particular race to be run. This latter practice is embraced in the "code horse" scheme and in our opinion involves touting as defined in §817.37, which reads as follows:

"Any person who knowingly and designedly by false representation attempts to, or does persuade, procure or cause another person to wager on a horse in a race to be run in this state or elsewhere, and upon which money is wagered in this state, and who asks or demands compensation as a reward for information or purported information given in such case is a tout, and is guilty of touting."

This practice involves selling purported information of the kind condemned by the statute which in the very nature of things would result in money being wagered on a horse in a race to be run. Laws should not be construed to permit evasion and circumvention. The public policy of the state frowns on touting for compensation. The "code horse" scheme seems clearly designed to contravene this policy. Accordingly we do not believe the license should issue.

056-32—February 6, 1956

TAXATION

HOMESTEAD TAX EXEMPTION—RIGHTS OF CESTUI QUE TRUST; TRUSTEE'S TITLE—§7, ART. X, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where the title to real property in this state is held by trustees under a trust giving the cestui que trust the use and occupancy of such property during his or her lifetime with remainder over to the donors or their heirs, is such property within the purview of §7, Art. X, State Const., and entitled to tax exemption as a homestead?

"Every person who has the legal title or *beneficial title in equity* to real property in this state and, who resides thereon and in good faith makes the same his or her permanent home . . . shall be entitled to exemption from all taxation, except assessments for special benefits, up to the assessed valuation of \$5000 . . ." (§7, Art. X, State Const.). In the matter before us a husband and wife, residents of another state, conveyed a dwelling house in Pinellas county, to themselves as trustees, for the use and occupancy of the mother of the wife during the remainder of her life (even should the cestui que trust outlive the settlors), with remainder over after the death of the cestui que trust to the settlors or their heirs. The legal title to the property is vested in the trustees, with a beneficial life estate (a beneficial title in equity for life) in the cestui que trust, and a remainder in the settlors and their heirs after the termination of the life estate.

The fact that the settlors of the trust are also the trustees presents no difficulty, as "a settlor of a trust may in general make himself the trustee of it" (54 Am. Jur. 101, §116; see also 90 C. J. S. 137, §210, note 69). Under the trust deed before us the trustees hold the legal fee title, with the cestui que trust holding a life estate, and upon the death of the cestui que trust the trust comes to an end and the remainder is to be distributed by the trustees to certain named parties. There are clearly 2 or more estates in the lands, (1) the life estate, and (2) the remainder, which is to be distributed by the trustees upon the death of the life tenant. The life estate is vested in the cestui que trust and the remainder in the trustees for the purpose of distribution to the remaindermen upon the death of the cestui que trust. Life estates are estates of freehold; the life tenant is a freeholder (33 Am. Jur.

460, §2). The life estate is less than a fee, therefore, not the entire estate.

Under Florida taxing statutes the levy and assessment is on the realty itself, at its full cash value, regardless of the existence of estates in it (*Bancroft Investment Corp. v. Jacksonville*, 157 Fla. 546, 27 So. 2d 162, text 167) where all such estates are subject to taxation. Where one or more of the estates is exempted from taxation, then the estates not subject to the exemption may be taxed (*Bancroft Investment Corp. v. Jacksonville*, supra, So. text 169 et seq.; 84 C. J. S. 773-4, §404, note 23; AGO 050-363, of July 25, 1950). This is a democracy in which every parcel of property is expected to bear its due portion of the burden of taxation, unless exempted by law. (*Bancroft Investment Corp. v. Jacksonville*, supra, So. text 170). Here we have 2 estates, one entitled to tax exemption under §7, Art. X, State Const. (the life estate) and the other entitled to no exemption (the remainder vested in the trustees for distribution upon the death of the cestui que trust).

We are, therefore, of the opinion that the life estate of the cestui que trust residing on the property and making the same his or her permanent home is entitled to exemption under §7, Art. X, State Const.; but we find nothing entitling the remainder of the estate (the title to the lands less the exempt life estate) to tax exemption. These observations seem to answer the above question.

056-33—February 7, 1956

MOTOR VEHICLES

REGULATION OF TRAFFIC ON HIGHWAYS—§317.76(4), F. S.

To: *H. N. Kirkman, Director, Department of Public Safety, Tallahassee*

QUESTION:

Would a motor vehicle known as a hydrocrane, model H-3, self-powered machine, manufactured by Bucyrus Erie Co. of Milwaukee, Wis. be in violation of Ch. 317, F. S., if operated upon state highways?

The pictures and enclosures indicate and apparently it is admitted that the boom on said piece of equipment will extend more than 3 feet beyond the front wheels or the front bumper of the vehicle.

Chapter 25342, 1949, now §§317.73-317.95, F. S. both inclusive, was enacted in 1949 by the Florida legislature and is known in this state as the Florida motor vehicle safety law. It will be noted that §317.76, F. S., places a maximum on width, height and length of vehicles, sub §(2) providing that no vehicle shall exceed a height of 12 ft. 6 in. inclusive of load carried thereon with certain exceptions, not here material.

Subsection (3) provides that no vehicle shall exceed a length of 40 ft., extreme overall dimension inclusive of front and rear bumpers and load carry thereon with certain exceptions, not here material.

Subsection (4) provides as follows:

"The load upon any vehicle operated alone, or the load upon the front vehicle of a combination of vehicles, shall not exceed more than 3 ft. beyond the front wheels of such vehicle or the front bumper of such vehicle if it is equipped with a bumper."

It is noted from the specifications that the model H-3 Hydro-crane has a road speed of 50 miles per hour. Inasmuch as Ch. 317 is a safety act and construction must be given in the interest of public safety, it is my opinion that the boom attached to the hydrocrane is a portion of the load carried thereon and comes within the provisions of §317.76(4), F. S.

A vehicle such as the one described in the specifications attached to your request may be operated in the state only under the provisions of §317.81, F. S., by securing a permit from the state road department upon submitting an application in writing and good cause being shown therefor that the operation of said vehicle is in the public interest and when the same is operated under conditions specified by the issuing authority under said statute.

056-34—February 9, 1956

REGULATION OF TRADE, COMMERCE AND INVESTMENTS

SALE OF SECURITIES—APPLICATION OF CH. 517, F. S. TO CERTIFICATES OF INTEREST IN LIMITED PARTNERSHIP—§620.18, F. S.

To: *Florida Securities Commission, Tallahassee*

QUESTION:

Where real property in this state is held by or for a limited partnership existing under and by virtue of Ch. 620, F. S., and such partnership has no other assets, are the certificates of interest, or other evidences of partnership interest, within the purview of Ch. 517, F. S.?

It appears from the file handed us with the request for opinion that the "basic plan is to acquire a parcel of land upon which a multi-story building would be erected. The property would be financed by a 1st mortgage for approximately half of the value of the lands and improvements, and the balance would be financed by investors who would take a participating interest in a joint adventure. Title to the land would be held by the general partner and the interest of each of the investors would be evidenced in a limited partnership agreement, each partner receiving a certified copy thereof." (see letter from Herman I. Bretan to the commission). The articles of agreement will show the contribution and fractional interest of each of the partners. One of the partners, or members of the syndicate, "is the holder of the legal title to the premises . . ." The interests of the "investors" or limited partners may be transferred (§7 of the proposed participation agreement).

"A limited partner's interest in the partnership is personal

property" (see §620.18, F. S.). "Although it has been said that the ownership of firm property is vested in the limited partnership as such, there is authority that the legal title to all the firm property should be vested in the general partner." (68 C.J.S. 1024, §475). The attorney general of Minnesota, on May 26, 1939, held that the sale of interests in a limited partnership was not exempt as a "limited sale" under the securities law, thereby holding that interests in a limited partnership were securities within their securities statutes. We are of the opinion that the above question should be answered in the affirmative.

Although the above question is answered in the affirmative, we have made no attempt to determine whether the transaction is or is not within the purview of §517.06, F. S., which question is left to the decision of the commission if the same should be material.

056-35—February 10, 1956

PROFESSIONS AND VOCATIONS

RULES AND REGULATIONS—SCOPE—IMPOSITION OF FEES

To: *Edward C. Grissom, Jr., Secretary-Treasurer, State Board of Funeral Directors and Embalmers, Kissimmee*

QUESTION:

Does the state board of funeral directors and embalmers have the authority to charge apprentices a \$5 registration fee and a \$2.50 renewal fee?

I do not find any statutory authority granted the state board of funeral directors and embalmers to charge apprentices any fees whatsoever until an apprentice makes application to take the examination for licensure as an embalmer, at which time the fee to be charged is fixed by statute in the amount of \$25.

Inasmuch as the rule-making power of the public administrative body is delegated legislative power, which it may not use either to abridge the authority given it by the legislature, or to enlarge its powers beyond the scope intended by the legislature, statutory provisions control with respect to what rules and regulations may be promulgated by such a body, as well as with respect to what fields are subject to regulation by it.

The power delegated to the board by the legislature allows it wide discretion in matters of public and procedural policy to help carry out the purpose, operation and enforcement of the statute; however, such power of the board does not include the authority to change, add to, subtract from or amplify the law and the powers definitely conferred.

Accordingly, your question is answered in the negative.

056-36—February 10, 1956

WRECKED OR DERELICT PROPERTY

**ABANDONED MOTOR VEHICLES—DISPOSITION—LIENS—
TITLE CERTIFICATES—§§85.01, 85.07, 85.18, 86.01-86.06,
319.15, 319.28 AND CH. 705, F. S.**

To: Thomas J. Kelly, Sheriff, Dade County, Miami

QUESTIONS:

1. What legal steps can a garage owner take to dispose of an automobile abandoned in his garage by its owner?
2. What legal steps can a garage owner take to dispose of abandoned or wrecked automobiles stored in his garage by municipal police officers?
3. What legal steps can a garage owner take to dispose of abandoned or wrecked automobiles stored in his garage by the sheriff's office?

In my opinion the above questions are answered as follows:

AS TO QUESTION 1:

The lien laws of the state provide that a lien prior in dignity to all others accruing thereafter shall exist on any engine or machine in favor of any person who by himself or through other persons performs any labor upon such engine or machine. (§§85.01, 85.07, F. S., 1955; *G. F. C. Corp. v. Spradlin*, 38 So. 2d 679. See also §85.18, F. S. 1955, which provides a lien for garage space.)

Judicial proceedings are provided for the enforcement of such liens (§§86.01-86.06, F. S., 1955). In addition a summary remedy is provided whereby the lien holder, without going through judicial proceedings, but after giving proper notice, can sell the property at public auction at the expiration of 3 months from the date the charges which created the lien became due (§86.08, F. S. 1955).

AS TO QUESTION 2:

I understand that §§294-297 of the ordinances of the city of Miami establish the procedure for the sale of abandoned motor vehicles found upon the public streets, and after said vehicles have been stored by the city for a period of 90 days. Assuming that said ordinance is valid, it is my opinion that the city should relieve the garage owner of the nuisance of such vehicles by disposing of them in the manner prescribed by the ordinance.

AS TO QUESTION 3:

I understand that there is no special act of the legislature applicable to Dade county relating to this question; therefore, the state law would apply in this instance.

Chapter 705, F. S. 1955, prescribes the procedure to follow when disposing of wrecked derelict goods, abandoned motor vehicles, or other personal property found in any county. This would

include wrecked automobiles. The procedure requires the person finding such property to report such finding to the county judge of the county wherein the property is found; and, upon receipt of an order from such judge, the sheriff is required to sell such property at public auction.

Authorization is given in the statute for the county judge to appoint 2 disinterested citizens of the county to act as arbitrators in the determination of the amount of salvage the person finding and reporting the property shall receive. Salvage is limited to half of the proceeds of the sale of such abandoned and wrecked automobiles.

The county judge is entitled to 1% of the proceeds for his services, and the sheriff is authorized 2½% for his services. The balance of the proceeds is required to be held by the sheriff for a period of 1 year and a day. If a legal claim has not been established by the true owner of the vehicle during this period, the sheriff is required to pay such proceeds to the commissioner of agriculture who in turn pays such proceeds into the state treasury.

In the situation presented here in question 3, I believe the sheriff is the salvor, and, as such, is responsible for notifying the county judge of the presence of these abandoned and wrecked motor vehicles, so that they will be disposed of in the manner provided by law.

Section 319.15, F. S. 1955, provides that a lien to be enforceable must be recorded in the office of the state motor vehicle commissioner. In my opinion, no matter what method is applicable to the enforcement of the lien or disposal of the vehicle, the commissioner should be furnished with a description of such vehicle, its license number and engine number, and a request made for the names and addresses of the owner and lien holders of record, in order that such persons may be notified of the impending sale by the lienor, city or sheriff, whichever the case may be.

Inasmuch as the question will probably be propounded to you as to the issuance of title certificates by the motor vehicle commissioner on such abandoned and wrecked motor vehicles, perhaps this question should also be discussed at this time.

Section 319.28, F. S. 1955, authorizes the motor vehicle commissioner to recognize the transfer of ownership of a motor vehicle by operation of law, as upon judicial sale, or whenever a motor vehicle is sold to satisfy storage or repair charges, etc. This section requires the surrender of the prior certificate of title to the commissioner, or, when that is not possible, a presentation of satisfactory proof of ownership, and in either case payment of the fee prescribed by law before the certificate of title is issued to the applicant.

This opinion considers, and intends to supplement and not conflict with, the opinion of the attorney general dated July 9, 1927, and opinion 051-361 dated Oct. 16, 1951, which opinion relates to the disposition of abandoned and wrecked automobiles.

056-37—February 13, 1956

BOARD OF COMMISSIONERS OF STATE INSTITUTIONS

**PUBLIC BUILDINGS—DUTY OF BOARD—FLORIDA
DEVELOPMENT COMMISSION—CH. 29831, 1955
(§§288.17-288.18, F. S.)**

To: *Harry E. Simmons, Executive Director, Council for the Blind,
Tampa*

QUESTION:

Is the board of commissioners of state institutions required to assume responsibility and to participate in carrying out construction projects of state buildings under the provisions of Ch. 29831, 1955?

Section 2 of Ch. 29831, 1955, provides, in part, "The board of commissioners of state institutions shall be responsible for promoting any state building project financed as provided by law in any community where a state building is needed The board of commissioners of state institutions may make the improvement commission its agent in the planning and the supervision of the buildings, including the collection of rentals and the maintenance of buildings and sale of certificates."

The above quoted act would appear to require the board of commissioners of state institutions to cooperate with the improvement commission (now known as the Florida Development commission, pursuant to Ch. 29788, 1955) and other state agencies in promoting the construction of necessary state buildings. The act provides that the board of commissioners may make the development commission its agent in carrying out the necessary details of planning, financing and construction of buildings. This portion of the act is permissive and I believe that the board of commissioners of state institutions is authorized to determine in each specific project the degree of responsibility it wishes to delegate to the development commission.

Apparently all details of planning, financing and construction could be delegated to the development commission if the board of commissioners so desired or only a limited portion of such responsibilities could be delegated if the board considered such action advisable.

In any event, the final responsibility for carrying out such projects is vested in the board of commissioners of state institutions and any work delegated to the development commission as its agent must meet with the final approval of the board of commissioners. The actual details of planning, financing and construction in any specific project should be agreed upon in advance as to method of operation between the board of commissioners, the development commission and other state agencies which may be involved.

Your question is therefore answered in the affirmative, as modified by the above observations.

056-38—February 13, 1956

SHERIFFS

EXECUTIONS—FEES—DOCKETING AND INDEXING—
§§30.23, 55.15, F. S.

To: *John A. Madigan, Jr., Attorney, Florida Sheriffs' Association, Tallahassee*

QUESTION:

Where a sheriff, after receipt of a writ of execution, in good faith makes search for property out of which such execution may be satisfied, but finds none, and at the request of the attorney for the plaintiff makes a return of nulla bona, but more than 2 years later the attorney discovers property upon which levy can be made and has a 2nd writ of execution issued, is the sheriff entitled to a fee for docketing and indexing the 2nd execution?

Section 30.23, F. S., in setting forth various fees for sheriffs, provides, in part: "Docketing and indexing executions, which the sheriff shall cause to be indexed alphabetically as to each defendant in the execution and cross indexed alphabetically as to each plaintiff for *each* execution — \$1.50." (Emphasis supplied.)

Section 55.15, F. S., provides that the plaintiff shall be entitled to "his execution at any time within 3 years after the rendition of any judgment or decree, and upon the issuance of his execution, shall be entitled to renew the same upon the return to the clerk's office of the original execution, from time to time for 20 years . . ." Once the return of nulla bona is properly made and filed by the sheriff, no levy can be made by virtue of the original execution and only after issuance of another or renewal execution may a levy be made by the sheriff. Consequently, where the sheriff, in good faith, after proper search for property standing in the name of the defendant and finding none, returns the execution nulla bona at the request of the plaintiff's attorney, no levy can be made under the initial writ. The plaintiff's attorney, having requested the issuance of an additional execution which must be docketed and indexed as required by §30.23, F. S., thereby initiates in legal effect a new execution for which the sheriff should be compensated. This seems to be clearly provided by law and, therefore, not governed by *Bradford v. Stoutamire*, Fla., 38 So. 2d 684.

The question is properly answered in the affirmative.

056-39—February 13, 1956

CRIMINAL PROCEDURE

APPEALS—MUNICIPAL COURT TO CIRCUIT COURT—
TRANSMISSION OF RECORD—§§932.52, 924.25, 924.28, F. S.

To: *Joseph O. Macbeth, Assistant State Attorney, Sebring*

QUESTION:

Where an appeal is taken to the circuit court from

a conviction in a municipal court, pursuant to §932.52, F. S. does any duty rest upon the appellant to see to it that the clerk of the municipal court, or the judge if there be no clerk, transmits the appeal record to the circuit court?

Subsection (10) of §932.52, F. S., provides as follows:

"(10) It shall be the duty of the clerk, or the judge if there be no clerk, of the municipal court as soon as completed and ready for transmittal to forthwith transmit, under his hand, to the clerk of the circuit court, the entire original record, including the reporter's authenticated transcribed notes, or copy thereof, the notice of appeal and such other papers, books and pleadings as may have been filed in the cause. The record shall be accompanied by a certificate of such clerk or judge reciting that such record constitutes all the record and files in said cause."

This statutory provision places the primary duty of transmitting the appeal record to the circuit court upon the clerk of the municipal court or upon the judge if there be no clerk but I do not think that this relieves the appellant of responsibility to see that the clerk or judge of the municipal court, as the case may be, transmits such record to the circuit court within the time required by sub §(11) of said §932.52, or within such extension of time as may be obtained under authority of said sub §(11).

Prior to the 1953 amendment of §924.25, it required that:

"Upon notice of appeal being filed by the defendant, *the clerk of the trial court shall, within 10 days after the filing of grounds of appeal, unless a longer time is granted by the trial court, transmit to the clerk of the appellate court the appeal papers. . .*" (Emphasis supplied).

and §924.28 provided that:

"924.28 *Failure of clerk to transmit appeal papers as required.*—Failure of the clerk to transmit all the appeal papers within the time provided shall not prejudice the rights of the parties. If the clerk fails to transmit any of the papers the appellate court or the trial court may on its own motion, or shall on the motion of either party, direct the clerk to transmit such papers."

Nevertheless, the supreme court of Florida dismissed many appeals upon the state's motions because the appeal records were not transmitted to said court in due time. It is my view that the supreme court's dismissal of said appeals for failure to file transcripts of record despite the provisions of §924.25 and §924.28 is to be construed as a recognition by that court of the proposition that a duty rests upon the appellant to see that his appeal is perfected and that he may not escape the consequences of failure to file his transcript of record in the supreme court by sitting by and contending that he had no responsibility in the matter.

Likewise, it is my opinion that sub §(10) of §932.52 does not

relieve the appellant of his duty to see that the appeal record is filed in the circuit court. This opinion is strengthened by the fact that sub § (16) of said statute requires that the appellant shall enter into a bond "*conditioned to prosecute his appeal with dispatch and to abide the judgment of the court therein*"; I do not think that an appellant is prosecuting his appeal with dispatch if he does nothing and lets the time go by without seeing to it that the clerk or judge of the municipal court, as the case may be, transmits the appeal record to the circuit court as required by the statute.

056-40—February 14, 1956

PROFESSIONS AND VOCATIONS

CHIROPRACTORS—AUTHORITY TO SIGN DEATH CERTIFICATES—§460.23, F. S.

To: *Daniel K. Kirk, Secretary-Treasurer, Florida State Board of Chiropractic Examiners, Jacksonville*

QUESTION:

Does a chiropractor properly licensed under the laws of the state have the legal right and authority to sign a death certificate?

Section 460.23, F. S., provides:

"All licensed chiropractors shall observe and be subject to all state and municipal regulations relating to the control of contagious and infectious diseases, *sign death certificates* and comply with all laws pertaining to public health, reporting to the proper authority as other practitioners are required to do." (Emphasis supplied.)

In view of the foregoing statute, your question is answered in the affirmative.

056-42—February 14, 1956

STATE OFFICERS AND EMPLOYEES

EMPLOYMENT—RESIDENCE REQUIREMENTS—§§112.02 AND 443.12(4), F. S.

To: *Burnis T. Coleman, General Counsel, Florida Industrial Commission, Tallahassee*

QUESTION:

Does the applicant for employment with the unemployment compensation division of Florida industrial commission meet the residence requirements of §443.12 (4), F. S., read in conjunction with §112.02, F. S., under circumstances as stated?

Certain facts evidenced by the application for employment, which accompanied the request for opinion, and others furnished me, are mentioned. The applicant is a native-born citizen of this state. She received all her education in Florida. She has never moved her domicile from this state. Some years ago,

after her marriage, she accompanied her husband, a school teacher, to various places where he obtained employment outside the state, and where she also obtained employment, as follows: From Jan., 1950 to June 1950, in Missouri; from Sept., 1950 to May, 1952 in Louisiana; from Dec., 1953 to Aug., 1954 in Mississippi. From Dec., 1954 to Aug., 1955 she was employed at Bushnell, Florida.

In view of the provisions of §443.12(4), F. S., the question has arisen concerning her eligibility for employment with the commission at this time. In this connection attention is also given the provisions of §112.02, F. S., covering the same subject matter. Relevant wording from §443.12(4) and all of §112.02 are quoted:

"All persons employed to work for the state or for any county of the state, shall be bona fide residents of the state for 2 years next prior to such employment, except only where after due diligence no person can be found in the state possessing the required qualifications necessary to the particular employment." (§112.02, F. S.)

"No person shall be employed by the commission nor shall the commission authorize the payment of any compensation to any person employed under this chapter who has not been a resident of the state for at least 2 years immediately preceding his employment." (From §443.12(4), F. S.)

On March 24, 1942, then Attorney General Watson, construed the mentioned sections in opinion 042-137 (1941-42 Biennial Report 591), copy of which opinion is attached. It will be noted that the effect of such opinion was to hold that residence contemplated by these sections means actual residence in Florida, as distinguished from domicile. It will be noted in said opinion that §443.12(4) in 1942 required 5 years' residence; otherwise the section today is the same.

I agree with the conclusion reached in opinion 042-137 that "resident" as set forth in §443.12(4) F. S., is subject to the same construction as "bona fide residents", as used in §112.02, F. S., in the light of the rule that in the construction of a statute all laws in *pari materia* should be considered to ascertain legislative intent. E.g., *Bryan's Heirs v. Dennis*, 4 Fla. 445; *Peninsular Industrial Ins. Co. v. State*, Fla., 55 So. 398.

It is recognized that unless qualified, the word "resident" or "residence" used in a statute creates ambiguity. Reasonably we may look to the intent of a statute in which either of such words is used without qualification to aid us in ascertaining the intent. The purpose of this statute is quite apparent; and reasonably it is difficult to believe, and it is not believed, that it was the intent of the legislature which adopted it that its provisions be invoked against a person domiciled in Florida, as here found.

The court stated in *Herron v. Passallaigue*, Fla., 110 So. 539, that the rule is well settled that "resident", "residing in", or equivalent terms, when used in statutes, or actions or suits relating to taxation, right of suffrage, divorce, limitation of actions or the like are used in the sense of "legal residence". In *Minick v. Minick*,

Fla., 149 So. 483, the court differentiates between "residence" and "domicile" stating in effect that any place of abode or dwelling place constitutes a "residence" while the term "domicile" relates rather to legal residence or fixed place of abode. Our supreme court has further indicated that legal residence or domicile may be acquired by one coming from another state or country into this state with the intention of permanently remaining here. *Warren v. Warren*, Fla., 75 So. 35. Hence, a person may have a legal residence or a domicile in Florida without necessarily being a voting citizen of Florida.

I take notice of the fact that opinion 042-137 has been observed and followed by administrative officers since its rendition. It is only with considerable reluctance that I must disagree with the conclusions set forth in it. However, in the light of the purpose of these statutes, I am driven to the reasonable conclusion that the words "bona fide residents" as used in said §112.02 and the word "resident", as used in said §443.12(4) refer to persons domiciled in Florida.

For the reasons stated, in my opinion the above-named applicant meets the residence requirements of both §§112.02 and 443.12(4), F. S.

056-43—February 16, 1956

REGULATION OF TRADE, COMMERCE AND INVESTMENTS

MILK COMMISSION—PRODUCERS AND DISTRIBUTORS— PAYMENT OF TAX UNDER §§501.04 AND 501.09, F. S.

To: *L. K. Nicholas, Jr., Administrator, Florida Milk Commission,
Jacksonville*

QUESTIONS:

1. Do producers and distributors of milk have to pay to the Florida milk commission the tax imposed by §501.09, F. S., on that portion of milk sold to the public schools and charitable institutions in Florida?

2. Is such tax due on milk sold to federal installations in Florida, such as naval bases, veterans hospitals and air force bases?

Section 501.09(4)(b), F. S., provides, among other things, as follows:

"For the privilege of continuing in or engaging in the business of distributing milk or acting as a distributor under the provisions of this chapter, there is imposed upon every distributor a tax in an amount equal to one tenth of one cent upon each gallon of milk distributed by each distributor during each calendar month. The amount of such tax shall be remitted by each distributor to the commission at the time that the monthly reports are required to be filed by the distributor with the commission as provided by this chapter." (Emphasis supplied.)

Section 501.09(6), F. S., provides:

"For the privilege of continuing in or engaging in the business of producing milk, or acting as a dairy farmer under the provisions of this law, there is hereby imposed upon every dairy farmer a tax in an amount equal to one tenth of one cent upon each gallon of class 1 milk produced, as defined, by the commission, by each such dairy farmer, and delivered to the platform of the distributor and/or producer-distributor during each calendar month. The amount of such tax shall be deducted by the distributor and producer-distributor from the monies due to the dairy farmer, and by such distributor and/or producer-distributor remitted to the commission at the time that the monthly reports are required to be filed by the distributors and producer-distributors with the commission, as provided by this chapter; and in event the dairy farmer acts as his own distributor he shall remit the said tax to the commission at the time that the monthly reports are required to be filed by the distributor or producer-distributor with the commission, as provided by this chapter." (Emphasis supplied.)

Section 501.04(12), F. S., prohibits the Florida milk commission from fixing milk prices sold and delivered to lunch rooms of public schools for student consumption, and to charitable organizations of a public or semi-public nature who buy milk for free distribution to the needy. There is no provision in the statutes relative to federal installations or institutions.

In view of the foregoing, it is my opinion that both of your questions should be answered in the affirmative.

056-44—February 16, 1956

REGULATION OF TRADE, COMMERCE AND INVESTMENTS

STATE PLANT BOARD—CERTIFICATE OF INSPECTION— FEES—\$581.081, F. S.

To: J. B. Culpepper, Executive Secretary, Board of Control,
Tallahassee

QUESTIONS:

1. Can the state plant board charge a half-fee for the last 6 months of a year?
2. Are the fees only specifically available for grading, and if so, if there was a particular group of plants on which inspection was required which was not graded, should a fee be required?
3. Should a fee be collected when a man sells no plants but uses them all on his own property, often moving them long distances along public highways?

AS TO QUESTION 1:

Section 581.081, F. S. 1955, provides:

"Certificate of Inspection.—Before any nurseryman,

dealer or agent shall sell or distribute, or offer for sale or for distribution, any nursery stock in this state he shall apply to the board and obtain a certificate of inspection indicating that he has complied with the provisions of this act and the lawful rules and regulations made and promulgated by the board. Each application for a certificate of inspection shall be accompanied by a certificate fee in such amount as shall be determined by the board; and upon the issuance of such certificate *it shall be renewed annually thereafter upon its anniversary date*, upon satisfactory showing to the board that the provisions of this law and the regulations of the board have been complied with and upon the payment of an annual renewal fee in such amount as shall be determined by the board; provided, however, that neither such certificate of inspection fee nor such annual renewal fee shall exceed \$25. All monies received by the board under the provisions of this section shall be deposited with the state treasurer in the state agencies fund, and shall be used by the board to defray its expenses in carrying out the additional duties imposed on the board by this act." (Emphasis supplied.)

The above quoted act clearly provides for an annual fee to be paid each year "upon its anniversary date." There is no basis or authority for the board to charge a half-fee for the last 6 months of the year. The certificates in question are not issued on a calendar year basis but may be issued at any time for a full year. Question 1 is therefore answered in the negative.

AS TO QUESTION 2:

Section 581.081 requires a "certificate of inspection" before nurserymen, dealers or agents shall sell or distribute any nursery stock. No mention is made of "grading" in connection with the inspection certificate required. The inspection certificate and fee charged therefor are required regardless of grading.

AS TO QUESTION 3:

It is my opinion that §581.081 relates only to nursery stock sold or distributed or offered "for sale or for distribution."

The word "distribution" would seem to imply delivery of the plants into the possession of others.

So long as the plants are not sold or distributed for any reason to other persons but remain the property of the individual who grows them solely for his own use on his own property, I do not believe that the act would apply. This question is therefore answered in the negative.

056-45—February 16, 1956

EDUCATION

RETIREMENT SYSTEM FOR TEACHERS—BENEFITS—
DISTINCTION BETWEEN “AN EMPLOYMENT”
AND “AN OFFICE”—§238.181, F. S.

To: K. D. Farris, Executive Secretary, Teachers' Retirement System, Tallahassee

QUESTION:

May a person retired on or after July 1, 1955, under the provisions of Ch. 238, F. S. 1955, continue to receive monthly benefits while serving as a member of the Florida legislature or as a member of a county board of public instruction if he is compensated for such service?

Section 238.181, F. S., as amended by the 1955 legislature, provides:

“Retired member may be substitute teacher; conditions.—Any member who has retired may be employed, on a substitute basis only, as a substitute teacher in any of the public free schools of this state, and such employment shall not affect the rights of such retired member under the retirement system, including, without limiting the general terms, hereof, his right to receive his retirement allowance; provided that a county board of public instruction may employ as a substitute teacher a member who has retired only if the county board is unable to employ for such substitute teaching position, a qualified teacher who has not retired.

“Any member who hereafter retires and receives a retirement allowance under the provisions of this chapter shall have his retirement allowance suspended during any period of re-employment in any capacity whatsoever by the state or any political subdivision, department, branch, or agency thereof, except as in this chapter specifically provided.” (Emphasis supplied).

In order to answer the question we must consider whether the “employment” includes a public officer as defined by the supreme court. In *State ex rel Clyatt v. Hocker*, 39 Fla. 477, 22 So. 721, the court, in its Syllabus, in part said: “. . . A person in the service of the government, who derives his position from a duly and legally authorized election or appointment, whose duties are continuous in their nature, and defined by rules prescribed by government, and not by contract, consisting of the exercise of important public powers, trusts, or duties, as a part of the regular administration of the government, the place and the duties remaining though the incumbent dies or is changed, is a public officer; . . .”

In *Re Advisory Opinion to the Governor*, 153 Fla. 650, 15 So. 2d 765, the court cited the *Hocker* case, *supra*, with reference to what constitutes a public officer and then said, in distinguishing

an office from an employment, that an employment does not authorize the exercise "in one's own right of any sovereign power or any prescribed independent authority of a governmental nature; and this constitutes perhaps the most decisive difference between an employment and an office, and between an employee and an officer." See, also, *State ex rel Dresskell v. City of Miami*, 153 Fla. 90, 13 So. 2d 707; *State ex rel Holloway v. Sheats*, 78 Fla. 583, 83 So. 508; *Dade County v. State*, 95 Fla. 465, 116 So. 72. Applying this test, a legislator or member of a county board of public instruction clearly occupies a public office and, consequently, is not an employee. Hence, I do not think the prohibition found in §238.181, F. S., applies to either of them. Of course, where a person retires under one system provided by the laws of the state, he cannot thereafter, after accumulating the required period of service, retire under another system and participate therein.

Your question is therefore answered in the affirmative.

This opinion is limited to the teachers' retirement system and would not apply to other retirement systems either directly or by implication.

056-46—February 20, 1956

ELECTORS AND ELECTIONS

COUNTY EXECUTIVE COMMITTEE—ADDITIONAL MEMBERS IN LARGE PRECINCTS—METHOD OF SELECTION—§103.111, F. S.

To: *Philip Opper, Secretary, Orange County Democratic Executive Committee, Orlando*

QUESTION:

Where a particular precinct in a county has an official registration of more than 1000 qualified electors and an additional 2 members of a county executive committee are authorized by §103.111, F. S., may such additional members be supplied through the method prescribed for the filling of vacancies on the executive committee?

Subsection (2) of §103.111, F. S., as amended by Ch. 29935, 1955, provides in part as follows:

"The county executive committee of each political party shall consist of 2 members, a man and a woman, from each precinct within the county, who shall be elected for 4 years at the 2nd primary held in the year 1958, and every 4 years thereafter; provided that in precincts having an official registration of more than 1000 qualified electors an additional 2 members, a man and a woman, shall be authorized and their membership provided for as in other precincts . . ."

Sub §(3) of the same section provides in part as follows:

"In the event of no election of committeemen or committeewomen, or of a vacancy occurring from any

other cause in any county executive committee, the chairman shall call a meeting of the county executive committee by due notice to all members and the vacancy shall be filled by a majority vote of the members of the county executive committee attending from among the members of the party residing in the precinct where the vacancy occurs . . ."

The authorization for additional membership on county executive committees constitutes the creation of 2 new party offices on such committees for each precinct in the county that may have more than 1000 registered electors. Since it is not specifically provided that these new party offices shall not be filled until 1958, and since provision is made for the immediate filling of vacancies, it reasonably follows that the vacancies should be filled in the manner indicated in sub §(3) of §103.111 for the remainder of the 4 year term that will expire in 1958.

Thus, it is my opinion that your question should be answered in the affirmative.

056-48—February 21, 1956

PUBLIC HEALTH

CRIPPLED CHILDREN'S COMMISSION—EMPLOYMENT OF OUT-OF-STATE FACILITIES AND PERSONNEL— §§391.01, 391.05 AND 391.06, F. S.

To: *William R. Stinger, Director of Services, Florida Crippled Children's Commission, Tallahassee*

QUESTION:

Is the crippled children's commission limited by statute to the use of Florida hospital facilities and personnel in the treatment and services rendered to their patients?

STATEMENT OF FACT:

"At the present time, the Florida crippled children's commission is rendering services for children with operable heart conditions. Most of the surgical procedures involved can be performed in Florida, but there are few relatively new operations that are being performed almost exclusively in medical centers such as the Mayo clinic and the Johns Hopkins hospital."

Section 391.05, F. S., provides:

"As soon as practicable after the appointment and organization of the Florida crippled children's commission, from time to time, and thereafter, such commission shall select and designate hospitals, clinics, convalescent homes, or other medical centers from those approved either by the American college of surgeons, American hospital association or the state board of health as orthopedic centers, the same to be located in various sections of the state, so

as to serve most economically and efficiently the crippled children who may need care and treatment; the number and location of such orthopedic centers to be within the discretion of the said commission. Said commission may pay reasonable costs to such orthopedic centers for the surgical or medical care or treatment of crippled children placed therein by said commission." (Emphasis supplied.)

Section 391.06, F. S., authorizes the commission to employ from time to time such *orthopedic surgeons* as it may deem necessary for the proper treatment or care of crippled children, provided no *orthopedic surgeon* shall be employed unless his professional standing and ability as such has been certified to by the *Florida state health officer*, and such commission may employ from time to time physicians, nurses or other such help as it may deem necessary and proper to carry out its functions.

For the purpose of carrying out the provisions of Ch. 391, F. S., a crippled child is defined in §391.01 thereof as:

"... any person of normal mentality under the age of 21 years whose physical functions or movements are impaired by accident, disease or congenital deformity, regardless of whether or not such impaired physical functions or movements are due to an orthopedic condition; it shall include children suffering from any disease or condition which is likely to result in a crippling condition. Nothing in this chapter shall be construed to limit the duties, functions and services of the Florida crippled children's commission to orthopedic cases."

In view of the foregoing it appears that all hospitals, clinics, convalescent homes or other medical centers designated and used by the commission as "orthopedic centers" shall be located in the state on somewhat of a regional basis. However, it is particularly noted in §391.01, F. S., that "*nothing in Ch. 391, F. S., shall be construed to limit the duties, functions and services of the Florida crippled children's commission to 'orthopedic cases'.*" Therefore, it is my opinion that the commission is not prohibited from using hospital facilities and personnel outside the state in the treatment of non-orthopedic cases of crippled children, as defined by statute, when such treatment or service cannot be given in "orthopedic centers" such as are required to be designated and located in the state.

056-49—February 21, 1956

PROFESSIONS AND VOCATIONS

BARBERS—FEES—APPLICANT FOR EXAMINATION— §476.16, F. S.

To: *Arthur P. Ellis, Administrative Assistant, Barbers' Sanitary Commission, Tallahassee*

QUESTIONS:

1. What is the fee to be paid by an applicant who is a resident of Florida, for examination to determine

his fitness to receive a certificate of registration to practice barbering in Florida?

2. What is the fee to be paid by an applicant who is a resident of Florida for examination to determine his fitness to receive a certificate of registration to practice as an apprentice barber in the state?

3. In relation to the above 2 questions, is there any provisions in the law which requires non-resident applicants to pay a fee different from that of a resident?

The portion of §476.16, F. S., covering fees for examination pertaining to the practice of barbering provides as follows:

"The fee to be paid by an applicant, who was not a resident of the state on May 30, 1939, for an examination to determine his fitness to receive a certificate of registration to practice barbering is \$25 and for the issuance of the certificate is \$2."

At first blush it may appear that the fees provided for in §476.16, F. S. apply only to applicants who were not residents of the state on May 30, 1939. However, a careful examination of §476.16, its history, and other relevant statutes, convinces us that the fees provided for in §476.16 apply to all who have made or make applications for examination subsequent to May 30, 1939, the date of the enactment of the law.

The present provisions of §476.16, F. S., as above set out, differs from the provisions of §17, Ch. 19183, 1939, in that the last sentence which read "The fee to be paid by an applicant who is a resident of the state at the date this law becomes effective, and qualifies under §12 of this act is \$10, and for the issuance of the certificate is \$2" was deleted as obsolete in the 1941 statutes. (History and Source of Law, §476.16 F. S. A., 1941.) This deleted portion of the 1939 act applied only to those who were already applicants for examination to practice barbering on or before the effective date of the present law, May 30, 1939.

I find no provision in the laws of Florida which requires a non-resident applicant for examination to practice barbering to pay a fee different from that required of a resident. Therefore, under the present laws of Florida, I am of the opinion that the fee to be paid by an applicant, resident or non-resident, for examination to determine his fitness to receive a certificate of registration to practice barbering in the state is \$25, plus \$2 for issuance of certificate. Accordingly, this answers your 1st question and that portion of your 3rd question which pertains to barbers.

The portion of §476.16, F. S., covering fees for examination pertaining to practice as an apprentice barber provides as follows:

"The fee to be paid by an applicant for an examination to determine his fitness to receive a certificate of registration to practice as an apprentice is \$10 and for the issuance of the certificate is \$2."

I find no provision in the laws of Florida which makes a distinction in fee to be paid by a non-resident applicant for examination to practice as an apprentice barber, from that required by the statute as above set out.

Therefore, it is clear that the fee to be paid by an applicant, resident or non-resident, for examination to determine his fitness to receive a certificate of registration to practice as an apprentice barber in the state, is \$10, plus \$2 for issuance of certificate.

Accordingly, this answers your 2nd question and that portion of your 3rd question which pertains to apprentice barbers.

056-50—February 24, 1956

STATE AND COUNTY OFFICERS AND EMPLOYEES

RETIREMENT—MOSQUITO CONTROL DISTRICTS— PAYMENT OF SOCIAL SECURITY TAXES— CH. 122, F. S.

To: *Bryan Willis, State Auditor, Tallahassee*

QUESTIONS:

1. Were the employees of mosquito control districts in this state within the purview of either Ch. 121 or Ch. 134, F. S., prior to the effective date of Ch. 29801, 1955, and if so, are they now under said 1955 Act?

2. Is payment of social security taxes a legal expenditure for mosquito control districts?

Mosquito control districts may be organized and established pursuant to either of Chs. 388, 389 or 390, F. S., and some such districts may have been created and established by special or local acts. Such mosquito control districts appear to be designed for the maintenance and betterment of the comfort, health, welfare and prosperity of the people of the said districts. Places where mosquitoes incubate and hatch are by the statutes declared to be public nuisances (see §388.01, F. S.). County ad valorem taxes for mosquito control are authorized (§§388.17, 389.05 and 390.18, F. S.). State funds have also been appropriated to assist in such mosquito control works and projects (§9, Ch. 28131, and Ch. 29826, 1953 and 1955). Public health and welfare are of public concern (Art. XIII and XV, State Const.). It is clear that mosquito control districts are state or county agencies, branches, departments or institutions, and as such are within the purview and operation of the state and county officers and employees retirement system (Ch. 29801, 1955) and were prior to the enactment of said law within the operation of either Ch. 121 or Ch. 134, F. S. By departmental construction by the comptroller they were classified as being within the purview of the county officers and employees retirement system (Ch. 134, F. S.) and we see no reason to question this classification. These observations answer the 1st question.

We are advised of no action having been taken to authorize the inclusion of mosquito control districts within social security, such districts being within the retirement statutes of this state, as is

provided by the federal and state statutes. We know of no authority of mosquito control districts to expend public funds in payment of social security taxes unless and until the state and federal statutes are complied with, in that such districts are within the retirement systems set up by the state. This answers the 2nd question.

056-51—February 24, 1956

**STATE AND COUNTY OFFICERS AND EMPLOYEES
RETIREMENT SYSTEM—EMPLOYMENT BY STATE AFTER
RETIREMENT—CONSTRUCTION OF FORMER
§121.14, F. S., PRIOR TO 1953 AMENDMENT**

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

What are the retirement rights of a state employee who, as a member of the state officers and employees retirement system, retired in September, 1946, and remained on the retirement roll through November, 1950, at which time he returned to state employment, but has made no contributions under the retirement statutes since such re-employment?

Section 121.14, F. S., prior to the amendments thereof made by Chs. 28174, 28250 and 28258, 1953, provided that

“Employment after retirement.—Any person accepting or receiving the benefit of retirement compensation under this chapter shall not be employed in any capacity by the state or any department, branch or agency thereof and any person accepting or enjoying the benefits of retirement compensation under this chapter who accepts employment or receives any other compensation from the State of Florida or any department, branch or agency thereof for services rendered shall forfeit all the benefits of this chapter forever and the state comptroller shall forthwith strike such person's name from the retirement compensation roll and refuse to honor any requisitions for retirement compensation made by such person.”

This section was in full force and effect in 1946, when the person in question retired, and in 1950, when he returned to state employment.

The provisions for suspending retirement benefits in case of re-employment did not get into the state officers and employees retirement system statutes until the enactment of above Chs. 28174, 28250 and 28258, in 1953. We find nothing in the statutes making the said provisions for suspending benefits in case of re-employment retroactive to cases such as that set out in the above question. The rights of the person described in the above question are determined by the above quoted section of the statute as the same existed in 1946 and 1950.

These observations answer the above question.

056-52—February 27, 1956

**STATE AND COUNTY OFFICERS AND EMPLOYEES
RETIREMENT—PERMANENT DISABILITY, DETERMINATION
—§122.09, F. S.**

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where a member of the state or county retirement system, or of the consolidated state and county officers and employees retirement system, quits state or county employment because he is suffering with a nervous disorder, but accepts private employment, may he be retired under the statutes relative to permanent disability?

Whenever any state or county officer or employee has accumulated 10 or more years of service credit with the state or county officers and employees retirement system, or under the consolidated system, and while a member of such retirement systems and in state or county employment, all as required by §10, Ch. 29801, 1955, or §§121.07 or 134.07, F. S., becomes "permanently and totally disabled, physically or mentally, or both, from rendering useful and efficient service as such officer or employee," he may retire from his office or employment. Upon such retirement such person may be paid, so long as his permanent and total disability continues, such sums as are provided by statute from the "state and county officers and employees retirement fund."

Your request for opinion presents the following facts and circumstances relative to a particular case now before you for determination:

"The doctor's certificate states that the applicant is 'suffering with a nervous disorder known technically as Anxiety Reaction, chronic, with depressive reaction. I had previously treated this man for the same condition in September, 1954, and although he has improved, it is my opinion that he is totally and permanently disabled from performing the work being done by him at the time his application for retirement benefits under Sec. 9 of the State and County Officers and Employees Retirement System was filed. His particular occupation at that time was school bus driver and his unstable emotional reaction made it hazardous for him and the school children if he were to continue driving the school bus.' "

You also state that you are "informed and believe that the applicant is now employed by a private corporation."

Under prior state or county officers and employees retirement systems (§§121.07 and 134.07, F. S.) and the present state and county officers and employees retirement system (§10, Ch. 29801, 1955) no state or county officer or employee "shall be permitted to retire under the provisions of this section (or sections) until examined by a duly qualified physician or surgeon, or board of

physicians and surgeons, *to be selected by the governor* for that purpose, and found to be disabled in the degree and in the manner specified in this section." These requirements are that such person be found to be "*permanently and totally disabled, physically or mentally or both, from rendering useful and efficient service*" as a county or state officer or employee. (Emphasis supplied.)

First, for a person to retire by reason of disability he must be "permanently and totally disabled." This term is not defined in the statutes. The terms "permanent and total disability," "permanently and totally disabled," "totally disabled," have received various constructions by the courts (42 Words and Phrases, 6-21, 31-79, 101-122, 125-142, 145-151, etc.) These words have been defined in the sense when used in connection with insurance, workmen's compensation, and other things. We feel that the court definitions in connection with workmen's compensation are persuasive in this connection. (See 42 Words and Phrases, 72-79, 120-122, 139-142, and 147-151.) The cases referred to in Words and Phrases seem to carry the idea that "total and permanent disability," and words and phrases of similar import mean a lack of ability to follow continuously some substantially gainful occupation without serious discomfort or pain and without material injury to health or danger to life. "It may be said, however, generally, that, in the absence of any provision to the contrary, incapacity or disability cannot be found to be total where it appears the claimant's earning power is not wholly destroyed and that he is still capable of performing remunerative employment. . . . But the fact that an injured employee may be able to perform light work, or that some usefulness remains in an injured member, has been held in some cases not to preclude an award on the basis of total disability . . . (58 Am. Jur. 778-9, §283). "A finding of total incapacity may, in a proper case, be predicated upon a nervous condition or affection." (58 Am. Jur. 779, §283, Note 19; Annotation in 67 A. L. R. 805, 98 A. L. R. 732).

Second, for a person to retire he must not only be permanently and totally disabled but must also be incapable of rendering useful and efficient service. This question is largely covered in our discussion of what is a permanent and total disability.

In conclusion we feel that before a person may be retired for disability under §§121.07 or 134.07, F. S., or §10, Ch. 29801, 1955, that such person must (1) be certified by a doctor or board of doctors *selected by the governor* to be "permanently and totally disabled, physically or mentally, or both, from rendering useful and efficient service," as a state or county employee, (2) the term "permanently and totally disabled" has been hereinbefore defined, (3) and a finding of total and permanent disability may in proper cases be predicated upon a nervous condition or affection. Where an applicant for benefits based on permanent and total disability appears to be employed careful appraisal of such employment should be made to determine the nature and extent of the same with regard to ability to perform work. It may be that before an answer may be given with regard to the subject of your request that additional information may be required.

056-53—February 27, 1956

CLERK OF CIRCUIT COURT

RECORDS—RECORDING OF JUDGMENTS IN OFFICIAL RECORDS BOOK—§28.221, F. S.

To: *H. T. Piety, Clerk of the Circuit Court, Highlands County,
Sebring*

QUESTION:

Where the clerk of the circuit court uses the alternative method provided by §28.221, F. S., maintaining an "official records" book, is it necessary that final judgment in a proceeding in the circuit court be entered in the minutes of that court, as well as appear in the "official records" book?

Section 28.221, F. S., in part provides:

"(1) In lieu of the separate books now required to be kept by the clerks of the circuit courts for the purpose of recording each kind or class of instrument which they are or hereafter may be required by law to record, said clerks of the circuit courts may record any or all of these instruments in one general series of books to be called 'Official Records.' The series shall be numbered consecutively beginning with number one."

* * * * *

"(4) Certified transcripts of judgments and decrees recorded in "Official Records" shall become liens on the real estate of the defendants in the county where the same are recorded in the same manner as if said certified transcripts had been recorded in the judgment lien record. Laws 1953, c. 28033, §§1-4."

Enclosed herewith is a copy of opinion 051-84, dated April 6, 1951 (AGO 1951-1952, p. 40) and your attention is directed to question 1 thereof. This points out that it is not the duty of the clerk of the circuit court to see that a decree or judgment is recorded in the judgment lien record book, but that such is within the control of the judgment creditor or his attorney whose privilege it is to submit to you a certified copy of the such decree or judgment. Consequently, unless you are directed by the judgment creditor or his attorney, there is no obligation upon you to see that a certified copy of the judgment or decree of the circuit court is recorded in the judgment lien record book. Sub §(4) of §28.221, F. S., contemplates that certified transcripts of judgments and decrees recorded in official records when such recording method is used shall be substituted in lieu of the judgment lien record book which the clerk would maintain under §28.21 (11), F. S.

By sub § (1) of said §28.21, F. S., the clerk is required to keep minute books of all proceedings of the circuit court and of the judge "... which shall be signed by the judge before the ad-

journalment of each term." I do not interpret the provisions of §28.221, F. S. to mean the clerk may dispense with the keeping of the minute book. The minute book, properly maintained, should show the entire proceedings relating to the trial and is of prime importance. The judgment in an action at law is rendered when entered or recorded in the minutes of the court in term time or when in vacation it is put in form for entry or record and signed by the judge. *Pittsburgh Steel Co. v. Streety*, 60 Fla. 267, 53 So. 505; *Atl. Coast Line R. Co. v. Holliday*, 73 Fla. 269, 74 So. 279. Consequently, the minute book should be maintained by the clerk. Certainly the signing of the minutes gives finality to them and they cannot be questioned by collateral attack. In this connection see *Florida Clerks' Manual*, pp. 81-82.

By reason of the above, the question is properly answered in the affirmative.

056-54—February 27, 1956

WORKMEN'S COMPENSATION LAW

REAL ESTATE SALESMEN AS EMPLOYEES— CHS. 475 AND 440, F. S.

To: *Rodney Durrance, Director, Workmen's Compensation Division, Florida Industrial Commission, Tallahassee*

QUESTION:

Is a real estate broker, registered as such in pursuance of Ch. 475, F. S., (Real Estate License Law), liable for securing payment of compensation under Florida's workmen's compensation law to real estate salesmen whose registrations, in pursuance of such law, list such broker as their employer?

Reference is made to the definitions set forth in §440.02, F. S., (part of workmen's compensation law), particularly definitions of "employment," "employee," "employer" and "wages."

Attention is also directed to references in said Ch. 475 to the employer-employee relationship existing between such a registered broker and the salesmen registered as his employees, pointed out in the request for opinion as follows: §§475.01(4), 475.23, 475.26, 475.31(4), 475.42(1) and 475.42(1)(d).

It is recognized that if the status of a real estate salesman is that of an independent contractor in relation to the broker registered as his employer, then the employer-employee relationship within the contemplation of said Ch. 440 does not exist. (*E. G. DeLuxe Laundry & Dry Cleaners v. Frady*, Fla., 49 So. 2d 779; *Baya's Bar and Grill v. Alcorn*, Fla., 40 So. 2d 468; *Peterson v. Highland Crate Co-op*, Fla. 23 So. 2d 716). In the first-mentioned of these cases the court referred to *Gentile Bros. Co. v. Fla. Industrial Commission*, Fla., 10 So. 2d 568, wherein the court stated it had defined an independent contractor as one following an individual employment and representing his employer as to the results of the work, but not as to the means by which the results are accomplished.

There has not been furnished to us a detailed description of the functioning of a real estate salesman in relation to his broker-employer. However, attention is directed to §475.42(1)(d): "No salesman shall collect any money in connection with any real estate brokerage transaction, whether as commission, deposit, payment, rental, or otherwise, except in the name of the employer, and with the express consent of the employer . . ."

Elaborating on the common law relationship of master and servant, as mentioned in the above Gentile case, it has been said that there are 4 elements which are considered in connection with the question of whether the master-servant relationship exists: selection and engagement of the services; payment of wages; power of dismissal; and power of control of the servant's conduct in relation to services to be done. It seems that the essential element of the relationship is that last mentioned: the right of one person (master) to order and control another person (servant) in performance of work done by the latter. 35 Am. Jur., 445-449.

On the basis of the disclosures in the request for opinion and the mentioned laws and cases, reasonably it appears that the employer-employee relationship as contemplated by Ch. 440 exists between a real estate broker and his salesmen; hence, the question is answered in the affirmative.

056-55—February 27, 1956

MOTOR VEHICLES

FINANCIAL RESPONSIBILITY LAW—OUT-OF-STATE VEHICLES—AUTHORITY OF MUNICIPAL OFFICERS TO DELIVER SUSPENDED ITEMS—AUTHORITY TO SUSPEND NON-RESIDENT OWNER'S REGISTRATION AND LICENSE PLATES—CHS. 324 AND 322, F. S.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTIONS:

1. When an out-of-state vehicle is involved in an accident in Florida with legal limits of 5/10/1 coverage meeting the requirements of his home state, does he come within the purview of our financial responsibility law?

2. Where a municipality or other governmental agency impounds a motor vehicle, the tag and registration of which are under suspension by virtue of the provisions of Ch. 324, F. S., or arrests a driver whose privilege to drive is under suspension, may the insurance commissioner properly call upon such municipality or agency to surrender the suspended items to the commissioner?

3. Section 324.04(2) reads in part, ". . . shall suspend such non-resident's operating privilege in this state unless such operator or owner shall prior to the expiration of such 30 days be found by the commissioner to be exempt . . ." Does this mean the commissioner can-

not suspend a non-resident owner's registration and license plates?

Chapter 324, F. S., is the revised financial responsibility law, effective Oct. 1, 1956.

The word "registrations" as used herein shall be understood to include certificates and registration plates, as defined in §324.021(11).

In my opinion the questions are answered as follows:

1. Section 324.051(2) provides, among other things, that when an accident involves an automobile operated by a non-resident owner or operator, within the purview of said section, such non-resident's operating privilege in this state shall be suspended "unless such owner or operator shall prior to expiration of such 30 days be found by the commissioner to be exempt from the operation of this chapter, based upon evidence satisfactory to him that:" followed by enumerated circumstances exempting such owner or operator from the suspension features or prescribing conditions to be met to avoid such suspension. The question deals with insurance coverage. To meet the requirements of the act, such coverage must not be less than the 10/20/5 limits prescribed by §324.021(7), F. S. Hence, coverage with limits of 5/10/1 is not sufficient; and the question must be answered in the negative.

2. The owner or operator of a motor vehicle involved in an accident within the meaning of Ch. 324, F. S., and who fails to meet the financial responsibility requirements of the chapter suffers suspension of his driving license and/or registration, as provided in the law. §324.201, F. S., requires any person whose license or registration has been suspended "immediately to return his license and registration to the commissioner;" and other provisions of that section and those of §324.221 provide procedures and penalties for failure to so return such license and registrations. Once such a license or registration is suspended in pursuance of the law, the person to whom the same shall have been issued loses the right of possession thereof, and such right passes to the state.

The question speaks of the situation where a governmental agency (political subdivision) "impounds a motor vehicle." When such happens as a legal fact, right of possession of the vehicle passes to the state or political subdivision so impounding the vehicle, and the registration plates may be removed from the vehicle and delivered to the commissioner. However, the fact that the operator of a motor vehicle is arrested for operating the same after suspension of license and registration, in absence of law (including valid city ordinance) authorizing arresting officers to take the motor vehicle into possession, right of possession does not pass to the arresting officers.

There is the provision in §322.25, F. S., which requires that when a person is convicted of any offense for which Ch. 322 F. S., makes mandatory revocation of the operator's or chauffeur's license by the department of public safety, "The state or municipal court in which such conviction is had shall require the surrender

to it of all operator's and chauffeur's licenses then held by the person convicted, and the court shall thereupon forward same... to the department." Delivery of the license under this section would be to said department.

Section 901.21, F. S., provides in effect that when any sheriff, deputy sheriff or other police officer in this state shall lawfully arrest any person, the arresting officer may search the person so arrested and, if such search reveals the violation of any law, the officer shall hold such person upon a charge of violating the law, and anything found on such person or in his possession which tends to show the guilt of such person shall be admitted in evidence upon trial in which such violation is charged. Attention is also directed to the other provisions of this section. Reasonably it would appear that where a person has been lawfully arrested for any alleged offense and a search of his person discloses a driver's license issued to him and which license has been suspended under the provisions of Ch. 324, such license may be retained for the purposes of evidence at trial for violation by the arrested person of appropriate provisions of Ch. 324, and thereupon such license should be delivered to the commissioner unless same is required by law to be delivered to the department of public safety.

It is apparent that any answer to this question must be rather general unless propounded in relation to a given factual situation. Generally it may be stated that where, under any circumstances, lawful right of possession of a suspended driver's license and/or motor vehicle is acquired by an arresting officer or other officials of a political subdivision, then the arresting officer or other proper official of that subdivision is authorized to deliver to the commissioner such suspended license and/or registration, subject to the following: (1) After necessary use of either in connection with a prosecution has terminated; or (2) Unless such license is required by statute to be delivered to the department of public safety.

3. The suspension features of §324.051(2) in relation to a non-resident is quoted: "shall suspend such non-resident's operating privilege in this state." This operating privilege is granted non-residents who hold valid licenses issued by their home state or country and otherwise meet the requirements and conditions of §322.04, F. S. It is to be noted that such privilege is also subject to suspension or revocation by the department of public safety, as set forth in §322.23, F. S. As we construe the wording of these mentioned statutes, there is, under stated circumstances, a suspension of a privilege here involved, not a suspension of a license issued by another state.

Section 324.081(1), provides that the commissioner may establish reciprocal agreement with any other states for the purpose of fulfilling the provisions of Ch. 324, F. S., and pursuant to such agreements may suspend the license and registration of a resident of this state involved in an accident in another state. Section 324.081(2) provides in part: "In the case of non-resident owners or operators subject to this chapter, the commissioner may notify the home state of said non-resident that the operator's

license of such operator and the registration of such owner shall be suspended and shall not be restored until after compliance with this chapter in the same manner required of resident owners or operators" While mentioned sub §(1) refers to a reciprocal agreement, reasonably sub §(2) is not dependent upon such an agreement. Under this latter subsection, there is added to the power concerning suspension of operating privileges of a non-resident, as provided in §324.04(2), the power of the commissioner to issue an order suspending (for use in Florida) a license issued by another state and suspending the foreign registration (for use in Florida) of a non-resident's motor vehicle. Such suspension of license or registration does not carry with it right of possession by the commissioner to such license or registration.

As conditioned above, the question is answered in the affirmative.

056-56—February 27, 1956

ELECTORS AND ELECTIONS

ELECTION CODE—VIOLATIONS AND PENALTIES— INVESTIGATIONS—WITNESSES—IMMUNITY TO PROSECUTION—§104.39, F. S.

To: William D. Hopkins, State Attorney, Tallahassee

QUESTIONS:

If a state attorney first warns a witness as follows:

"Mr. Blank, you understand that you are here to talk to me at your own solicitation and I want you to understand that you do not have to tell me anything. I am investigating an alleged violation of the election laws regarding the state senate race in this county and any other violation of the election laws here in this county, and you understand that you may be involved. You understand that you are not under oath and that you are going on record waiving any claim you may have to immunity under the constitution of the United States and of the state of Florida, §§932.29, and 104.39, F. S. Annotated, and any other statutes of immunity in this state by talking to me. What you say to me at this time can and will be used against you if incriminating and you must fully understand that you can get up and leave now without saying anything, and if you do make any statement I want you to understand it is because you desire to make such a statement and not because I am asking you any questions or for any statement whatsoever. Do you agree to waive any and all immunity in making any statement to me and agree that you will not ever plead in bar the making of such a statement if charged with an offense in connection therewith?"

1. In your opinion, would such a witness giving a statement under such circumstances be immune to prosecution under §104.39, F. S.?

2. In your opinion, could such a witness plead the giving of such a statement in bar to a prosecution under the election laws?

I do not think it of vital importance whether the person who wishes to talk to you agrees to waive immunity and agrees to refrain from pleading in bar the making of the statement if charged with an offense in connection therewith. However, for the purposes of this opinion, I shall assume an affirmative answer by him to this question.

Of course, any defendant can plead as he sees fit but I construe your second question as inquiring whether the person referred to could "successfully" plead the giving of such a statement in bar to a prosecution under the election laws. So construed, it is my opinion that both of your questions should be answered in the negative.

The case of McKown v. State, 54 So. 2d 54, involved the construction of the general immunity statute, §932.29, F. S., and that construction is important here because, as will hereinafter be more fully pointed out, it is my view that said statute gives a witness the same immunity when he is required to testify as to the crimes therein mentioned as is afforded by the immunity statute found in the election laws viz., §104.39, F. S., to a witness to election law violations. McKown pled guilty and thereafter moved for permission to withdraw his plea of guilty. The 6th ground of his amended motion to withdraw plea set up that the plea was offered when the defendant had already been given immunity by testifying under oath before the county solicitor, the state attorney, and the investigator for the governor. The testimony showed that on Aug. 19, 1950, McKown, accompanied by the state attorney and the governor's investigator, took a trip and wound up spending the night at Lake Wales; that the following morning McKown talked with the state attorney, the investigator and the county solicitor in the state attorney's office about lottery activities in the county and the information he gave was reduced to writing and later attested by him. The supreme court observed that McKown was under no pressure, he said, when he gave these officials information relative to lottery operations, and that he left his home in the first instance with the investigator and the state attorney at his own request. In affirming his conviction and rejecting his claim that he was entitled to withdraw his plea under the circumstances the supreme court said, among other things:

"But there is no need to pursue that proposition further because of the very manner in which the appellant made the disclosures to the prosecuting officers. He evidently was not compelled, or 'required,' to say anything raising any point of his being excused or, being granted by the state through the statute, immunity of himself from prosecution in return for divulging information to prosecute others. Had he declined to reveal what he knew about bolita operations in the county on the ground that he would be implicated or, to use the words of the statute, 'the testimony (might) tend to convict him of a crime or to subject him to a penalty,' he would

not have been excused but he could not have been prosecuted.

"Such a guarantee has been called by this court a contract between the state and the criminal based on public policy and amounting to an exchange of an exemption for a disclosure of crime. *Ingram v. Prescott*, 111 Fla. 320, 149 So. 369. The value to the state of such an arrangement is great, for without it, too often would it be impossible to fracture a criminal combine. *But if there has been no effort to force damning information, hence no claim of the personal advantage, no occasion arises for a concession by the state. ONE CANNOT VOLUNTEER TESTIMONY INCULPATING HIMSELF AND THEN CLAIM THE REWARD THAT IS CALCULATED TO OVERCOME HIS RELUCTANCE OR RESISTANCE.*" (Emphasis supplied).

State ex rel. Raines v. Grayson, 55 So. 2d 554, also involving a construction of §932.29, is likewise important to this discussion. When Raines was arrested on a charge of accepting a bribe, he was carried to the office of the city detective, where he was subjected to an examination concerning the bribery transaction. A reporter's transcript of his statements was made and turned over to the county solicitor, who thereafter filed an information charging Raines with a bribery law violation. The county solicitor was present but took no active part in the examination of Raines and his presence was unknown to Raines. (I don't think Raines would have been immunized even if the county solicitor had done the questioning if Raines had answered voluntarily after being warned in the manner set forth in the foregoing quotation from your letter.) I think that the meat of the supreme court's decision is found in the following quotation from its opinion:

"Section 932.29 in terms provides that no person shall be excused from testifying upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime. *IN ORDER TO IMMUNIZE HIM FROM PROSECUTION THERE MUST BE COMPULSION, COERCION OR AN OFFER OF IMMUNITY IN RETURN FOR HIS TESTIMONY.* What took place here takes place frequently when one is arrested charged with crime. No one threatened Raines or forced him to testify, he was not under oath and in the main what he testified to was not incriminating. It is far from sufficient to immunize him under Section 932.29, F. S. A." (Emphasis supplied.)

It is noted that in said quoted excerpt the supreme court said, "... and in the main what he testified to was not incriminating." I regard this statement as of no governing force because under §932.29 a witness who is "required" to give any self-incriminating testimony as to bribery is immunized, and it is immaterial whether "in the main" his testimony incriminates him or not.

In discussing the rights of a witness under constitutional and statutory provisions for immunity, Corpus Juris Secundum says:

"Ordinarily, to be within the protection of an immunity statute, the witness must give his testimony under oath." (22 C. J. S. 111, Criminal Law, §46-B(4-a).)

"Under the constitutional or statutory provisions in question ordinarily to entitle accused to immunity his self-incriminatory testimony must not have been given voluntarily, more particularly where he has been warned as to his rights . . ." (22 C. J. S. 111, Criminal Law, §46-B(4-b).)

"Immunity is a personal privilege, and may be waived." (22 C. J. S. 113, Criminal Law, §46-B(4-c).) (Emphasis supplied.)

The above quoted excerpts from Corpus Juris Secundum apply to immunity statutes generally and have as much application to §104.39 (the statute immunizing witnesses to election law violations) as to §932.29 (the immunity statute construed by the Fla. Supreme Court in the McKown and Raines cases).

I also think that the statements which I have hereinabove quoted from the Florida supreme court's opinions in said cases are equally applicable to §104.39, F. S.

As indicated by the supreme court's said opinions, a witness is not immunized under §932.29 unless he is required, compelled or coerced to furnish evidence which may tend to incriminate him or unless, as stated in the Raines opinion, there is "an offer of immunity in return for his testimony." I think that the same construction should be given to §104.39, which reads as follows:

"104.39 Witnesses as to violations.—Any person violating any provisions of the election code shall be a competent witness against any other person so violating and may be COMPELLED TO attend and TESTIFY as any other person can be. The testimony given shall not be used in any prosecution or proceeding, civil or criminal, against the person SO TESTIFYING. Any person SO TESTIFYING shall not be liable to indictment or punishment by information, nor to prosecution or punishment for the offense with reference to which his testimony was given, and may plead the giving of testimony in bar to such indictment, information or prosecution." (Emphasis supplied.)

Said §104.39 starts out by providing that any person violating any provisions of the election code shall be a competent witness against any other person so violating and *may be COMPELLED TO TESTIFY* as any other person can be. Then said statute goes on to provide that the testimony given shall not be used in any prosecution or proceeding against the person *SO TESTIFYING* and that any person *SO TESTIFYING* shall not be as liable to indictment and punishment by information, nor to prosecution or punishment for the offense with reference to which his testimony was given and may plead the giving of testimony in bar to such indictment, information or prosecution. I think that the words "*SO TESTIFYING*," as thus used in the statute, refer back to and relate only to the kind of testimony

referred to in the first provision of the statute, that is to say, testimony which is "COMPELLED." I do not think that said statute has any application to a person who seeks out the state attorney and volunteers an unsworn statement after being warned in the manner proposed by your letter, quoted above.

Therefore, it is my opinion that a person making a statement under the circumstances set forth above would not be immunized from prosecution by said §104.39, and that such person could not successfully plead the giving of such a statement in bar to a prosecution under the election laws.

056-57—February 27, 1956

OFFICES, OFFICERS AND PUBLIC RECORDS

STATE BOARDS, COMMISSIONS, DEPARTMENTS, ETC.—
RULES AND REGULATIONS—FILING WITH SECRETARY OF
STATE—DEPARTMENT OF VETERANS AFFAIRS—§§120.10-
120.17, F. S. (CH. 29777, 1955)

To: *Melvin T. Dixon, State Service Officer, Department of Veterans' Affairs, St. Petersburg*

QUESTION:

Is the department of veterans' affairs of the state required to file a copy of its regulations with the secretary of state?

Chapter 29777, 1955, requires "every officer, commission, department, or other agency of state government" authorized to adopt rules and regulations, to file a copy of such rules and regulations with the secretary of state.

Chapter 292, F. S. 1955, provides for the creation of a "department of veterans' affairs" to succeed to the powers and duties previously vested in the "state veterans' commission."

In view of the above, it is my opinion that the department of veterans' affairs would be one of the departments contemplated by Ch. 29777, 1955.

Section 6, Ch. 29777, provides that regulations relating *solely* to the internal operation and management of an agency, and not affecting the rights of the public, need not be filed with the secretary of state.

Although the regulations adopted by the department of veterans' affairs relate, for the most part, to the internal operation of the department, nevertheless, to some degree, they affect the rights and interests of veterans. It is, therefore, my opinion that such regulations should be filed with the secretary of state as provided by Ch. 29777, 1955.

056-58—February 27, 1956

EDUCATION

COUNTY SCHOOL SYSTEM—COUNTY BOARD MEMBER RESIDENCE DISTRICTS—§§230.06 AND 230.07 AS AMENDED BY CH. 29764, 1955

To: *Thomas D. Bailey, Superintendent of Public Instruction, Tallahassee*

QUESTION:

If a county school board has set up its own residence districts by board resolution will this resolution now legally hold subsequent to the 1955 amendment of Ch. 29764 as relating to this procedure?

Section 230.06, F. S., 1955, provides as follows:

"For the purpose of nominating and electing county board members, each county shall be divided into 5 county board member residence districts, the boundaries and numbers of which shall conform to the boundaries and numbers of election districts for county commissioners."

This section was originally enacted as Ch. 19355, 1939, and was amended by Ch. 23726, 1947, and again by Ch. 29764, 1955.

Prior to the 1955 amendment, the act read as follows:

"For the purpose of nominating and electing county board members, each county shall be divided into 5 county board member residence districts, the boundaries and numbers of which shall conform to the boundaries and numbers of election districts for county commissioners, provided however, upon resolution duly adopted by a county board within 6 months from the time this law becomes effective a county can be divided into 5 numbered county board member residence districts so as to place in each district, as nearly as practicable, the same number of qualified electors, the lines of said districts to be so drawn as to place each election precinct wholly within one or another of the county board election districts."

Section 230.07, F. S., 1955, now provides:

"The county board of any county may make any change which it deems necessary in the boundaries of any county board election district of the county at any meeting of the county board held in January of the year of any general election. Such changes in boundaries shall be shown by resolutions spread upon the minutes of the county board, shall be recorded in the office of the clerk of the circuit court, and shall be published as required for fixing such county board election districts in the first instance.

This act, originally enacted as Ch. 19355, 1939, was amended by Ch. 29764, 1955. The act prior to the 1955 amendment read as follows:

"The county board of any county may make any changes in the boundaries of any county board election district of the county which they deem necessary to meet the requirements prescribed in this chapter at any meeting of the county board held in January of the year of any general election. Such changes in boundaries shall be shown by resolutions spread upon the minutes of the county board, shall be recorded in the office of the clerk of the circuit court, and shall be published as required for fixing such county board election districts in the first instance."

Upon reviewing the history of this legislation, however, I find that the 1955 amendments to §§230.06 and 230.07 were accomplished through a statutory revisor's bill (Ch. 29764, 1955, senate bill 154).

The title or preamble to the act makes it clear that the act is purely a revisor's bill and that no substantive changes are contemplated in the act.

Revisor's bills as authorized by §16.44, F. S., do not authorize changes in substantive law but are strictly limited to the removal of obsolete matters, inconsistencies, redundancies and unnecessary repetitions.

In my opinion, the 1955 amendment, being a revisor's bill, is ineffective in making a substantive change in §230.06 and 230.07, since it was not the legislative intent to do so and since the title was insufficient to accomplish this purpose. Moreover, the only effect of re-enacting the first paragraph of §230.06 was to bring it forward subject to the same construction and meaning as when originally enacted in 1947. Under applicable statutory rules of construction it has no effect as a new enactment and must be construed in relation to the time of its original enactment in 1947 since it is merely brought forward in a revision. Therefore, it follows all action taken subsequent to said paragraph's enactment in 1947 pursuant to the deleted second paragraph of §230.06 or §230.07 in modifying county board member residence districts differently from county commissioner's election districts stand unaffected and unchanged. It has no effect to mandatorily require such county board member residence districts to be conformed to the county commissioners election districts nor does it preclude the power to modify embraced in §230.07 in January of each general election year.

Under these circumstances and subject to the above observations, your question is therefore answered in the affirmative.

056-59—February 27, 1956

ELECTORS AND ELECTIONS

CANDIDATES AND CAMPAIGN EXPENSES—POLITICAL ADVERTISEMENTS—QUALIFIED PUBLICATIONS— §99.161(2)(c), F. S.

To: George S. Okell, Sr., Representative, Dade County, Miami
QUESTION:

In view of sub §(2)(c) of §99.161, F. S., as amended,

may a candidate lawfully purchase political advertising space in a program published in connection with an amateur theatrical production?

Subsection (2) (c) of §99.161, F. S., as amended, provides that:

"No candidate or party executive committee, or person or organization on behalf of such candidates or committee, shall spend any moneys or give anything of value for advertising in *any publication or newspaper* not qualified for legal advertising as provided by law." (Emphasis supplied.)

This language affords some opportunity for construction with reference to the question you have raised. Although the doctrine of ejusdem generis appears to be applicable only where there is a listing of specific things of the same kind (See *ex parte Amos*, 93, Fla. 5, 112 So. 289), the broader maxim of *noscitur a sociis* might be urged.

Where general and specific words are capable of analogous meaning and are associated together they take color from each other so that the general words are restricted to a sense analogous to the less general (See *Townsend v. State* 63 Fla., 46, 57 So. 611).

In addition to the arguments that may be founded on these maxims a consideration of other cogent provisions of the election code appears appropriate. Section 99.172, F. S., lists the purposes for which a candidate may expend money in the furtherance of his candidacy. One of the items for which expenditures are permitted, is "advertising in magazines or other periodicals." Section 104.371 in defining political advertisement refers to advertisements placed in magazines, newspapers and other periodicals. Section 104.372 regulates the rates that a newspaper or other periodical may charge for political advertising and was adopted by the 1955 legislature at the same time as the amendment that added sub §(2) (c) of §99.161.

If the words "any publication" are given their broadest meaning, they would then conflict with the other provisions of the election code which permit the publication of campaign literature of the usual kind and the purchase of advertising in magazines and periodicals.

In view of these considerations it is my opinion that your question should be answered as follows:

No candidate, or person acting in behalf of a candidate, can purchase advertising in a newspaper or any publication which is similar to a newspaper, but which is not qualified under Ch. 49, F. S., for the publication of legal advertising. However, such prohibition does not refer to magazines or periodicals or occasional printed matter, such as theater or convention programs, which bear no resemblance to a newspaper and would never be eligible for qualification for legal advertisements. The legislature could have extended its prohibition to these periodicals but did not do so.

056-61—February 28, 1956

STATE AUDITING DEPARTMENT

AUDIT OF BOOKS AND RECORDS OF COUNTY SOLICITOR—
TRUST FUNDS AND ACCOUNTS—CH. 21, F. S.
(CH. 29887, 1955)

To: *Bryan Willis, State Auditor, Tallahassee*

QUESTIONS:

1. Is the state auditing department required or permitted to audit the books and records of county solicitors?

2. If the 1st question is answered in the affirmative, should the said auditing department extend the audit to trust accounts handled by such county solicitor for the use and benefit of individuals?

The statutes and laws relating to the state auditing department were revised and extended by Ch. 29887, 1955. Under §10 of this enactment the department has "the power and duty to make an annual post-audit of the accounts and records of all state and county officers and all state and county boards, departments, commissions, institutions or other such agencies." Special audits may be directed or required by the governor or the legislative auditing committee (§14 of said enactment). Doubtless these requirements relate to the fiscal duties and operations of the officers, boards, departments, commissions, institutions and other agencies mentioned.

County solicitors are county officers (Segars v. State, 94 Fla. 1128, 115 So. 537; Palaez v. State, 107 Fla. 50, 144 So. 364, text 365) and therefore within the purview of said §10, Ch. 29887, 1955, if they have any books and records within the purview of the duties of the state auditing department. This gives a conditional answer to the 1st question.

We gather from the request for opinion that in connection with the enforcement of §856.04, F. S., orders to pay weekly, monthly or quarterly sums for the support and maintenance of wives and children are made by the criminal court of record, and the county solicitor is by the court made the trustee of such payments to receive them and see that they are applied to the uses and purposes intended. We know of no provision in the constitution or laws of this state making county solicitors trustees of such funds by virtue of their offices. Acting as such trustees are not the regular and usual duties of county solicitors. Should we consider such weekly, monthly and quarterly payments as payments into court, then they should be held by the clerk and not the county solicitor. If we admit, for the purposes of this opinion, the authority of the court to, by order, make the county solicitor trustee for the purpose of receiving and distributing such funds, then he is acting more in the nature of an officer of the court than a county officer. His status would be similar to a trustee or receiver appointed by a court of chancery; in which case such trustee or receiver would be an officer or agent of the court. Under these circumstances the county solicitor acting as trustee

would not be a county officer within the purview of the auditing statutes above mentioned. This seems to answer the 2nd question in the negative; unless such an audit be directed by the governor or the state auditing department pursuant to §14 of Ch. 29887, 1955, for some legitimate purpose, such as a criminal charge involving such trust funds.

056-62—February 28, 1956

JUDGMENT AND SENTENCE—COURTS

INHERENT POWER OF MUNICIPAL COURT TO WITHHOLD IMPOSITION OF SENTENCE

To: *John F. Harkness, Judge, Municipal Court, City of North Miami, Miami*

QUESTION:

In the absence of charter provisions or other special legislation governing the matter, does a municipal judge have the inherent authority to withhold entry of judgment and sentence of a municipal court from day to day and term to term?

A judgment is an adjudication that the defendant is guilty or not guilty and, in the absence of charter provision or special legislation authorizing a municipal judge to withhold the entry of judgment from day to day and term to term, I do not think that he has the inherent authority to do so. However, it is my opinion that he does have the inherent authority to withhold the imposition of *sentence* from day to day and, if the municipal court has terms, from term to term.

I am aware that 62 C. J. S. 703, *Municipal Corporations*, §358, appears to be authority for the proposition that a municipal court may not indefinitely suspend the imposition of sentence after conviction, and that this is in accord with the holdings of many courts that a state or federal court has no power to indefinitely withhold the pronouncing of sentence upon the conviction of a defendant for the violation of a state or federal law (15 Am. Jur. 135-136, *Criminal Law*, §480). However, as is shown by the last cited authority, other courts recognize the power to indefinitely suspend the imposition of sentence, and the supreme court of Florida has repeatedly recognized the power of a court to withhold the imposition of sentence from day to day and term to term of court. (See, for example, *Carnagio v. State*, 143 So. 162; *Campbell v. State*, 179 So. 137, and *Moutos v. State*, 49 So. 2d 841.) And in *Bronson v. State*, 3 So. 2d 873, the supreme court of Florida recognized "the court's inherent power to suspend pronouncement of sentence, once having entered a judgment of conviction."

I see no reason why the rulings of the supreme court of Florida with regard to state courts should not also apply to a municipal court. Therefore, it is my opinion that where a municipal court has no terms and where there is no charter provision or special legislative act authorizing it to withhold the imposition of sentence, the municipal judge has the inherent power to with-

hold such imposition from day to day; and that where the charter or special legislation provides for a municipal court to hold terms of court (as does the charter of the City of North Miami, in Art. 6-b), the judge of such court has the inherent authority to withhold the imposition of sentence from day to day and term to term of court.

056-63—February 28, 1956

STATE AND COUNTY OFFICERS AND EMPLOYEES

RETIREMENT—DISABILITY BENEFITS—WORKMEN'S
COMPENSATION PAYMENTS—OVERPAYMENT—DUTY OF
COMPTROLLER—CHS. 122 (FORMER 121, 134) AND 440, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. Where a state or county officer or employee is retired by reason of total disability arising by reason of an accident or otherwise (§§121.07, 134.07 or 122.09, F. S.) but after retirement is awarded workmen's compensation bringing him within the purview of sub §(4), §440.09, F. S. what sum, if any, does such person owe to the state by reason thereof?

2. What duty, if any, has the comptroller when application is made to him for the payment of the award for workmen's compensation in the light of the overpayment of the retirement compensation?

3. Is such award of workmen's compensation exempt from the claim of the state for overpayment of the retirement compensation to such retired person?

We gather from the file handed us with the request for opinion that "A" (the subject of this opinion) an employee of the state road department and member of the state officers and employees retirement system was retired, on June 1, 1954, by reason of permanent and total disability suffered while an employee of the said state road department. This retired employee had an average yearly final compensation of \$2,709.27 (a monthly average of \$225.77) at the time of his retirement. When the said employee retired on June 1, 1954, he was not receiving workmen's compensation, although an application may have been pending for such compensation at that time. On or about Oct. 17, 1955, (see also further order of Jan. 31, 1956, by deputy commissioner) the workmen's compensation division of the Florida industrial commission made and entered an order against the state road department, in which workmen's compensation in the amount of \$35 per week was awarded such retired employee retroactive to Jan. 16, 1954, a time prior to the retirement of the said employee.

From June 1, 1954, through January 31, 1956, the said retired employee has been paid retirement compensation at the rate of \$104.89 per month, for which period of time he has been awarded workmen's compensation at the rate of \$35 per week, but which has not yet been paid in full. The workmen's compensation award exceeds the retirement compensation.

Under sub §(4), §440.09, F. S., (in force and effect during the time and times above mentioned) retirement compensation is required to be reduced by the amount of any award of workmen's compensation; however, paragraph (d), sub §(1), §122.16, F. S., (which became effective July 1, 1955) provides that the combined retirement and workmen's compensation benefits shall not exceed the "average final compensation" upon which retirement pay was determined, and in case the retirement pay and workmen's compensation payments exceed such average final compensation the retirement pay is to be reduced by the excess. When and if the award of workmen's compensation is paid the retired employee will have been overpaid retirement compensation at the full rate of compensation until July 1, 1955; this because the weekly workmen's compensation benefits were more than \$140 per month while the retirement compensation was \$104.89 per month (applying §440.09, F. S., to July 1, 1955). It now becomes necessary that we determine whether §440.09 or §122.16, F. S., is applicable since July 1, 1955. §122.16, F. S., became effective on July 1, 1955. The answer to this question in turn seems to depend upon the applicable statutes (Ch. 121 or Ch. 122, F. S.,) to state employees retiring prior to July 1, 1955.

Section 1, Ch. 29801, 1955, (sub §(1), §122.01, F. S.) provides that "Chapter 121, F. S., the state officers and employees compulsory retirement system, and Ch. 134, F. S., the county officers and employees compulsory retirement system, are hereby consolidated and shall be known as the 'State and County Officers and Employees Retirement System'". Section 25 of the said act (§122.01 F. S.) provides that "the rights of members of the retirement system established by Chs. 121 and 134, F. S., shall not be impaired, nor shall their benefits be reduced by virtue of this act." Many provisions common to Chs. 121 and 134, F. S., have been brought into Ch. 122, F. S. Ch. 122, F. S., when read and compared with Chs. 121 and 134, F. S., is clearly a consolidation, revision and amendment of said Chs. 121 and 134. Section 25 (§122.01(3) F. S.) shows a clear intent to preserve rights that had become vested under Chs. 121 and 134, F. S., but we find nothing in said section or elsewhere in the enactment evidencing an intent to exclude retired state employees from the operation of Ch. 122, F. S., except in so far as vested rights may be involved. "To consolidate laws is to collect them in one act, implying the intention to include in such act entire control over the subject, and to exclude all prior enactments." (82 C. J. S. 451, §271). Amended statutes are to be read as to all subsequent occurrences as if they had originally been in the amended form (U. S. v. La Franca, 282 U. S. 568, 51 S. Ct. 278, 75 L. ed. 551, text 557). We are, therefore, of the opinion that §122.16, F. S., is the applicable law since July 1, 1955, instead of §440.09, F. S., even as to state employees retiring prior to said date, unless the application of said §122.16 affects vested rights. We find no evidence where vested rights would be affected in this case. Therefore, only in so far as the combined retirement pay and workmen's compensation payments exceed the "average final compensation," as defined in §122.02, F. S., will there be an overpayment of retirement compensation.

The workmen's compensation award being in excess of the retirement pay, in the case before us, the retirement pay until July 1, 1955 (\$1,363.57), upon receipt of the award of workmen's com-

pensation will be an overpayment. Since July 1, 1955, through Jan. 1, 1956, retirement pay in the sum of \$734.23 has been received, and in addition thereto there has been an award of workmen's compensation in the sum of \$35 per week, or approximately \$1,070, making a total of \$1,804.23 paid in retirement pay and awarded as workmen's compensation. The average final compensation (as defined in §122.02) during said time (7 months at \$225.77) amounts to \$1580.39, there being a difference between this amount and the above mentioned \$1,804.23, of about \$223.84. When and if the retired state employee receives his award of workmen's compensation he will have been overpaid in retirement compensation of about \$1,707.41.

Our tentative answer to the 1st question is that the sum due the state by the retired employee, when and if he receives full payment of the workmen's compensation award, will be approximately \$1,707.41; however, the account should be audited by the comptroller in accordance with the above rules to determine the exact amount due the state.

It having been determined that upon the payment of the workmen's compensation award there will have been paid out of the retirement fund illegally the sum of about \$1,707.41, and which sum will be due the state by the retired employee. Upon the payment of the workmen's compensation award there will have been wrongfully paid from the retirement fund the said sum of about \$1,707.41. This seems to raise the question of the right of the state to set off its claim against the retired employee against the claim of such employee for workmen's compensation.

In this connection we note 81 C. J. S. 1327, §221, bearing upon this question, as follows:

"A state being sued may set off a claim it holds against plaintiff, and a commission being sued officially as representative of the state may counterclaim on a claim of the state with respect to which it could sue as agent for the state, but where an officer is sued individually, to compel him to pay or allow a sum which it is his clear legal duty to pay or allow plaintiff, he cannot set off claims against plaintiff which are those of the state alone and on which defendant has no right to institute suit."

In *Capitol Distributors Corp. v. Kent's Restaurant, Inc.*, 173 Misc. 827, 21 N. Y. S. 2d 219, text 220, the court remarked that "Since the comptroller acts for the state in its fiscal affairs generally, and since the payment of money under the control of the state is void unless approved by his audit (New York Constitution, Art. V, §1), it would seem that he has the right to offset any valid claim of the state against one to whom money under his control is due from the state."

Under §17.04, F. S., the comptroller is required to "examine, audit, adjust and settle the accounts of all the officers of this state, and any other person . . . who may be in anywise indebted or accountable to this state for any property, funds or moneys, and require such officer or person to render full accounts thereof, and to yield up such property or funds according to law, or pay such moneys into the treasury of the state" In this connection

see also §§17.05 and 17.06, F. S., relating to the same subject matter. See also §§215.05-215.07, F. S.

Under the above authorities we feel that the state, by and through its comptroller, when auditing the claim for payment of the award of workmen's compensation above mentioned may set-off the state's claim, in behalf of the state and county officers and employees retirement fund covering the payments made as aforesaid from the said retirement fund to the retired state employee in question. These observations seem to answer the 2nd question.

Under §440.22, F. S., workmen's compensation benefits "shall be exempt from all claims of creditors, and from levy, execution and attachments or other remedy for recovery and collection of a debt, which exemption may not be waived." Under usual rules of statutory construction "the government, whether federal or state, and its agencies are not ordinarily considered as within the purview of a statute, however general and comprehensive the language may be, unless intention to include them is clearly manifest, as where they are expressly named therein or included by necessary implication." (82 C. J. S. 554-5, §317). "In the absence of express provision it has been held or stated that the exemption laws do not apply as against debts due to the state, on the principle that the state is not to be bound by a statute unless expressly named therein" (35 C. J. S. 117, §85, note 25; see also 22 Am. Jur. 85, §110). In case of insolvencies of debtors owing the state, or in case of the death of deceased debtors owing the state, the state has a preference over other creditors (§215.07, F. S.). As the retirement for total disability and the award of workmen's compensation grew out of the same accident or transaction, we have something in the nature of a recoupment when we deduct the amount of retirement pay from the workmen's compensation award, this because under the statutes the retirement compensation should and would have been reduced by the payment of workmen's compensation if the award had been made at the time of the accident. Here we feel that the comptroller would be complying with the requirements of the statutes by deducting the amount due the state from the amount of the award of workmen's compensation when the account is audited by him.

The above observations seem to answer the 3rd question in the negative.

056-64—February 28, 1956

STATE AND COUNTY OFFICERS AND EMPLOYEES

RETIREMENT—BRADFORD COUNTY HOSPITAL CORPORATION—CH. 122, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are the officers and employees of the Bradford County Hospital Corp., (organized and established by Ch. 27413, 1951) within the operation and purview of the state officers and employees retirement system (Ch. 122, F. S.)?

There is included in the operation and purview of the state and county officers and employees retirement system "all full-time officers or employees who receive compensation for services rendered from state or county funds . . . or who receive compensation for employment or service from any agency, branch, department, institution or board of the state, or any county of the state, for service rendered the state or county from funds from any source provided for their employment or service regardless of whether the same is paid by state or county warrant or not" (§122.02, F. S.).

Chapter 27413, 1951, created and established "a public non-profit corporation which is hereby designated the Bradford County Hospital Corporation, for the purpose of establishing, acquiring or constructing, erecting, equipping, maintaining and operating, at Starke, in Bradford County, a public hospital primarily for the benefit of the citizens and residents of Bradford County, Florida, which hospital shall be known as the Bradford County Hospital" (§1 of said Ch. 27413, 1951). This hospital corporation was established "for the benefit of the inhabitants of Bradford County" and its purposes were also declared to be for "public purposes and county purposes of the County of Bradford." (§2 of said Ch. 27413). Ch. 27413, 1951, was amended in some respects by Ch. 28918, 1953. The governing board of the said hospital corporation is given authority to pledge as security for securities issued by it the race track funds allocated to the county under Ch. 550, F. S., in excess of \$80,000.

Under §3, Art. XIII, State Const., counties have certain duties toward those "who by reason of age, infirmity or misfortune, may have claims upon the aid and sympathy of society" and under Art. XV State Const. the counties have certain powers and duties in connection with public health. We are, therefore, of the opinion that the hospital and hospital corporation in question were established to serve a county and public purpose and are primarily for the benefit of the inhabitants of Bradford County. Unless the hospital corporation be considered as a public corporation and an agency of either the state or county, question as to its validity might become material under §25, Art. III, State Const., which prohibits the incorporation of "useful corporations and associations" by local or special acts.

We construe the said hospital and hospital corporation to be an agency or institution of either the state or county and within the purview of Ch. 122, F. S. This being true the above question is answered in the affirmative.

056-65—March 1, 1956

CRIMINAL PROCEDURE

UNIFORM INTERSTATE EXTRADITION—PERSON
IMPRISONED OR AWAITING TRIAL IN ANOTHER STATE—
§941.05, F. S.

To: *LeRoy Collins, Governor, Tallahassee*

QUESTIONS:

1. Under the circumstances set forth below, please

advise me if we should return these prisoners to the state of Tennessee, can they be brought back to Florida and made to serve the unexpired term of their present sentences?

2. If your answer to the above is in the affirmative, is it otherwise consistent with Florida law and policy to grant the request of the governor of Tennessee?

In connection with the above questions, you present the following statement of facts:

Wallace Humphrey and Lloyd Warwick, fugitives from Tennessee, are presently confined in the Florida state prison under 15 year sentences; previously, in January, 1955, they had been convicted in Tennessee and had received 3-year sentences to the Tennessee penitentiary and on appeal the Tennessee supreme court affirmed at the October, 1955, term; their Tennessee bondsman put up a \$10,000 bond for them and unless they can be produced when called by the Tennessee supreme court at its next session the bond will be forfeited; according to the bondsman, they were apprehended in Florida on information furnished by him to the local authorities; and the governor of Tennessee requests you to allow them to return to that state and serve their Tennessee sentences before being subjected to the remainder of their Florida sentences.

AS TO QUESTION 1:

In the absence of a governing statute, the authorities are divided as to whether a person whose departure from a state is involuntary or under legal compulsion may later be extradited back to that state as a fugitive from justice, but the majority view appears to be that he can be extradited under such circumstances (35 C. J. S. 327, Extradition, §10-b(1); 22 Am. Jur. 263, Extradition, §23). To resolve this conflict of authority (See Commissioners' note, Uniform Laws Annotated, Vol. 9, p. 191), the national conference of commissioners on uniform state laws included in §5 of the uniform criminal extradition act the following provision:

"The Governor of this state may also surrender on demand of the Executive Authority of any other state any person in this state who is charged in the manner provided in Section 23 of this act with having violated the laws of the state whose Executive Authority is making the demand, even though such person left the demanding state involuntarily." (Emphasis supplied).

The substance of said quoted provision was incorporated into §941.05, F. S., but, although Tennessee adopted the uniform criminal extradition act in 1951, it omitted said quoted provision (1955 pocket part to Uniform Laws Annotated, Vol. 9, p. 68).

So it is that the Tennessee act left out the very provision which would have authorized its governor to surrender the above named fugitives to the Florida authorities if they left Florida under legal compulsion to return to Tennessee to serve their Tennessee sentences. I do not find any Tennessee decision indicating what the courts of that state would decide if said fugitives should invoke habeas corpus to prevent their return to Florida upon the theory that they left Florida under legal compulsion. Said courts might

well align themselves with the minority and hold that the fugitives could not be extradited to Florida.

Even if I were in a position to assure you that said fugitives could be extradited to Florida after having completed their Tennessee sentences, they would have to be given credit on their Florida sentences for the time they spent in the Tennessee prison unless they consented to having their Florida sentences interrupted for the purpose of serving their Tennessee sentences and then serving the balance of their Florida sentences. A convict has the right to pay his debt to society by one continuous period of imprisonment and, where a prisoner is liberated from confinement in a jail without his request or consent, while serving a sentence, his sentence continues to run and he is entitled to credit on the sentence for the time during which he is thus at liberty (*State ex rel. Libtz v. Coleman*, 5 So. 2d 60; and *Craton v. Sinclair*, 22 So. 2d 762). In other words, a prisoner may not be compelled to serve his sentence in installments (24 C. J. S. 1225, Criminal Law, §1995-a). I think that these legal principles would apply to the above named fugitives and that unless they should consent to having their Florida sentences interrupted and served in full in installments in the manner contemplated by the governor of Tennessee, they would be entitled to credit on their Florida sentences for the time spent in the Tennessee prison.

AS TO QUESTION 2:

If Tennessee desired these fugitives for the purpose of prosecuting them, I think that as a matter of comity between states they should be lent to Tennessee for that purpose, with the understanding that they would be returned to Florida as soon as the prosecution was concluded, without first serving any sentences imposed upon them in Tennessee as the result of such prosecution. Such comity has frequently been exercised between the states and between the states and the federal government. And, if the fugitives were merely under criminal prosecution in this state, as distinguished from serving sentences, §941.19, F. S., would authorize you, in the exercise of your discretion, to surrender them to Tennessee, but I do not interpret such statute as applying to a person who has already been convicted and is serving a sentence in this state. I do not find any statute which would authorize you to interrupt the Florida sentences of said fugitives and surrender them to Tennessee for the purpose of having them serve sentences there, and I am inclined to agree with the supreme judicial court of Massachusetts that a governor has no authority to interfere with the execution of a sentence in a criminal case except by pardoning the prisoner where the pardoning power is vested in the governor (*In re Opinion of Justices*, Mass., 89 N. E. 174).

But, even if the Florida courts should disagree with the Massachusetts court in this regard, I point out that to release these fugitives to Tennessee for service of their sentences there would be opposed to the long standing policy of this state. I have never known of a Florida prisoner being released to another state before the expiration of his Florida sentence for the purpose of permitting him to serve a sentence in the other state before being subjected to the balance of his Florida sentence. Also, Hon. S. L. Walters, chief clerk of the prison division, who has

handled the prison records for many years, advises that he has never known of a Florida prisoner being released to another state for such a purpose.

056-66—March 1, 1956

STATE OFFICES, OFFICERS AND RECORDS

STATE MERIT SYSTEM—PAYMENT OF COST OF ADMINISTRATION—CH. 110, F. S.

To: *Angus Laird, Director, State Merit System, Tallahassee*

QUESTIONS:

1. May the administrative expenses and costs of operating the state merit system be allocated on the basis of the number of employees of the various agencies being served under the merit system?

2. May the funds appropriated under §110.10, F. S. be used to pay part of the allocated cost of the state road department under the merit system?

AS TO QUESTION 1:

Subsection (1) of §110.10, F. S., authorizes the apportionment of cost among the agencies served by the merit system, and in part provides:

"To establish an equitable division of the costs, the amount to be paid by each division shall be determined in such proportion as the service rendered to each division bears to the total service rendered by the department."

You advise that the method being used at present for apportionment of costs is not on the basis of services rendered but on the basis of the number of employees in each agency served, and that you have no other choice but to use this method until the federal government approves another plan which you have submitted.

It is my opinion that sub §(1) of §110.10, *supra*, contemplates the use of the most equitable method possible under the circumstances. In the light of the provision of §110.03, F. S., to the effect that no amendment shall be made to a rule or regulation of the merit system which would deprive an agency of federal funds, the method in use for allocating costs is an acceptable one at present. Therefore, the answer to your 1st question is in the affirmative.

AS TO QUESTION 2:

You indicate in your letter that the state road department under the present system of allocating costs must pay 51% of the cost of operating the merit system, and that under its current budget it is unable to provide for the entire payment of its allocation of cost and must therefore draw from the general revenue fund for the balance.

I believe the legislature anticipated such a problem when it provided, in sub §(2) of §110.10, F. S. as follows:

"To provide funds for administrative costs for any agency which is unable at the time of its application to provide such funds out of its then current budget, there is hereby appropriated out of the general revenue the sum of \$50,000 which shall be allocated by and with the approval of the budget commission to the merit system herein established to pay the costs of administration for such agencies, as contemplated in sub §(1) of this section."

Section 4, Art. IX, of the Fla. Const. relating to expenditure of public funds, provides:

"No money shall be drawn from the Treasury except in pursuance of appropriations made by law."

In *State v. Lee*, 121 Fla. 360, 163 So. 859, 868, the supreme court held:

"An appropriation of money is the setting it apart officially, out of the public revenue for a special use or purpose, in such manner that the executive officers of the government will have authority to withdraw and use that money, and no more for that object, and for no other."

The legislature, in sub §(2) of §110.10, F. S., provided the manner for the expenditure of a certain amount from the general revenue fund, when necessary, to help defray the cost of administering the merit system. As a safeguard to the use of the funds provided in sub §(2), I feel that some method should be used to determine whether an agency is in fact unable to pay the full amount of its allocated cost. It is my opinion that, prior to the release of any funds provided in such section, the agency should submit its request and reasons therefor to the budget commission and receive its approval for the use of such funds.

Although the operation of the state road department is not normally financed from the general revenue fund, the words "any agency" used in sub §(2) of §110.10 would include the state road department. It is my opinion that the answer to your 2nd question should also be in the affirmative, provided the budget commission is satisfied that the state road department is unable to pay its entire allocation of cost.

056-67—March 1, 1956

**STATE AND COUNTY OFFICERS AND EMPLOYEES
RETIREMENT—COUNTY AND MUNICIPAL SERVICE
OFFICERS—§§292.10-292.12 AND CH. 122, F. S.**

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where a county and a municipality contribute to a

fund to operate a veterans service office pursuant to §292.10, F. S., et seq., is the officer of such office within the purview of Ch. 122, F. S., or former Ch. 134, F. S., and a member of the retirement systems provided by said chapters?

The county officers and employees retirement system (now consolidated with the state officers and employees retirement system into the state and county officers and employees retirement system by Ch. 122, F. S.) included "all full-time officers or employees, who receive compensation for service rendered from county funds . . . or who receive compensation for employment or service from any agency, branch, department, institution or board of any county in the state . . ." (§134.02(1) F. S.). This group of officers and employees are now within the purview of the state and county officers and employees retirement system (§122.02(1), F. S.). Our question is whether the service officer mentioned in the above question is wholly or partly within this definition or not within it at all.

Sections 292.10, et seq. F. S., provide for the establishment of county and other local service officers for the assistance of war veterans and their families. County service officers are expressly provided for by §§292.10 and 292.11 F. S. Boards of county commissioners are given express authority to "work jointly with any agency of the federal government, any present or future state agency or commission, or any other county in the state, or any municipality in such county, and such board may contribute directly from the funds herein provided to any such agency, commission, political entity or municipality in furtherance of the purpose of this law" (§292.12, F. S.). Under this provision the boards of county commissioners may contribute county funds to the operation of service agencies by the federal government, state, other counties, and to municipalities; however, such contributions do not of themselves make such service agencies and their employees county agencies and employees of the county making such contributions. We are inclined to view such contributions as gifts to such agencies as authorized by Ch. 292, F. S.

Likewise working jointly and cooperating with federal, state, and other agencies, including other counties and municipalities, may well include gifts and contributions from other counties, municipalities and other political agencies, for the operation of county service offices; in these cases the contributions and gifts may well be considered as becoming county funds for specific use. Funds contributed by a county to a municipality for the operation of a municipal service office (should one be provided by law, including special and local laws) may become municipal funds for specific use. Municipal funds contributed to a county toward the operation of a county service office may likewise become county funds for specific use. Under §292.12, F. S., a county "may, with any other county or *municipality*, employ jointly a *county service officer* to carry out for such counties the purposes of this law." (Emphasis supplied.) Under this provision the service officer to be employed is made a "county service officer" by the statute although a municipality provides a part of the funds from

which paid. If the county and municipality mentioned in the request for an opinion are operating under this provision of the statute then the service officer is a county employee within the purview of the above mentioned retirement systems.

The above question is, therefore, conditionally answered in the affirmative based upon the presumption that the county and municipality jointly employ a county *service officer*; however, if this presumption is not correct then the question must be answered from the rules above set out for the determination of such and similar questions.

056-68—March 1, 1956

TAXATION

LICENSE TAXES—HOTELS LICENSED UNDER §205.29, F. S.—
OTHER PLACES OF BUSINESS OPERATED WITHIN
BUILDING AND GROUNDS—§205.37, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where a hotel is licensed under §205.29, F. S., are the places of business within the hotel building and grounds (including bar and cocktail lounges, dance studios, solariums, photographic studios, and businesses within §205.37, F. S.) subject to license taxes and licenses in addition to the hotel license?

Section 205.29, F. S., provides that "every person engaged in the business of operating a boarding house, lodging house, tourist camp, cabin camp, auto court, or hotel having beds for 10 or more persons shall pay a license tax for each place of business of 50c for each room therein." Section 205.37, F. S., provides that "every person who operates for a profit any place where dancing is permitted or entertainment, such as variety programs or exhibitions, is provided for a charge shall pay a license tax of \$100. The license required by this section shall be in addition to any other license required by law and the operation of such a place as herein described shall not be construed to be incidental to some other business . . . ; provided, further, that this section shall not apply to hotels paying an occupational tax as provided for in §205.29." (Emphasis supplied.) The definitions of "hotels" contained in Chs. 509, 510 and 511, F. S., relate to regulatory fees or taxes and not to occupational licenses and license taxes and has no effect upon said §205.29.

The classifications made by the statutes in imposing license taxes by §§205.29 and 205.37, F. S., "are clearly distinct and predicated upon reasonable differences in the classes. The first class merely provides lodging accommodations as the sole business, while the latter class operates for a profit a 'place where dancing is engaged in or entertainment such as variety programs or exhibitions, is provided' which occupation shall not 'be incidental to some other business.'" (*Pellicer v. Sweat*, 131 Fla. 60, 179 So. 423, text 425). Section 205.37, F. S., although an occupational license, is also a police regulation (*State v. Wentworth*, 135 Fla.

565, 185 So. 357; *Levy v. Collins*, 143 Fla. 619, 197 So. 522). A place of business may be operated for a profit although no direct charge be made for the use of the facility (*State v. Wentworth*, supra; *Levy v. Collins*, supra).

The provision in §205.37, F. S., that "this section shall not apply to hotels paying an occupational license tax as provided for in §205.29," was intended to exclude from the operation of said §205.37 dancing and entertainment facilities operated by hotels primarily for the entertainment of their guests and not for profit. The exemption relates to entertainment features and facilities maintained as a service to hotel guests and not as a separate facility. Where bar and cocktail lounges, dance studios, solariums, photograph studios, and other types of businesses are operated within hotel buildings or on hotel grounds as separate facilities, whether operated by the hotel or under concessions by others, they are not within the said exception and are subject to the license taxes applicable to such businesses. Only those facilities operated by the hotel as a part of the actual hotel operations and directly related thereto are within the said exception.

These observations seem to answer the above stated question.

056-69—March 2, 1956

CORPORATIONS

NONPROFIT CORPORATIONS, ORGANIZATIONS OR ASSOCIATIONS—SOLICITATION OF FUNDS FOR CHARITABLE PURPOSES—SIGNATURE ON APPLICATION FOR PERMIT—

§§617.22-617.25, F. S. (Ch. 29992, 1955)

To: *Edwin Baur, Clerk of the Circuit Court, Gadsden County, Quincy*

QUESTION:

Is it necessary that applications for permits to solicit funds for charitable purposes, as required by Ch. 29992, 1955, be manually signed by the applicant or his agent?

Chapter 29992, 1955, relates to the solicitation of funds for charitable purposes and, among other things, requires that any non-profit corporation, organization or association, shall, prior to soliciting funds in this state for charitable purposes, obtain a permit from the clerk of circuit court of the counties in this state in which solicitations are to be made (§1, Ch. 29992, 1955), and to file with the clerks of the circuit court financial statements and reports concerning such solicitations (§4, Ch. 29992, 1955).

Applications for permits to solicit funds shall bear the name and address of the applicant, its board of directors, its president and secretary, the place and type of proposed solicitation and the proposed use of the receipts from said solicitations (§2, Ch. 29992, 1955). The act does not specifically require that applications for permits to solicit funds shall be manually signed by the applicant or his agent.

In the absence of a statute prescribing the method of affixing a signature, it may be affixed in many different ways. It may be written by hand, and, generally, in the absence of a statute otherwise providing, it may be printed, stamped, typewritten, engraved, photographed, or cut from one instrument and attached to another. A signature lithographed on an instrument by a party may be sufficient for the purpose of signing it, and it has been held or recognized that it is immaterial with what kind of an instrument a signature is made. A facsimile signature of a person may be a genuine signature. (80 C.J.S., Sec. 7, pp. 1292-1294.)

There are numerous decisions holding that "signature" includes any name, mark or sign written with intent to authenticate any instrument of writing, which language would include a facsimile signature. See the South Carolina case of *Smith v. Greenville County*, 199 S.E. 416. Such "signature" is binding on the person who affixes it as his own or authorizes another to do so. See the Georgia case of *Hansen v. Owens*, 64 S.E. 800.

However, the burden of proof of a signature not in the handwriting of the party whose signature it purports to be, is on the party relying on the genuineness or authenticity of such signature. See 58 Corpus Juris, p. 730, Signatures, §18.

Where the name required has been placed by rubber stamp by one having authority to do it and with intent to endorse the instrument, the authorities hold that this is a valid endorsement. The endorsement, however, does not prove itself but must be established, as in other cases, by proper testimony. See the North Carolina case of *Mayers v. McRimmon*, 53 S.E. 447.

It is our opinion that applications for permits to solicit funds for charitable purposes, as required by Ch. 29992, 1955, do not have to be manually signed by the applicant or his agent. However, in view of the fact that the burden of proof of a signature, not in the handwriting of the party whose signature it purports to be, is on the party relying on the genuineness or authenticity of the signature, it is our further opinion that if a clerk of a circuit court is not completely satisfied in his own mind that the facsimile signature is genuine and authentic, he should require that application be manually signed by the applicant or his agent.

The question should, subject to the foregoing observations, be answered in the negative.

056-70—March 5, 1956

CRIMINAL PROCEDURE

VIOLETION OF RULES AND REGULATIONS OF GAME AND
FRESH WATER FISH COMMISSION—FORFEITURE OF
GUN USED TO PERPETRATE VIOLATION—
§§372.83, 372.84, 775.07, 790.07 AND 790.08, F. S.

To: *Tom Treadwell, County Prosecuting Attorney, Everglades*
QUESTION:

Upon conviction of a charge of attempting to take

game at night, with the use of gun and headlight, does the county judge have authority to deprive the defendant of the gun found in his possession, even if the actual ownership of the gun is in doubt?

The possession of a gun and light by a person for the purpose of taking game at night is prohibited by rule 16 of the rules and regulations of the game and fresh water fish commission; any violation of this rule and regulation is made a misdemeanor (§372.83, F. S.) and punishable upon conviction by forfeiture of any license or permit held by such person and issued by or for the game and fresh water fish commission (§372.84, F. S.) and by fine and/or imprisonment as provided by §775.07, F. S. Under §790.07, F. S., any person lawfully arrested while committing a criminal offense, having in his possession a firearm, is guilty of a misdemeanor punishable as provided in said section. Officers making an arrest under said section *or any other law* are required to take possession of any firearms "found upon the person arrested and deliver them to the sheriff of the county . . . wherein the arrest is made, who shall retain the same until after the trial of the person arrested." (§790.08(1), F. S.).

Where the person arrested as aforesaid is convicted of an "offense involving the use or attempted use of such weapons or arms, such weapons or arms shall become forfeited to the state, without any order of forfeiture being necessary although the making of such an order shall be deemed proper, and shall be forthwith delivered by the sheriff . . . to the adjutant general of the military department of the state . . ." (§790.08(2)) but if such person is acquitted of the offense the weapons or arms are to be delivered to him upon acquittal (§790.08(3)).

There exists in many jurisdictions statutory provision for the forfeiture of specific property used in the commission of a crime, or in connection with the commission of a crime (37 C. J. S. 6 and 7, §3). Such statutes have almost universally been held valid against constitutional objections (37 C. J. S. 7 and 8, §4); however, such statutes are to be construed strictly (37 C. J. S. 8 and 9, §4). Under common law forfeitures, such as forfeiture of property upon conviction of a felony, it was not the commission of the crime but the conviction that worked the forfeiture; the conviction in and of itself worked the forfeiture (37 C. J. S. 12, §5). The Florida statute above mentioned is of this nature. "Under statutes in which the proceeding to enforce a forfeiture is regarded as one in rem and the res as the offender, the owner's or lienor's knowledge of, consent to, or guilt of the acts which constitute grounds for the forfeiture is not essential, and may be made immaterial; but under statutes in which the proceeding is in personam defendant is the wrongdoer and party to be punished, and, in such proceedings, a person's knowledge of, consent to or guilt of acts constituting grounds for forfeiture is an essential prerequisite to the forfeiture of his interest in the property involved." (37 C. J. S. 13 and 14, §5).

Section 790.07, F. S., makes the use of firearms in connection with the commission of a crime a criminal offense; the punishment for such a crime is against the person committing such crime.

Under sub §(2), §790.08, F. S., there is no forfeiture unless the accused is convicted, and under sub §(3) of said section upon acquittal the weapons or arms are returned to the accused. The forfeiture appears to be directed against the defendant as additional punishment, and not against the weapons and arms as such. There is no process issued against the res as in proceedings strictly in rem. We, therefore, hold that the forfeiture is one in personam, as a part of the punishment for the commission of the crime, and not one in rem against the said weapons or arms. It is doubted that a proceeding *in rem* to forfeit property used in connection with the commission of a crime may be maintained as a criminal proceeding (State v. Criminal Court of Record, 150 Fla. 285, 7 So. 2d 131) unconnected with the conviction of its owner.

We, therefore, feel that the owner's or lienor's knowledge of, consent to, or guilt of the criminal acts which form the basis for a forfeiture of weapons and arms under §790.08, F. S., the same providing for a forfeiture in personam and not in rem, are material and must be proven when the weapons or arms used are the property of another or others than the person committing the crime. It would seem proper to hold that possession is *prima facie* evidence of ownership, but that such *prima facie* evidence may be overcome by evidence. This gives a conditional negative answer to the above question.

056-71—March 7, 1956

STATE OFFICERS AND EMPLOYEES

MERIT SYSTEM—CONSTRUCTION OF PARAGRAPH (k), SUBSECTION (2), §110.06, F. S. RELATING TO EXCLUSION OF CERTAIN PERSONNEL—RULES AND REGULATIONS

To: *Burnis T. Coleman, General Counsel, Florida Industrial Commission, Tallahassee*

QUESTION:

May the persons excluded from the merit system by paragraph (k) of sub §(2) of §110.06, F. S., be included within the system by rule or regulation?

Subsection (2) of §110.06, F. S., excludes various positions from the merit system, including elective officers, temporary and part time employees, members of boards and commissions and heads of departments, attendants and employees of the judiciary, and many others. Paragraph (k) of sub §(2) excludes "all employees exempted by the merit system regulations heretofore adopted by the Florida merit system council and any other employees who may hereafter be exempted by the state personnel board or legislative act."

If the employees exempted under paragraph (k), above quoted, may be included within the merit system by rule or regulation, then it would follow that the other positions excluded under sub §(2) could also be included by rule or regulation. I do not

believe that this was the intent of the legislature. It is my opinion that the legislature intended this act to be in the nature of an experiment and all positions enumerated in sub §(2) would be legislative exclusions and would remain as such until the legislature provided otherwise.

Subsection (2) of §110.03, F. S., relating to the authority of the state personnel board, provides that the rules and regulations previously adopted by the merit council and which were "applicable to employees served by the Florida merit system council" (emphasis supplied) may be amended by the board. This is the only authority mentioned in the statute for the personnel board to amend regulations previously adopted, and it relates to regulations applicable to employees served and not to employees exempted from the merit system. It is, therefore, my opinion that the answer to your question should be in the negative.

056-72—March 8, 1956

TAXATION

MILITARY RESERVATIONS—LICENSE TAXES—§§6.02 AND 6.04, F. S., §8, ART. I, FEDERAL CONSTITUTION

To: *Vernon Peebles, City Manager, Niceville*

QUESTION:

Where a portion of a military reservation, over which jurisdiction has been ceded by the state, extends into the boundaries of a municipality in this state, and there is operated thereon a golf course, country club and other recreational facilities, may such municipality levy, assess and collect license taxes for the operation of such golf course, country club and other recreational facilities?

This question presents an issue of state jurisdiction, power and authority over military reservations. Under §8, Art. I, Fed. Const. the congress of the U. S. has authority "to exercise exclusive legislation over all places purchased with the consent of the Legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings." Under §6.02, F. S., (Ch. 25, 1845) the legislature of Florida gave its consent to the purchase, acquisition, ownership, occupancy and use of lands in this state, by the U. S., for forts, magazines, arsenals, dockyards and other needful buildings; and by §6.04, F. S., authorized and provided for the ceding of state jurisdiction over such lands; subject, however, to the right of the state to enforce criminal and civil process, issued by its courts and judicial officers, upon said lands. The term "exclusive legislation" used in the federal constitution is synonymous with "exclusive jurisdiction." (*Arledge v. Mabry*, 52 N. Mex. 303, 197 P. 2d 884; *State v. Blair*, 238 Ala. 377, 191 So. 237). See also 54 Am. Jur. 594-602, §§81-88, and 65 C. J. 1255, §7.

Unless there is some federal statute expressly authorizing the levy, assessment and collection of license taxes against the businesses operated upon the lands in question such license taxes

may not be levied, assessed and collected by the municipality without regard to the general powers of the municipality to levy and collect license taxes under its charter powers. From a cursory examination of the federal code we are not advised of any federal statute expressly authorizing the levy of municipal licenses and license taxes upon businesses operated on military reservations other than sales and use taxes.

The above stated question is answered in the negative in the absence of a federal statute authorizing the levy, assessment and collection of such licenses and license taxes.

056-73—March 8, 1956

TAXATION

TAX SALES—DISTRIBUTION OF EXCESS PROCEEDS OF TAX DEED SALE UNDER §194.22, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

How should the excess proceeds of a tax deed sale, held by or under the control of a clerk of the circuit court in this state under §194.22, F. S., be distributed as between different claimants, including a federal internal revenue tax lien, the lien of a mortgage, lien of judgments, and of municipalities and taxing districts?

Under §194.22, F. S., payment from said excess proceeds of tax deed sales may be made to (1) the holders of tax liens equal in dignity with the county ad valorem taxes, (2) special assessment liens, (3) "After all liens for general taxes and special assessments . . . are paid in full, the balance of the purchase price shall be retained by the clerk and notice mailed to the owner . . . that this sum will be paid to him upon demand . . ."

Federal tax liens, as between the government and the taxpayer, become liens when the assessment is made (§6322, Title 26, U. S. Code) and against mortgagees, pledges, purchasers and judgment creditors when the lien is filed in the office of the clerk of the circuit court of the county wherein the property lies (§6323 (1), Title 26, U. S. Code and §28.20, F. S.). The priority of judgment and mortgage liens seems to be determined by the statutes of this state and the priority of the federal lien by the federal statutes. If the federal tax lien was filed with the clerk of the circuit court prior to the tax sale then the lien attached to the real property itself and took its priority according to law over the mortgages and judgment liens; if filed after the tax deed sale it attached to the proceeds from the sale in the hands of the clerk of the circuit court. Ad valorem taxes and special assessment liens take priority over the tax lien according to the date of their attachment as tax liens, which must be determined from the statutes providing for such taxes and assessments. Duly recorded mortgages and duly entered, docketed and recorded judgments and decrees, take priority with the federal tax lien in order of recording.

Not being advised of the recording dates of the mortgages, judgments and the federal tax lien, and the date of the local ad valorem assessments and special assessments, we are unable to fully answer the above question; however, we think that we have furnished information from which priorities may be determined. Further, as a precaution it may be suggested that no portion of such excess funds be paid out until the persons entitled thereto, including the federal government, agree on priorities if such an agreement is possible.

056-74—March 9, 1956

COUNTY FINANCE

FEES, COLLECTED BY COUNTY OFFICERS—REPORTS TO COMPTROLLER—§116.03 AND CH. 128, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Is the report to the state comptroller, mentioned in §116.03, F. S., required in counties having local, special or population acts fixing a salary in lieu of fees for all or some of the county officers in such counties?

Section 116.03, F. S., provides that each county officer "who receives all or any part of his compensations in fees or commissions, or other remuneration, shall keep a complete report of all fees and commissions or other remuneration collected by him, and shall make a report to the state comptroller of all such fees and commissions, or other remuneration, annually on December 31 of each and every year . . ." It is stated in the request for opinion that "the reports received under this section are used in making out the annual report of the comptroller of county finances." This comptroller's report appears to be made under and pursuant to Ch. 128, F. S. Sections 116.03-116.09, F. S., were derived from Ch. 6815, 1915, the title to this act being: "An Act Requiring the Reports of All Fees and Commissions, or Other Remuneration Collected by State and County Officials, And the Official Expenses of Such Officers, And to Provide for the Publication of Such Reports." Under §116.06, F. S., a summary of all such reports is required to be included in the comptroller's report to the governor. Section 116.06, F. S., requires that the comptroller examine and verify such reports.

When §§116.03-116.06, F. S., are read and considered together, and with the title of the act from which derived as well as Ch. 128, F. S., especially as to the officers therein named, we feel that the report is required notwithstanding the county officers in question receive a salary instead of fees and commissions under local, special or population acts. We are not here called upon to pass upon the validity of such local, special or population salary acts under §20, Art. III, State Const.; and, therefore, express no opinion in that connection.

The above question is, therefore, answered in the affirmative.

056-75—March 9, 1956

INSURANCE

REGIONAL HOME OFFICE CONSTRUCTION OF WORDS
"SUBSTANTIALLY OCCUPIES" AND ISSUANCE OF
POLICIES—§205.432, §1, ART. IX, STATE CONST.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTIONS:

1. Under the first paragraph of sub §(1) of §205.432 F. S. (relating to establishment of regional home offices in this state), what is meant by a foreign insurer "substantially" occupying a building owned by it in this state?

2. In view of the provisions of sub §(2) of §205.432 where a foreign insurer has established a regional home office in this state, would the practice of sending to its home office in another state punched cards for use in machines resulting in the production of policy forms to be issued to insureds in Florida be in conflict with the words "issuance of policies" by such regional home office, as such words are used in said sub §(2)?

Section 205.432, F. S., provides for the establishment in this state of regional home offices by foreign insurers doing business in this state under the conditions and circumstances set forth therein.

Section 205.432(1) provides in part: "A foreign insurance company incorporated by or under the laws of any other state or foreign country, which is subject to the tax imposed by §205.43(2), F. S., and which owns and *substantially occupies* any building in the state of Florida as a regional home office, as hereinafter defined, shall be entitled" to described credits and deductions against such tax. (Emphasis supplied.)

Section 205.432(2) is quoted: "A regional home office, for the purpose of this section, shall mean an office performing, for an area covering 3 or more states, the selling, underwriting, issuing and servicing of insurance, including the following functions relating thereto; actuarial, medical (where required), law, approval or rejection of applications for insurance and issuance of policies thereon, approval of payment of all types of claims, maintenance of records to provide policyholder information and service, advertising and publications, public relations, supervision and training of sales and service forces."

Generally it may be stated that the effect of the quoted subsection is that with respect to the activities defined an insurer who establishes such a regional home office must be independent of and practically autonomous in relation to the home office of the corporation.

Recourse to dictionaries and *Words & Phrases* for definitions and construction of "substantial" and "substantially" is of little assistance here. So far, after considerable search, we have been unable to locate a case construing the words "substantially occupies". The words "substantially completed" dealt with in *Bowery v. Bab-*

bitt, Fla., 128 So. 801, are not in point. We consider that a good yardstick for use here is found in the manner in which our legislature has exempted property of educational, charitable and religious, etc., organizations.

Section 1, Art. IX, Florida Const., providing for uniform rate of taxation, just valuation of property, etc., concludes with the words, "excepting such property as may be exempted by law for municipal, education, literary, scientific, religious and charitable purposes." Section 192.06, F. S., exempts certain property from taxation, sub §(3) thereof providing, "Such property of education, literary, benevolent, fraternal, charitable and scientific institutions within this state as shall be actually occupied and used by them for the purpose for which they have been or may be organized; provided, not more than 75% of the floor space of said building or property is rented and the rents, issues and profits of said property are used for the educational, literary, benevolent, fraternal or charitable purposes of said institutions . . ."

It is recognized that nothing is said in the mentioned constitutional provision or the statute granting the described exemption about "substantial" occupancy. However, in the light of the purpose of the constitutional and statutory provisions, reasonably it may be assumed that *actual* occupancy of 75% of the floor space of a building does in fact constitute "substantial occupancy" for the tax exemption purpose.

In explanation of the 2nd question, it is explained that all determinations with respect to the policies mentioned will be made at the regional home office; that the sole reason for recourse to the home office of the corporation is because of business machines located there used in the production of policies; that the policies so produced will be delivered to the regional home office and actually will be *issued* by the regional home office.

In view of the foregoing, in my opinion the questions are answered as follows:

1. In absence of court construction, reasonably it appears that the words "substantially occupies," appearing in the first paragraph of §205.432(1), F. S., and "substantially occupied", appearing in §205.432(1) (b), are to be construed as meaning the actual occupancy by a foreign insurance company of not less than 75% of a building owned by it in Florida and designated as its regional home office within the purview of §205.432, F. S.

2. The situation set forth in the 2nd question as explained above, would not conflict with the words "issuance of policies" (by a regional home office), as such words are used in §205.432, F. S.

056-76—March 15, 1956

DRAINAGE

DRAINAGE DISTRICTS—INVESTMENT OF FUNDS IN SAVINGS AND LOAN SHARE ACCOUNTS— CH. 298 AND §665.44, F. S.

To: Thos. McE. Johnston, Miami

QUESTIONS:

1. May drainage districts organized and existing

under the general drainage statutes of this state (Ch. 298, F. S.) invest their reserve funds in federal savings and loan association share accounts?

2. May drainage districts organized by special or local acts of the legislature invest their reserve funds in federal savings and loan association share accounts?

Section 665.44, F. S., which originated as Ch. 17906, 1937, provides as follows:

"Political subdivisions authorized to invest in share accounts of federal savings and loan associations and Florida building and loan associations which are members of federal home loan bank system.—Any and all boards of county commissioners, trustees for county bonds, trustees of county bonds, county boards of public instruction, road trustees for special tax road districts, bond trustees for special road and bridge districts, bond trustees for special road, bridge and ferry districts, bond trustees for superspecial road and bridge districts, bond trustees for special drainage districts, boards of supervisors for drainage districts, boards of trustees for public hospitals and all other county and other taxing unit officers and officials, by whatever name known, having the custody, control, supervision, management or authority to invest any fund or funds, of any county, school district, special tax school district, special tax road district, special road and bridge district, special road, bridge and ferry district, superspecial road and bridge district, special drainage district, drainage district, county commissioners district, other taxing unit, by whatever name known, may invest any such fund or funds in investment share accounts of any federal savings and loan association chartered under the laws of the United States, and doing business in the state, and in the shares of any Florida building and loan association, which is a member of the federal home loan bank system." (Emphasis supplied.)

This section in no way limits the investments otherwise authorized by law, and is cumulative of and in addition to other investments authorized (§665.47, F. S.). Said §665.44 seems to be applicable where the bond trustees or supervisors of drainage districts have "the custody, control, supervision, management or authority to invest" funds of the districts. (Emphasis supplied.)

Although §298.17, F. S., provides that the treasurer of drainage districts "shall keep all funds received by him from any source whatever deposited at all times in some bank, banks or trust company to be designated by the board of supervisors," we do not think that said §298.17 will prevent the application of said §665.44; said §298.17 was derived from an act of 1913, amended in 1923, while §665.44 was derived from an act of 1937, and is, therefore, the last expression of the state legislature (see *County Commissioners v. Jackson*, 58 Fla. 210, 50 So. 423; *Lykes Bros. v. Bigby*, 155 Fla. 580, 21 So. 2d 37) and controls in case there is a conflict between the two statutes.

It is stated in the request for opinion that "all of the districts have bonds outstanding, none of which are in default, and under some, and perhaps all, of the bond resolutions which require the establishment and maintenance of reserves, the reserves may be invested in Federal Savings and Loan Association Share Accounts." These resolutions doubtless were confirmed by the validation proceedings upon the ground that they were authorized by said §665.44, F. S.

We, therefore, feel that each of the above questions should be answered in the affirmative, unless there be some express provisions in the special or local acts mentioned in the 2nd question providing otherwise.

056-77—March 15, 1956

TAXATION

SPECIAL GAS DISTRICTS—TAX EXEMPTION PROVISIONS IN CERTAIN LOCAL ACTS—EFFECT ON CH. 203, F. S., RELATING TO GROSS RECEIPTS TAX

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Should the state comptroller recognize the tax exemption provisions in Chs. 29334, 30845 and 31166, 1953 and 1955, in the enforcement of Ch. 203, F. S.?

You appear to construe these acts as relieving the Okaloosa county gas district, the Holmes county gas district, and the city of Pensacola, from the 1½% utility taxes levied by Ch. 203, F. S. Accepting your construction of the said acts as relieving the said districts and municipality from the payment of the said taxes imposed by Ch. 203, F. S., which is a state-wide tax applicable to such districts and all municipalities throughout the state, we are immediately confronted with a constitutional question—a question of equal protection of the laws when the 2 districts and municipality are deleted from the operation of Ch. 203, F. S., and other like districts and municipalities are left within the operation of said Ch. 203, F. S.

In *Amos v. Mathews*, 99 Fla. 1, 126 So. 308, text 326, it was stated that "in the imposition of excise taxes there must be geographic uniformity throughout the taxing district to which the particular tax applies." A state tax must be state-wide, a county tax county-wide and a district tax district-wide (53 C. J. S. 535, §22). The tax here involved is a state tax; by the exemption of the 2 districts and municipality it is less than state-wide and there is no valid reasonable reason for exempting the 2 districts and municipality and not exempting other like districts and municipalities. Before the above question may be answered the above stated constitutional question must be considered and answered. If the acts are valid and constitutional, the question would be answered in the affirmative, but if invalid and unconstitutional the answer would be in the negative.

Although for the purposes of this opinion we are accepting

your construction of the application of the tax exemption provisions of Chs. 29334, 1953, 30845 and 31166, 1955, to Ch. 203, F. S., we call your attention to the following features of the said enactments:

Chapters 29334 and 30845 establish gas distribution districts in Holmes and Okaloosa counties, each of said acts providing specifically or in substance that "all *property* and all *income* of the district shall be exempt from all state, county, municipal and other taxation in the state." District bonds and the interest thereon, as well as all deeds, mortgages, indentures of trust and other documents of the districts are also exempted from state and local taxation.

Chapter 31166 relates to the city of Pensacola, and exempts "all *property* and all *income* of the gas distribution system . . . from all taxation by the state" There is a further phrase in the enactment providing that the municipality is "exempted from taxation in all of" its operations in the distribution of natural gas. The preamble to this enactment shows a design on the part of the legislature to give the municipality the same tax exemptions, in connection with the sale and distribution of natural gas by the said municipality.

Each of the said enactments purports to exempt the *property* and *income* of the gas distribution systems. *Income taxes* are prohibited by §11, Art. IX, State Const.; as to the exemption of the income of the districts and municipality the enactments do nothing more than does the said constitutional provision. Taxes imposed by Ch. 203, F. S., are excise taxes and not ad valorem, income or property taxes (*Lakeland v. Amos*, 106 Fla. 873, 143 So. 744). Such taxes are in the nature of sales taxes (*Jacksonville Gas Co. v. Lee*, 110 Fla. 61, 148 So. 188) or excise taxes (*Gaulden v. Kirk*, Fla., 47 So. 2d 567), and not property or income taxes. Tax exemptions, whether constitutional or statutory, are construed against the claimant and in favor of the taxing power (*Orange County v. Orlando Osteopathic Hospital*, Fla., 66 So. 2d 285; *Overstreet v. Tubin*, Fla., 53 So. 2d 913; *Lummus v. Cushman*, Fla., 41 So. 2d 895). The title to Chs. 29334 and 30845 note that one of the purposes of the enactments was to "provide that the property and income of the district shall be tax exempt," this seems to limit the tax exemption to a property and an income tax exemption. This may raise a constitutional question if the body of the act may be construed as providing exemption from the excise tax imposed by Ch. 203, F. S. The tax imposed by Ch. 203 being an excise tax there may be a question of the sufficiency of the title to Ch. 31166, which relates to exemption of "natural gas operations of the city" from taxation. A tax on sales and a tax on operations may not be the same. (Emphasis supplied.)

Under the long standing rule of the office to refrain from answering constitutional questions we do not feel that we should answer the above question, but the question is one that should be left to the courts.

056-78—March 15, 1956

MOTOR VEHICLES

TRAFFIC REGULATIONS AND CONTROL—FORESHORE
OF THE GULF OF MEXICO—CH. 317, F. S.

To: John A. Madigan, Jr., Attorney, Florida Sheriffs' Association, Tallahassee

QUESTION:

What authority and duty does the sheriff of Sarasota county have to enforce laws relating to vehicular traffic while in operation upon the foreshore of the Gulf of Mexico outside the corporate limits of a municipality in Sarasota county?

You have verbally explained that so far as you can ascertain a public way or road has not been created either by prescription or legislative enactment. We, therefore, assume there is no local or population law touching upon the question. For example, Ch. 10486, 1925 designated the beach of the Atlantic ocean between the high and low water mark in Duval county a public highway. In this connection, it was pointed out in *White v. Hughes*, 139 Fla. 54, 190 So. 446 that even though the foreshore may have been designated a public highway, the right of the public to use the beach for recreational purposes is superior to vehicular travel thereon. In opinion 050-366, dated July 27, 1950 (AGO 1949-1950, p. 351) we dealt with the regulation of speed upon a beach road which is a public highway.

Upon examination of Ch. 317 we note §317.22, F. S., regulating speed on a "highway." As set forth in the chapter, the definition of "highway" is found in §317.01 (2), F. S., and is not applicable to our situation. However, it should be noted that both in §317.20, F. S., (driving where under influence of liquor or drugs) and §317.21, F. S., (the offense of reckless driving) there is no mention of highway or public way in defining the crimes. In fact, prior to the passage of Ch. 23076, 1945, repealing §320.50, F. S., that statute provided that no person should "... operate a motor vehicle upon the highways of this state recklessly, or at a rate of speed greater than is reasonable and proper, having regard to the width, traffic and use of the highway . . ." (Emphasis supplied). Section 317.21, F. S., had its origin in Ch. 20578, 1941, so until the repeal of §320.50, F. S., by the 1945 legislature, for the period extending from 1941 to its repeal we had 2 statutes relating to reckless driving. The repealed statute, (§320.50, F. S.), pertained solely to operation upon the public highways of the state while the existing statute, (§317.21, F. S.), apparently applies to the operation either on or off the public highways of the state.

The title of said Ch. 20578, 1941 in part reads: "An Act Regulating Traffic on Highways and Defining Certain Violations in the Use and Operation of Vehicles; . . ." Doubt would then seem to be created as to prosecution for an offense occurring off the roadway and we do not find any Florida decision dealing specifically with the construction to be placed upon §§317.20, and

317.21, F. S., relating to reckless driving and driving while under the influence of intoxicating liquor or drugs respectively, determining whether or not it is necessary for the offenses to be committed upon the public highways of the state.

We call your attention to the case of *Guess et al. v. Azor et al.*, Fla., 57 So. 2nd 443 holding that the foreshore of the Gulf of Mexico, which is that portion lying between the high and low water marks and, of course, is owned by the state, is available to the public and might properly be used for transporting shell for commercial purposes. Consequently, if vehicles lawfully enter upon the foreshore and do not violate any provisions of law, I do not know of any means or authority for the sheriff to regulate or control them.

While I am by no means certain, until a court of competent jurisdiction says otherwise, I am inclined to believe that the reckless driving statute, as well as the driving while intoxicated statute, embraces operation both on and off the public highways of the state. If this is correct, the sheriff, as chief law officer of the county, has both the duty and power to enforce such laws.

This answers the question as definitely as possible.

056-79—March 15, 1956

EDUCATION

STATE BOARD OF EDUCATION—MORTGAGING STATE PROPERTY PROHIBITED—§10, ART. IX, STATE CONST.

To: *J. B. Culpepper, Executive Secretary, Board of Control, Tallahassee*

QUESTION:

May the state board of education acquire property and execute a mortgage and note against such property to represent a portion of the cost thereof?

Section 10, Art. IX, Fla. Const., provides in part: "The credit of the state shall not be pledged. . . ." See 81 C. J. S., p. 1168.

Your question is therefore answered in the negative.

056-80—March 19, 1956

MOTOR VEHICLES

REGULATION OF TRAFFIC ON HIGHWAYS—LEGALITY OF WEIGHT COMMITTEE, HEARINGS—§§317.73-317.95, F. S.

To: *H. N. Kirkman, Director, Department of Public Safety, Tallahassee*

QUESTION:

Has the weight committee, composed of the chairman of the state road department, director of the department of public safety, motor vehicle commissioner, and the chairman of the railroad and public utilities commission,

any legal status and are the activities being carried on by the weight committee, that is to say, the hearing of complaints in overload matters where penalties are paid under protest and in some instances all or part of the penalties are refunded, authorized under the statutes?

The statute required the motor vehicle department, department of public safety, state road department and the Florida railroad and public utilities commission to enforce the law. (§317.94)

The constitutionality of the original act was questioned in the case of *Youngblood v. Darby*, 58 So. 2d 315. Our court held that a provision in the act which authorized summary seizure and sale of a motor vehicle to satisfy the state's lien was unconstitutional because it provided for no notice and hearing and was the taking away from an alleged violator of his property without due process of law, but that the other provisions, including the equitable lien, were constitutional and upheld the remainder of the act.

In 1951 the legislature amended certain sections of the act providing that a person could file a forthcoming bond with the officer who has seized his vehicle for overweight in twice the amount of the penalty and this would release the vehicle, giving the state a remedy against the bond in court. There were other amendments not material to the questions here raised.

In May of 1950 the heads of the 4 agencies named in the statute to enforce this act met, drew up and approved an agreement, which appears in the May 30, 1950 minutes of said committee, whereby the 4 agencies agreed to act as a policy committee to enforce the act. They agreed that the department of public safety should be in charge and should supervise all of the physical enforcement of the law pursuant to the policy set by the committee; that the state road department would establish the fiscal procedure for the enforcement of the act and that the general auditor of the state road department should issue all official receipts therefor and have charge of the handling of all funds of the expenditures for the enforcement of the law. The road department agreed to establish permanent weighing platforms in various sections of the state and to provide other means of weighing motor vehicles.

Inasmuch as the state road board approved the expenditure of some of its funds to establish weighing stations at the various exits of the state, mainly at the large river bridges and the railroad commission has used these facilities in connection with enforcement work other than that relating to weights, it would appear that the agreement, *supra*, has already been approved by all agencies concerned unless the cabinet, as the department of public safety, wishes to formally ratify the action of its director *nunc pro tunc*.

This agreement set up an administrative board, comprised of the heads of the agencies named in the statute, mainly for coordination and policy-making procedure. It soon became a practice for persons aggrieved by some action of the department

of public safety in the physical enforcement of the act, whether it had to do with the correctness of a weight, the jurisdiction of the department of public safety to weigh the vehicle, or whether the owner of the vehicle had been issued a special permit provided for under §§317.81 and 317.82, F. S., to apply to the weight committee or weight board, sitting as an administrative agency for relief.

The committee over the past several years has heard numerous cases. The hearings have been informal in the manner of administrative hearings and the committee has acted in accordance with equitable principles.

Due to the nature of the business here regulated, trucking and transportation business, the agencies enforcing this law must be careful not to unduly throttle or choke the flow of traffic, thus the provision in the statute for the posting of a forthcoming bond by a violator of the said law.

The provisions in the law for the granting of permits for overweight, over-length and over-width vehicles under certain conditions, §§317.81 and 317.82, bring many cases to the attention of the weight committee in instances where a permit has been issued by the state road department, and not used by the holder thereof in strict compliance with the conditions of the permit.

The committee is nothing more or less than an administrative agency or board acting in a coordinated manner rather than 4 separate and distinct agencies, and undoubtedly its action has saved the state and the transportation public operating in the state thousands of dollars by giving the person aggrieved a forum whereby he can present evidence and explanations to substantiate the position he takes with reference to any particular penalty, thus saving time and expense of long drawn out litigation, both to the state and the trucking industry.

It is true that the legislature did not directly provide for the establishment of the so-called Florida weight committee, however, the law requires the four agencies represented by the committee to enforce the act, and from all information available, the act is being enforced in a fair and impartial manner and on equitable principles, and it is my view that the actions of the committee are within the spirit of the act.

The real intent and purpose of the law is to prohibit undue wear and tear and unnecessary destruction of Florida highways by use and employment upon them of overloaded motor vehicles.

It is further my opinion that any action the 4 agencies might take under the above statutes with reference to overweight violations should be presented to the entire committee for its approval or disapproval, which would include matters of compromise by the attorney and also jurisdictional and other aspects of the law which on occasions may be dealt with by any single agency required by the statute to enforce the act.

In this manner all matters of public interest will be acted upon in open meeting by the weight committee wherein a public record of the action is kept.

056-81—March 19, 1956

CRIMES

GAMBLING—BOOKMAKING, DEFINITION, VIOLATION—DOG RACING AND HORSE RACING—§§849.25 AND 550.16, F. S.

To: Quentin V. Long, Assistant State Attorney, Ft. Lauderdale

QUESTION:

Where a wager was placed on a horse entered in a race at Hialeah Park, Miami, but which horse was scratched prior to the running of said race and did not participate in the results thereof and 2 days subsequent to the placing of said bet, the person who received the wager was contacted and refunded to the bettor his wager, was §849.25, F. S., violated?

Section 849.25, insofar as material here, provides as follows:

"As used in this section the term bookmaking shall be deemed to be the taking or receiving of any bet or wager upon the result of any trial or contest of skill, speed, power, or endurance of man, beast, fowl or motor vehicle."

The gravamen of this statute is the taking or receiving of the bet or wager, and there is no intention in the statute that the man or animal must actually perform.

The supreme court of Florida in considering §849.14, F. S., quite similar to §849.25, in *Tampa Jockey Club v. State*, 93 Fla. 459, 111 So. 816, said:

"The fact that one engaged in the business of being custodian or depository of money unlawfully bet or wagered may agree to refund to any dissatisfied patron the amount of his bet or wager will not change the status before the law of the one engaged in such enterprise, nor render lawful the act which would otherwise be unlawful."

In my opinion, at the time the person took or received the bet or wager upon a certain horse in a certain race at a race track outside of the enclosure of such race track the statute was violated and the fact that the particular horse was scratched and did not run in the race is immaterial.

Under §550.16, F. S., the sale of tickets or other evidences showing an interest in or contribution to a pari-mutuel pool is permitted within the enclosure of any horse race track and dog race track or jai alai fronton licensed and conducted under Chs. 550 and 551, F. S., but *not* elsewhere in this state. When these statutes are read in para materia we reach no other conclusion than that stated above.

056-82—March 16, 1956

STATE AND COUNTY OFFICERS AND EMPLOYEES
RETIREMENT—REQUIREMENTS—SEPARATION FROM
SERVICE—REVIVAL OF STATUS—§§121.06 (REPEALED),
122.08 AND 122.10, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

May a person with more than 10 years back service with the county, who was employed by the county on July 1, 1945, and made contributions under the county officers and employees retirement act through Aug. 31, 1947, but who failed to comply with the requirements of §121.06, F. S., now retire under Ch. 122, F. S., upon making the contribution contemplated by said §121.06, at this time?

The person in question was employed by the county on July 1, 1945 (effective date of the county officers and employees retirement system) and remained in county employment until Aug. 31, 1947, at which time he left such employment and has not returned. Although he made contributions to the said retirement system from July 1, 1945, until August 31, 1947, at no time did he make the 5 years contribution required by said §121.06, F. S., by July 1, 1950, as required by said section. Under Ch. 22938, 1945, and the amendments thereof, (Ch. 121, F. S.,) in force at the time of the enactment of Ch. 29801, and rule 13, of the rules and regulations approved by the state budget commission on Nov. 23, 1945, the said person's rights to come under the county officers and employees retirement system was barred. This seems to involve the question of whether or not such person is bound by the original statute and rule, or are sub §(1), §122.08 and §122.10, F. S., (combined state and county retirement systems) applicable to his situation.

It is admitted that if the county employee in question had 10 years of county service or employment on Aug. 31, 1947, and had paid the 5 years contributions required by §121.06, F. S., by July 1, 1950, that he would have been eligible for retirement upon reaching the age of 60; however, this contribution was never made. This brings us to the question of whether or not such right may have been revived by Ch. 122, F. S., (Ch. 29801, 1955). Under §122.03(2) F. S., "any officer or employee who held office or was employed by the state or a county of the state on July 1, 1945, or October 1, 1950, and has been holding office or has been continuously employed from April 1, 1955," may receive credit for services rendered prior to July 1, 1945, under certain limitations, and other mentioned advantages under said Ch. 122, F. S. We do not think that either §122.08 (1) or §122.10, F. S., extends the rights mentioned in §122.08 to persons who have not been in state or county employment since August 31, 1947.

We, therefore, feel that the above stated question should be answered in the negative.

056-83—March 20, 1956

TAXATION

TAX SALES—FIXING VALUATION ON LAND—RIGHTS OF DRAINAGE DISTRICTS—§§194.55 AND 194.47, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. Where there are drainage tax assessments against lands acquired by the county under §194.55, F. S., what are the rights of the drainage district upon the sale and conveyance of the lands by the board of county commissioners?

2. When calculating the rights of the drainage district in such lands, should the drainage assessments be totalled until the date of the final decree or until the date of the sale?

When county taxes become delinquent they are bid in for the county by the county tax collector, tax sale certificates issued to the county, and such delinquent taxes certified by the tax collector to the clerk of the circuit court. When the tax sale certificates become 2 years old the clerk of the circuit court is required to certify them to the board of county commissioners who are required to cause the tax liens to be foreclosed as is provided in §194.47, F. S. The foreclosure decree vests title in the county and forever quiets and confirms its title (sub §(4), §194.47, F. S.). We construe the statute as vesting title in the county upon the date of the entry of the final decree. "After the county acquires title to such lands . . . neither the county tax assessor, nor the municipal tax assessor, if such lands are situated within a municipality, shall assess the same for taxes or extend taxes upon the rolls, during the period of time such lands are owned by the county; nor shall any drainage district, if said lands are situated within the same, impose or levy annual assessments, maintenance taxes or liens thereon during the period said lands are so owned by the county . . ." (sub §(6), §194.55, F. S.).

After the lands are sold by the county, sub §(5), §194.55, F. S., provides in part that,

"The clerk of the circuit court shall calculate from the county tax rolls the amount of taxes due on the property *at the time the title was acquired by the county*, and the officials of the municipality shall calculate from the municipal tax rolls the amount of taxes due to such municipality at the time title was acquired by the county, and the officials of any drainage district, if the land lies within such a district, shall calculate the amounts due thereon for accrued annual drainage assessments, maintenance taxes and liens in accordance with the law *on the date of entry of final decree quieting title in the county*, and deliver official notice thereof to such clerk of the circuit court." (Emphasis supplied.)

After the said calculation is made by the clerk he is required

to "pay the expenses and costs of sale, and the fees of the county tax assessor, the county tax collector, and the clerk of the circuit court," and,

"Distribute the balance of the proceeds from the sale of the lands to the municipality and the county and the drainage districts, if any, *ratably*, in proportion to the amount of taxes, or accrued annual drainage assessments or liens so calculated to be due each . . ." (Emphasis supplied.)

We must construe the above portion of the statute as providing for a *ratable* distribution of the proceeds of the sale where the funds available are insufficient to pay such taxes and drainage assessments in full, together with all outstanding tax and drainage assessment liens held by individuals, firms and corporations, and not as providing for the dividing up of all available funds derived from the sale between the county, municipality and the drainage district. Tax and assessment liens held by individuals, firms and corporations are calculated upon the amounts due at the time the county acquired title to the lands and not to the date of the distribution. The following language of said §194.55(5), F. S., further supports this construction of the statute, to wit:

" . . . After the distribution should there remain any excess, the same shall be applied in payment of special improvement liens of the city or county, or both, *ratably*, and any remainder shall be distributed to the county and the municipality, if any, in the proportion that the tax lien of each as of the date of the final decree quieting title in the county bears to the total of the two."

This provision of the statute presumes the possible payment of all county and municipal taxes and drainage district liens, with a surplus available for the payment of county or municipal special assessment liens, and even in some cases a surplus after paying such county and municipal special assessment liens, which surplus is to be distributed to the county and municipality as provided by the statute.

We, therefore, construe the statute as providing for the payment of the costs and expenses incurred in the assessment, tax sale, and foreclosure of the county tax lien. After the payment of these items, county, municipal and drainage district taxes and assessments (both publicly and privately owned) are to be paid in full, if funds are available, but in case there are insufficient funds to pay said liens in full they are to be paid *ratably*. Such payments are calculated as of the date of the final decree of foreclosure. If there remain available funds after paying such tax and assessment liens in full, such surplus may be used in paying off municipal and county special improvement liens (evidently liens inferior to tax liens and drainage tax liens); if there are insufficient funds to pay said liens in full they should be paid *ratably*. If there remain funds after the payment of all tax and assessment liens (including the above special assessment liens) the same,

"... shall be distributed to the county and the municipality, if any, in the proportion that the tax lien of each on the date of the final decree quieting title in the county bears to the total of the two."

It is quite evident that drainage districts are omitted from the distribution of the final surplus. Where there is no municipality (and we do not deem a drainage district a municipality in this connection) the surplus is paid to the county.

The above observations answer the 1st question by holding that the extent of the rights of drainage districts in the proceeds can never exceed the total of its drainage assessments due on the date of the foreclosure decree, and in case there are insufficient funds to pay the liens in full they will be paid ratably with county and municipal taxes.

As to the 2nd question the assessments should be totalled as of the date of the final decree of foreclosure and not as of the date of the distribution.

056-84—March 20, 1956

TAXATION

HOMESTEAD TAX EXEMPTION—FAMILY, DEPENDENT—SEPARATE PREMISES—§7, ART. X, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

May homestead tax exemption be granted to a wife, on property used as a permanent home for herself and husband, and to the husband, on a different piece of property used as a permanent home for his minor daughter?

We gather from your file that a wife owns a parcel of land in St. Johns county, upon which she and her husband make their permanent home, and the husband owns another parcel of land in the same county, upon which he maintains a permanent home for his minor child by a previous marriage. The wife has filed application for homestead tax exemption on the premises owned by her and maintained as the permanent home of herself and husband; and the husband has filed application for homestead tax exemption on the premises owned by him and maintained as the permanent home of his minor daughter. The question is may both applications for homestead tax exemption be allowed.

Homestead tax exemptions in this state are provided by §7, Art. X, state constitution, under which section "Every person who has the legal title or beneficial title in equity to real property in this state and who resides thereon and in good faith makes the same *his or her permanent home, or the permanent home of another or others* legally or naturally dependent upon said person, shall be entitled to an exemption from all taxation" (Emphasis supplied.) Such title "may be held by the entireties, jointly or in common with others, and said exemption may be apportioned

among such of the owners as shall reside thereon" Until the 1934 amendment the exemption was "to every head of a family who is a citizen of and resident in Florida," however, this requirement was extended to every person making his permanent home in the state on real property owned by him *or* to permanent homes maintained for dependents, by the owner. The present constitutional provision makes provision for exemption of the permanent home of the owner *or* (disjunctive and not conjunctive) someone legally or naturally dependent upon him within the purview of the constitutional provision. It was held in *Bessemer Properties, Inc. v. Gamble*, 158 Fla. 155, 27 So. 2d 832, that a husband may have an equitable interest in his wife's lands, by reason of repairs or other contributions thereto, to justify homestead tax exemption under the constitution. There is an implication to be gathered from the *Bessemer* properties case that except for the contributions and repairs by the husband to the wife's property the same might not have been entitled to the exemption.

We feel that the legislature when it submitted the homestead tax exemption amendments, and the people when they adopted them, only intended to provide a single homestead to a landowner, even when one of the ownerships is equitable and not legal, although portions of his family may be maintained on two or more parcels of land. Only one exemption may be allowed to one landowner, although his interest in one parcel may be entirely equitable.

The above question is answered in the negative. It seems that the husband should be allowed to elect which parcel of property is to be claimed as homestead tax exempt. We have presumed that the husband resides on his wife's property.

056-85—March 20, 1956

REGULATION OF PROFESSIONS AND VOCATIONS

BARBERS' COMMISSION—INVESTIGATIONS, HEARING PROCEDURE—AUTHORITY OF ONE MEMBER TO CONDUCT— §§476.28 AND 476.27, F. S.

To: *Arthur P. Ellis, Administrative Assistant, Barbers' Sanitary Commission, Tallahassee*

QUESTION:

Does any one member of the barbers' sanitary commission have authority, under the provisions of §476.28, F. S., to conduct investigation hearings for the purpose of obtaining evidence to be used by the commission in considering a petition to establish reasonable opening and closing hours for barber shops?

The Florida barbers' commission has authority to establish opening and closing hours for barber shops by official order after due notice and hearing in counties where registered barbers therein petition the commission as authorized by §476.27, F. S. (In line with the long established policy of this office, we do not pass upon the constitutionality of §476.27, F. S.) The practice

and procedure of the commission with respect to any investigation authorized by Ch. 476, F. S., shall be in accordance with rules and regulations to be promulgated by the commission (§476.28(1), F. S.).

For the purpose of making an investigation or conducting any hearing on any matter covered by Ch. 476, F. S., or any rule or regulation or order of the commission, the commission or *any member thereof*, shall have the power to administer oaths, take depositions, issue subpoenas, compel the attendance of witnesses, and the production of books, papers, documents and other evidence and, in case of disobedience of any person in complying with any order of the commission, or a subpoena issued by the commission, or *any of its members*, or on the refusal of a witness to testify to any matter regarding which he may be lawfully interrogated, the county judge of the county in which the person resides, on application of any *member* of the commission, shall compel obedience by attachment proceedings as for contempt. (§476.28(3), F. S.)

Although §476.18, F. S. provides that a majority of the commission in meeting duly assembled may perform and exercise all the duties and powers devolving upon the commission, we do not think this would preclude the commission from appointing one of its members to conduct any investigation authorized by Ch. 476, F. S. The member of the commission conducting the hearing, in our opinion, would have authority to subpoena witnesses, administer oaths to and interrogate them on any matter about which the witnesses may be lawfully interrogated. However, no one member of the commission would have the authority to make orders based upon evidence established at any such investigation or exercise the commission's duties and powers relating thereto. A majority of the commission would be required to evaluate the evidence established by any investigation conducted by one of its members and official orders based upon such investigation would have to be promulgated by a majority of the commission.

We think your question should, subject to the foregoing observations, be answered in the affirmative.

056-86—March 21, 1956

**REGULATION OF TRADE, COMMERCE AND INVESTMENTS
EXPLOSIVES, MANUFACTURE, DISTRIBUTION AND USE—
USERS' LICENSES—CH. 552, F. S. (CH. 29944, 1955)**

To: J. Edwin Larson, State Fire Marshal, Tallahassee

QUESTIONS:

1. Under the provisions of Ch. 29944, 1955, does a company operating out of a central point, or headquarters, and conducting blasting operations at several locations, require a license for each point at which blasting operations are carried on?

2. Under said chapter, does a company engaged in blasting operations at several locations and operating independently of its central headquarters, require a license

for each point at which blasting operations may be carried on by it?

Chapter 29944 extensively regulates the manufacture, transportation, storage, sale, handling and use of explosives, as defined in the act. Licenses are required to be obtained from the state fire marshal by the following for the respective annual fees mentioned: Each "manufacturer-distributor", \$25; "dealer", \$25; and "user", \$1. Each "blaster" must obtain a permit, fee, \$1. The quoted terms are defined in §1 of the act.

It would appear relevant to make reference to opinion 047-342 of my immediate predecessor (1947-48 AGO 259). That opinion held that the tax required for various licenses as prescribed in Ch. 24302, 1947, §§526.12-526.20, F. S.), regulating the liquefied petroleum gas industry in this state, was an occupational license tax as distinguished from a regulatory tax. In opinion 048-208, dealing with the same law (1947-48 AGO 260), reference was made to said opinion 047-342, and it was held that where a dealer in appliances had more than one place of business in this state, he was required to pay a license tax for each place of business. In opinion 050-281 (1949-50 AGO 481), I agreed with both such former opinions. However, such opinions dealt with dealers in appliances and their several places of business. We are not here concerned with places of business and their proprietors; we are involved with Ch. 29944, a police regulation, in relation to a license to be issued an "ultimate consumer" of explosives.

The purpose of Ch. 29944 is obviously public safety. The companies involved in the two questions are "users" of explosives. A "user" is defined in §1 of the chapter as, "The person who, as an ultimate consumer of an explosive, purchases same from a dealer or manufacturer-distributor." As indicated above, the annual fee for a license for such a user is \$1. To obtain such a license, a "person", as defined in the act, must file an application with the state fire marshal, setting forth required data and information, and among other things evidencing that the purpose for which the applicant seeks a license falls within the purview of the act and is not violative of any other law of Florida, (§2). A person so licensed must purchase explosives from a "manufacturer-distributor" or a "dealer", and must evidence to such seller that he is duly licensed; and the seller must evidence such sales by invoices or sales tickets executed in duplicate, retaining the copies for inspection by the fire marshal or other peace officers (§4). Severe penalties are provided for violation of provisions of the act (§7). No mention is made in the act that a "user" must obtain a license for *each* location where blasting operations will be carried on. It is thus reasonably apparent that adequate controls are fixed by the act in relation to a "user" of explosives to attain the public safety purpose of the act mentioned above.

For the reasons stated, in my opinion the questions are answered as follows:

Both of these questions are answered in the negative. That is to say, that where any person, including a "company", applies for and receives a license as a "user" of explosives, under Ch.

29944, 1955, such a license, during the annual period of its coverage, permits the licensee to purchase and use explosives for blasting operations at one or more locations in this state.

056-87—March 21, 1956

PUBLIC BUSINESS

FLORIDA DEVELOPMENT CREDIT CORPORATIONS— CONSTRUCTION OF CH. 289, F. S., CORPORATE CHARTERS

To: R. A. Gray, Secretary of State, Tallahassee

QUESTIONS:

1. Should the secretary of state receive and file the proposed charter of the first Florida development credit corporation, a copy of which was submitted with the request for this opinion?

2. Is §289.03, F. S., giving development credit corporations established and organized thereunder the powers, duties, rights and privileges granted to business corporations established and organized under Ch. 608, F. S., in any way limited by other portions of said Ch. 289, F. S.?

The governor, at the 1955 session of the legislature, recommended that it "authorize the creation of a development credit corporation whereby our *banks and other leading institutions* may, on a voluntary basis, pool their resources so that deserving industries may obtain financial assistance that cannot be provided through existing normal banking channels. Such a corporation would be patterned along the lines pioneered by the state of Maine and since followed by other New England states. . . ." This type of corporation originated in Maine in 1949, and was adopted by other New England states in 1951 and 1953. In an article concerning such corporations published in the March 1955 *New York State Commerce Review*, we find the statement that "the development credit corporation pools loan funds advanced by *financial institutions* which choose to become members" and raised by the sale of stock in such development credit corporations is for loan to industries. In this same article we find a statement that development credit corporations raise "funds principally through loans to it by *member financial institutions, supplemented by the sale of stock*, while the (industrial) foundation secures funds from the sale of stock to and contributions from local residents. . . ." See also the article entitled "The Development Credit Corporations," by Melvin D. Peach, in the June issue of *State Government*. Although the language in §289.14(1), F. S., is somewhat confused, we feel that the corporation's authority to borrow money is "from *members only* for any of the purposes of the corporation. . . ." The title of the act gives notice of provisions providing that "such corporations may borrow money *from members* and issue securities and evidences of indebtedness and secure the same" and that "financial institutions are authorized to become members and make loans to such corporations, subject to certain limitations,

...” and that “financial institutions are authorized to acquire the securities and stock of such corporations ...”

When the history and purpose of development credit corporations are considered in connection with the governor's message to the 1955 session of the legislature and the language of §289.04, F. S., we doubt that the development credit corporations organized and existing under said Ch. 289, F. S., are authorized to “borrow money from any person, firm or corporation” or “make, issue notes, bills, bonds, indentures, mortgages and other evidences of indebtedness of all kinds and to secure the same by pledge, mortgage or otherwise, without limit as to the amount and to provide for payment of the same by deposited cash, sinking fund or otherwise.” Doubtless the corporations may do these things as to funds borrowed from “members” but not from persons, firms and corporations generally. Its purchase of lands and the development of the same, and any mortgaging or otherwise encumbering the same, must be in connection with industrial development and it may not engage in the real estate business generally. Any contracts and agreements entered into by it, and any acts on its part as agent, factor, broker, commission merchant, etc., must be in connection with industrial development and not generally. These observations raise serious questions as to the propriety of many of the charter provisions on pp. 4 and 5 of the proposed charter.

Although §289.03, F. S., grants to development credit corporations organized and established under and pursuant to Ch. 289, F. S., “the powers and duties, rights and privileges therein set out,” with 3 specified provisos, we must, nevertheless, ascertain the intention of the legislature from all other portions of said Ch. 289 taken as a whole. We construe said §289.03, F. S., as granting to development credit corporations organized thereunder the “powers and duties, rights and privileges” mentioned in said Ch. 608, F. S., in the exercise of the powers and duties, rights and privileges granted by Ch. 289, F. S. In other words, Ch. 289, F. S. fixes the general powers, duties, rights, privileges and limitations of development credit corporations, and Ch. 608, F. S., supplies the minor details for exercising the powers, duties, rights and privileges granted under Ch. 289. A corporation chartered under Ch. 289, F. S., may not be converted into a general business corporation by reason of the provisions of said §289.03, F. S. This being true any of the powers, duties, rights and privileges mentioned in the proposed charter of the first Florida development credit corporation must of necessity be those of development credit corporations as limited by Ch. 289, F. S., and not those of corporations organized generally under Ch. 608, F. S.

In the light of the above statutes, authorities and observations, we feel that:

1. The secretary of state should refuse to receive and file development credit corporation charters unless they conform to the requirements of said Ch. 289, F. S., as above construed.

2. Although §289.03, F. S., grants unto development credit corporations, organized pursuant thereto, the powers, duties, rights and privileges granted to business corporations generally,

such powers, duties, rights and privileges are limited by other provisions in Ch. 289, F. S., as above indicated. The general powers, duties, rights and privileges mentioned in said §289.03, F. S., may only be used in connection with the specific powers, duties, rights and privileges mentioned in Ch. 289, F. S.

3. We feel that the statement, on pp. 3, 4, and 5 of the proposed charter, of the powers, duties, rights and privileges of the proposed development corporation are too broad and should be limited to the specific powers, duties, rights and privileges mentioned in Ch. 289, F. S. As drafted and standing by themselves the powers, duties, rights and privileges mentioned on said pp. 3, 4 and 5 might be construed as going beyond the powers, duties, rights and privileges granted under Ch. 289, F. S., and giving the proposed corporation powers, rights and privileges never intended by said Ch. 289, F. S.

4. Whether or not any provisions of Ch. 517, F. S., are left applicable to corporations organized under Ch. 289, F. S., in the light of §289.10, F. S., and whether or not said section is an additional subject matter to the main purposes of said chapter and within the prohibitions of §16, Art. III, State Const., does not concern the secretary of state in the performance of his duties under said Ch. 289, F. S., and are not here considered or passed on.

056-88—March 21, 1956

FLORIDA CITRUS CODE

CITRUS COMMISSION—CITRUS COMMISSION BUILDING —
AUTHORITY TO SURRENDER LEASE—PURCHASE
AGREEMENT—USE OF PROCEEDS—§§601.05,
601.10(4) AND 601.15(10)(e), F. S.

To: *W. J. Stead, General Counsel, Florida Citrus Commission,
Lakeland*

QUESTIONS:

1. May the citrus commission surrender its interests in its lease-purchase agreement with the city of Lakeland on the present citrus commission building in exchange for the total consideration paid on such lease-purchase agreement and a tract of land suitable as a site for a new and larger building?

2. Is the citrus commission authorized to use the money received from the above transaction to purchase furniture and equipment for its new quarters?

AS TO QUESTION 1:

You indicate in your letter that as a result of the growth of the citrus industry in the past 15 years, and the attendant increase in the functions of the citrus commission, it is necessary for the commission to acquire larger quarters.

I understand that for the relinquishment of the commission's interests and rights in its present building under a lease-purchase

agreement with the city of Lakeland, the city has offered the following consideration: (a) The full amount paid by the commission for the present building, and (b) a tract of land in the city of Lakeland suitable as a site for a new and larger citrus commission building.

The commission possesses "all the powers of a body corporate for all purposes necessary for fully carrying out the provisions and requirements of this chapter." (§601.05, F. S.)

It is my opinion that the above grant of power would include authority to negotiate for new and larger quarters, if the commission felt such was necessary to properly perform its duties under the law. Such authority is proper provided it is exercised in a reasonable manner and the interests of the state are properly safeguarded (81 C.J.S., States, §58, p. 978).

Assuming that the city of Lakeland has the authority to convey the tract of land in the manner described in your letter, it is my opinion that the answer to your 1st question should be in the affirmative.

Although, as mentioned above, I feel that the commission may properly act in this manner, I would suggest that, as a further safeguard, a bill be submitted at the next legislative session confirming this transaction.

AS TO QUESTION 2:

The proceeds of the excise tax levied on citrus fruit is placed in a special fund and used for the purpose of paying expenses incurred by the citrus commission in the performance of its functions and to finance citrus advertising projects (§§601.10(6), 601.13(3), 601.14(2), 601.15(3)(7)(8), 601.151(4), and 601.0101, F. S.). Authority for the payment of the purposes for which this fund was created is a continuous grant (§282.002(7), F. S.).

Surpluses or amounts remaining in this special fund at the end of a fiscal period remain in the fund for use in following periods, and do not require specific reappropriation by the legislature as do appropriations from the general revenue fund (§282.001, F. S.; 81 C. J. S., States §162, at p. 1206).

A refund of any amounts paid from this special fund would revert to such fund, and be available again for the purposes for which the fund was created (81 C. J. S., States, §158, p. 1199).

Since the payments made by the commission on the lease-purchase agreement with the city of Lakeland were made from the citrus advertising fund, any refund would revert to this special fund for the reasons mentioned above, and should therefore be available once more to the commission for the payment of its expenses and for procurement of office equipment (§§601.10(4), 601.15(10)(e), F. S.).

The budget of the citrus advertising fund must be accepted as submitted to the budget commission with the exception of items relating to expenditures for equipment and certain other expenses (§216.19, F. S.). This would seem to indicate that the legislature

intended that approval of the budget commission be sought prior to making expenditures for equipment.

In light of the foregoing, it is my opinion that the money received by the commission from the city of Lakeland in return for surrendering its interest in the lease-purchase agreement represents a refund, and as such should return to the citrus advertising fund. Since one of the purposes of this fund is to pay the cost of furnishing office equipment, the citrus commission, subject to the approval of the budget commission, would be authorized to use this money to furnish its new building. Accordingly, the answer to your 2nd question is in the affirmative.

056-89—March 21, 1956

ELECTORS AND ELECTIONS

CANDIDATES QUALIFICATION FEES—DETERMINATION OF AMOUNT—§§99.031, 39.18(5) AND 298.401, F. S.

To: *T. Coburn Moore, Clerk Circuit Court, Hendry County, La-Belle*

QUESTION:

Are the qualifying fees required to be paid by candidates for the office of county judge, tax collector and tax assessor based only upon the basic income of the offices without taking into consideration the additional income received for ex officio duties under §§39.18(5) and 298.401, F. S.?

Section 39.18(5), F. S., authorizes the payment of the compensation of a juvenile judge to the county judge when the latter performs the duties of both offices. This office has on several occasions given informal advice to the effect that in such cases the juvenile court compensation is payable to the county judge only by virtue of his having been elected county judge and that it should be considered as much a part of the compensation of the office of a county judge as ex officio duties of juvenile court judge are a part of the duties of the county judge.

Applying the same reasoning with respect to the extra compensation that tax collectors and assessors are entitled to receive under §298.401 for their services to drainage districts, the same conclusion can be reached. The duties imposed by Ch. 298, F. S., on county tax assessors and collectors are ex officio duties, and the compensation therefor, although it is not considered under §298.401(2) as a part of the general income of the offices for certain purposes, is a part of the compensation an incumbent receives by virtue of his election to the principal office.

The law contemplates that the filing fee and party assessment should be determined on the basis of the total income that the incumbent is entitled to receive, regardless of the source from which it may derive and regardless of whether it is in the form of a salary or fees, or both. This construction has long been followed by this office despite the fact that §99.031, F. S., provides

merely that the qualifying fees should be a percentage of "the annual salary of the office." (For information concerning the method of computing filing fees for fee offices and for citations to earlier attorney general opinions on this subject see opinion 052-9 in the 1951-52 Biennial Report of the Attorney General, p. 125.)

Your question is answered in the negative.

056-90—March 22, 1956

ELECTORS AND ELECTIONS

POLITICAL ACTIVITIES OF STATE, COUNTY AND MUNICIPAL OFFICERS AND EMPLOYEES—PAYMENT OF SALARY—COUNTY AGRICULTURE TEACHERS—§104.31, F. S. AND §§118K, TITLE 5, U. S. CODE ANNOTATED

To: *T. D. Bailey, Superintendent, Department of Education, Tallahassee*

QUESTIONS:

1. Can an agriculture teacher remain on the county school board payroll while running or participating in an election?
2. Would it be legal to pay a person of this type if he is a candidate?

Section 104.31, F. S., regulates the political activities which may be undertaken by officers and employees of the state, a county, or a municipality. In sub §(1)(c) the statement is made that: "The provisions of this section shall not be construed so as to prevent any person from becoming a candidate for and actively campaigning for any elective office in this state. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates."

Assuming that agriculture teachers are employees of a state or local agency and that their principal employment is in connection with an activity financed in whole or in part by loans or grants made by the U. S. or by any federal agency, they would be prohibited by Title 5, §118K, U. S. C. A., from taking an active part in any political campaign unless they were exempted from such prohibition. Title 5, §118K-1, U. S. C. A., exempts from the mentioned prohibition "any officer or employee of any educational or research institution, establishment, agency, or system which is supported in whole or in part by any state or political subdivision thereof, or by the District of Columbia or by any territory or territorial possession of the U. S.; or by any recognized religious, philanthropic, or cultural organization."

Your questions are answered as follows:

1. If an agriculture teacher is employed by an educational agency or system that is partially supported by the state or a county, he may actively campaign for his own election to a public

office without violating either of the laws dealt with herein. He would be in violation of §104.31, F. S., however, if he actively campaigned for the election of anyone else to a public office.

2. There is no prohibition against continuing to pay the salary of an agriculture teacher running for a public office, but it is assumed, of course, that his campaign will not interfere with his teaching duties.

056-93—March 22, 1956

STATE MILITARY CODE

NATIONAL GUARD ARMORIES SITES—DONATION OF LAND
BY MUNICIPALITIES—LOCH HAVEN PARK BOARD—
§250.40(6) F. S. AND §1, CH. 29358, 1953

To: *Mark W. Lance, The Adjutant General, Military Department,
State Arsenal, St. Augustine*

QUESTION:

Does the Loch Haven park board have legal authority to convey, with the approval of the city council, a site within Loch Haven park to the armory board of the state for the purpose of constructing a national guard armory thereon?

Authority is contained in the general statutes for municipalities to donate land for national guard armory sites (§250.40(6), F. S.). This authority is valid unless in conflict with a provision of a special or local law applicable to the municipality (§24, Art. III, Fla. Const.). If compatible, the general law is treated as supplementary to the special or local law (*City of Lake Alfred v. Lawless*, 102 Fla. 84, 135 So. 895).

The act creating the Loch Haven park and park board provides that the park shall not be used, occupied or disposed of for any other purpose than a public purpose. A public purpose is defined in the act as an "educational, scientific, historic, cultural or park purpose, or a recreational purpose related directly to or connected with any of the foregoing specific purposes." (Ch. 29358, Special Acts of 1953).

Although a national guard armory is used primarily for furnishing military education and training, it is also properly used for civic and amusement purposes where the general public participates (57 C. J. S., *Militia* §18, p. 1096). It is common knowledge that in many localities in Florida, as well as in other states, the armory forms the cultural center of the community and provides an auditorium for public gatherings.

It is my opinion that an armory serves a public purpose as defined in the act cited above; therefore, the Loch Haven park board, subject to the approval of the city council, has legal authority to donate a site within the confines of Loch Haven park for a national guard armory. Accordingly, the answer to your question is in the affirmative.

056-94—March 22, 1956

**STATE AND COUNTY OFFICERS AND EMPLOYEES
RETIREMENT SYSTEMS—TRANSFER FROM TEACHERS' TO
STATE AND COUNTY OFFICERS AND EMPLOYEES—
CH. 238, F. S., CHS. 22831 AND 22938, 1945; 23958
AND 23959, 1947; AND CH. 29801, 1955**

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

May a person who has accumulated a permanent membership in the teachers' retirement system withdraw that membership and receive credit for all prior services by making the necessary contributions to the state and county officers and employees retirement system?

It appears from the request for opinion that the person in question has been a state employee since 1945 and at the time of such employment by the state was a member of the "teachers' retirement system of the state," which membership was retained until Feb. 15, 1956, when such person withdrew membership from the said teachers' retirement system. The said person has not heretofore been a member of the state or county officers and employees retirement systems or of the present state and county officers and employees retirement system. The fact that such person has been a member of the teachers' retirement system is evidence of his or her qualification for membership therein.

The former state officers and employees retirement system (Ch. 22831, 1945) and the county officers and employees retirement system (Ch. 22938, 1945) were voluntary or elective systems; however, they became compulsory as to all officers and employees whose services with the state or counties began after July 1, 1947 (Ch. 23958 and 23959, 1947). The combined state and county officers and employees retirement system is compulsory as to employees entering state service after July 1, 1955.

Sections 16 and 17, Chs. 22831 and 22938, 1945 (the state and the county officers and employees retirement systems) each provided that said acts "shall not apply to . . . members of the teachers retirement system of the state," and that the said acts "shall not operate to repeal . . . §§238.01-238.16, of the Florida statutes . . . nor to affect the rights of any person enjoying the benefits or entitled to enjoy the benefit of such sections . . ." Said §§16 and 17 of said Ch. 22938, and their effect upon the teachers' retirement system of the state (Ch. 238, F. S.) was considered in an opinion of this office of Sept. 29, 1945 (045-302; 1945-6 Biennial Report 424) and it was there held that "it does not appear it was the legislative intent to afford a particular class of county employees two distinct retirement systems from which to elect the one of their choice; therefore, those who may become members of the teachers' retirement system are excluded from the benefits of said Ch. 22938" (the county officers and employees retirement system).

Rule 14 of the rules and regulations, relative to the county

officers and employees retirement system, approved by the state budget commission on Nov. 23, 1945, provided that "county officers and employees who are eligible for membership in the teachers retirement system, but who have never been members thereof, are eligible to participate under the said retirement law. The law does not apply to members of the teachers' retirement system; therefore, if an officer or employee is a member of the teachers' retirement system, even though he later cancels his membership, he is not eligible to participate in the county officers and employees' retirement system." Said §§16 and 17 of said 1945 act became §§121.16 and 121.17, and 134.17, F. S. and remained without substantial change until the consolidation of the systems by the 1955 legislature. Sections 19 and 20, Ch. 29801, 1955 (§122.18, F. S.) are substantially identical with the said §§16 and 17 of the said 1945 enactments, and would seem to require the same construction.

The said opinion of Sept. 29, 1945, (a copy of which is handed you herewith), when considered in connection with the above mentioned rule 14 made pursuant to the 1945 county officers and employees retirement act, indicates a negative answer to the above question.

056-95—March 23, 1956

PUBLIC HEALTH

FLORIDA CRIPPLED CHILDREN'S COMMISSION— APPROVED ORTHOPEDIC CENTERS—PAYMENT OF "REASONABLE" COSTS FOR SURGICAL AND MEDICAL TREATMENT—§391.05, F. S.

To: *William R. Stinger, Florida Crippled Children's Commission,
Tallahassee*

STATEMENT OF FACTS:

The Baptist hospital in Pensacola has a contract with the Florida crippled children's commission to provide care to its patients at \$13 per day. In the past the average billing has been approximately \$16, so the loss incurred by the hospital has been approximately 20% or somewhat in excess of \$2000 a year.

On Nov. 28 Willie Elbert Jones, a 15-year-old negro boy, was admitted as a crippled children's case to the service of Fariss D. Kimbell, M.D., a neurosurgeon on the staff. This was Dr. Kimbell's first crippled children's case and he was under the impression that adequate payment would be made. At the time of the admission the hospital was not aware of the fact that extensive brain surgery would be performed.

On Dec. 1, 3 days after admission, a brain operation of 10 hours duration was performed; another of approximately 7 hours on Dec. 3, a 2nd 5-hour operation on Dec. 12, a minor procedure on Jan. 2 and another 8-hour operation on Jan. 7. Extensive laboratory work has been

necessary each day, 25 blood transfusions given, continuous intravenous solutions amounting to hundreds of dollars in drugs in addition to x-rays, oxygen, etc.

The bill is now \$2691.01. Payment of \$39 covering the 3 days in November has been paid by the commission to date. The commission's obligation to this date, in accordance with the contract, is \$546, resulting in a loss thus far of approximately \$2200 by the hospital. Mr. Pat Groner, hospital administrator, states, "*We expect to lose approximately 20% on these cases and would feel that payment of 80% of the bill would be more than fair.*" We also recognize the fact that this is an unusual case from the commission's standpoint and as such may over tax them. If the commission is not in position to meet this large payment then we would suggest that, as an equitable solution, the commission pay 50% and the hospital absorb 50% as a loss."

QUESTIONS:

1. Does the Florida crippled children's commission have the authority to defray the actual expenses of a patient placed in a hospital by the commission, which expenses are in excess of the contractual amount of \$13 per day, stated in the contract made by the commission and hospital, when it has become evident to both parties that the hospital will suffer a tremendous loss on the patient due to unusual and expensive surgery and treatment that has had to be given?

2. Can the commission make an exception in this unusual case and pay the actual billing rather than the negotiated rate?

Chapter 391, F. S., creates the Florida crippled children's commission and authorizes it to formulate and adopt general policies, adopt an annual budget and select and designate hospitals, clinics, convalescent homes or other medical centers; the same to be located in various sections of the state, so as to serve most economically and efficiently the crippled children who may need care and treatment and pay *reasonable costs* to such orthopedic centers for the surgical or medical care or treatment of crippled children placed therein by said commission.

There does not appear to be any specific standard set as to the amount the commission is authorized to pay for such surgical or medical care or treatment of a patient, nor is there any limitation on the amount the commission is authorized to expend for such care and treatment, other than the cost be "reasonable." Therefore, it seems that in the absence of such statutory limitation or specific authority, the commission may furnish financial aid to a child to the extent of the appropriation provided for that purpose. It appears to be in the commission's discretion to determine the reasonable amount it can pay for the individual surgical and medical treatment of a child.

It has been held that "where one agrees to do, for a fixed

sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation because unforeseen difficulties are encountered." U. S. v. Spearin, 39 S. Ct. 59, 61, 248 U. S. 132, 63 L. Ed. 166, affirming Spearin v. U. S., 51 Ct. Cl. 155. However, the question of whether or not a recovery may be had for extra work or services outside the contract but performed in connection therewith is, of course, dependent on the proper construction of the contract. It is obvious that if, by a fair interpretation of the terms of the agreement, the services for which extra compensation is claimed are included in those for which agreed compensation is stipulated, no further recovery may be had. On the other hand, recovery may be had for services rendered outside the terms of the contract but in connection therewith at the express or implied request of the other party. No recovery can be had for extra work, however, unless performed with the knowledge and consent of the adverse party (17 C. J. S. 364 p. 822). Also, where the original contract is deviated from by the consent of the parties, the party performing extra services or incurring additional expense by reason of the modification is entitled to recover therefor (17 C. J. S. 365, p. 822). It is generally held that the power to modify a contract is coextensive with the power to enter into it in the first instance, and is an incident of contractual capacity (Vinaird v. Bodkins, Adm'x, 72 S. W. 2d 707, 254 Ky. 841). In the case before us, it appears that services have been rendered by the hospital that far exceed the amount of medical care and treatment anticipated by the hospital or the commission when the contract was made.

In addition to the apparent willingness of the commission to pay a sum over and above the contract rate for the patient in question, it appears that the hospital is entitled to recover for what amounts to extra services not contemplated in the overall contract with the commission, and that though the bill of approximately \$2700 is a large amount, it does not follow that it is unreasonable. The commission is empowered to expend for such care and treatment "reasonable costs," and it is in the discretion of the commission to determine what constitutes "reasonable costs." Upon such determination, it appears that the commission is not prohibited from modifying the contract in order to reimburse the hospital for extra necessary services not contemplated in the contract.

056-96—March 23, 1956

MOTOR VEHICLES

LICENSES—TIME LIMITATION FOR MAKING APPLICATION FOR TAX REFUND—§§320.22 AND 215.26, F. S.

To: *Ina S. Thompson, Motor Vehicle Commissioner, Tallahassee*

QUESTION:

Does the 1-year limitation provided in §215.26, F. S., apply to certification of refunds of taxes by the motor vehicle commissioner to the comptroller?

Authority is given to the comptroller by §215.26, F. S., to make refunds to persons of any money paid into the state treasury constituting (a) over-payment of any taxes, licenses, or account due, or (b) a payment where no tax, license, or account is due, or (c) any payment made into the state treasury in error. This section also provides that in order to obtain a refund for the reasons given, application must be made within 1 year after the right to the refund has accrued.

Section 320.20, F. S., provides that moneys collected through the licensing of motor vehicles shall be deposited in the state treasury to the credit of the general revenue fund. Authority is provided in §320.22, F. S., for the motor vehicle commissioner to certify the refund of certain motor vehicle taxes to the comptroller, but such statute does not prescribe the time within which to apply for such refund.

In *State v. Gay*, 40 So. 2d 225, the question was presented as to whether the time limit of §215.26, supra, applied to the refund of intangible taxes as authorized by §199.31, F. S., which section did not provide for a time limit. In this case the court held that §215.26, supra, is not of a general application but one in relation to claims against the comptroller and held that the limitation of time provided in §215.26 is applicable. The same answer was applicable in 2 previous opinions of the court relating to chain-store taxes (*State v. Gay*, 158 Fla. 164, 27 So. 2d 907; *State v. Gay*, 158 Fla. 500, 29 So. 2d 246). The statute runs from the time the taxes are paid (*State v. Gay*, 74 So. 2d 560).

In light of the above cited cases and the language of §215.26, F. S., supra, which refers to "an overpayment of *any* tax, license or account due," (emphasis supplied) it is my opinion that the time limitation provided in said section applies to refunds by the comptroller which are certified by the motor vehicle commissioner under authority of §320.22, supra. Although §320.22 places no time limit on which the commissioner may certify a refund, it would be a useless gesture if the period were beyond a year. Accordingly, the answer to your question is in the affirmative.

056-97—March 23, 1956

PUBLIC HEALTH

FLORIDA CHILDREN'S COMMISSION—EXECUTIVE SECRETARY—COMPENSATION—MERIT SYSTEM COVERAGE—§§417.04, 216.171 (5) AND CH. 110, F. S.

To: *Mrs. H. J. McRoberts, Chairman, Florida Children's Commission, Pensacola*

QUESTIONS:

1. What is the maximum salary that the commission can pay the executive secretary as of this year?
2. Does the executive secretary of the Florida children's commission come under the merit system as now in force?

Replying to question 1, it appears that the salary of the executive secretary of the Florida children's commission may not exceed \$5000 per annum in view of §417.04, F. S., which provides that "the compensation of the executive secretary shall be fixed by the commission not to exceed \$5000 per annum."

However, I wish to call your attention to §216.171(5), F. S., relating to salary limitation of state officers, employees etc., which provides that "where a sum is mentioned in the general appropriations act for the salary of a state officer or employee, such amount shall control over prior statutes fixing such salary except those enacted at the same session of the legislature as the appropriations act." The supreme court of Florida has also held that when a salary is fixed in the report to the budget commission and the salary is carried on through in the appropriations act, that the fixed amount in the report may be read into the act.

In this case it appears that the sum of \$7000 per annum was requested by the Florida children's commission for its executive secretary. It is difficult for us to determine from the report itself if the amount was fully appropriated in the appropriations act. It is, therefore, suggested that you take the matter up with the state budget director, Mr. Harry Smith, to ascertain if his more detailed records will reveal just what was specifically intended to be appropriated for the position in question.

If it cannot be shown that the amount specified in the budget report was not also appropriated, then §417.04, F. S., is the controlling law and the salary appears to be fixed at \$5000 per annum.

Chapter 110, F. S., relating to the merit system, covers employees of specifically named state boards and commissions *and employees of such other state agencies as the governor, other constitutional officers, or the railroad and public utilities commission may direct in accordance with Ch. 110, F. S.*

Replying to question 2, I wish to advise that the executive secretary or other employees of the Florida children's commission were not placed under the merit system by Ch. 110, F. S., nor were they under it prior to the enactment of said chapter. I am also advised by the Florida merit system that no executive order by the governor or other authority has been issued placing the employees of the commission under the merit system. Your 2nd question is, therefore, answered in the negative.

056-98—March 27, 1956

INSURANCE

DOMESTIC FIRE AND CASUALTY INSURANCE COMPANIES
—VOLUNTARY DEPOSITS—SECURITIES—§§626.25
AND 626.04, F. S.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTION:

May the insurance commissioner accept as a volun-

tary deposit from a domestic fire and casualty insurance company, the securities described below, under the provisions of §626.25, F. S.?

The securities referred to in the question are described in the request for opinion as follows:

25,000 Florida state board of education, 2.70% school bonds series B (Orange county) #1626/50 due 6-1-74.

10,000 Jersey City, N. J., 3½% school bonds #4957/84 due 3-1-80.

10,000 Bradenton, Fla., utilities system 3% rev. bonds #1804/13 due 3-1-82.

5,000 Branford, Fla., 4¼% water rev. bonds #74/78 due 11-1-75.

5,000 Daytona Beach, Fla., 3½% water & sewer rev. bonds #2721/25 due 1-1-77.

5,000 Daytona Beach, Fla., 3½% water & sewer rev. bonds #4481/85 due 1-1-78.

5,000 Daytona Beach, Fla., 3½% water & sewer rev. bonds #2446/50 due 1-1-86.

10,000 Tampa, Fla., 2½% hospital rev. bonds #4031/40 due 2-1-83.

10,000 Tampa, Fla., 3.40% water rev. bonds #3431/40 due 9-1-81.

5,000 Florida state improvement commission, 3.3% rev. bonds series 30, Broward county, #3856/60 due 11-1-83.

5,000 Florida state improvement commission, 3.30% rev. bonds series 30, Broward county #1801/05 due 11-1-73.

5,000 Chattanooga, Tenn., 3¼% sewer rev. bonds, series B #B1189/93 due 1-1-73.

5,000 Chattanooga, Tenn., 3.40% sewer rev. bonds, series B #B2056/60 due 1-1-81.

Section 626.25, F. S., provides that "any insurance company, organized under the laws of this state, and doing a fire, casualty or title insurance business in this state or elsewhere," may deposit with the insurance commissioner for the common benefit of all holders of its policies, "cash or securities of the kind in which by other laws of this state, it is permitted to invest or loan its funds and, in addition thereto, it may invest in the securities of any territory or insular possession of the U. S., in such amounts as it may from time to time desire," in addition to other deposits required by Florida laws, "which cash or securities shall be held by said insurance commissioner in trust for the purposes and objects herein specified."

In opinion 050-347 (1949-50, AGO 526), question arose concerning the propriety of the insurance commissioner releasing

certain securities of an insurance company deposited under §626.25, upon the substitution by the company of a like value of Puerto Rican government bonds. The position was assumed in that opinion that the words in said section, "cash or securities of the kinds in which by the laws of the state it is permitted to invest or loan its funds," were to be construed as referring to those securities described in §626.04, F. S., relating to required minimum investments, namely, "bonds of the U. S., of any state or of any county or municipality in the U. S." and certain described mortgages; that bonds of the Puerto Rican government were not bonds included within the quoted language from §626.04; hence, that such bonds could not be accepted by the insurance commissioner under §626.25.

For reasons set forth below we consider that such construction of §626.25 should be modified.

Other than with respect to the minimum investment requirement for life companies set forth in §626.04, prior to 1953 we had no laws specifically describing permitted investments of life companies. Ch. 28015, 1953 (§§635.27-635.33, F. S.), provides that "every domestic life insurer must have and continually keep to the extent of an amount equal to its entire reserves, as defined in §635.30, and entire capital, if any, invested in:"—followed by a detailed description of permissible investments. We are informed that the insurance commissioner construes the provisions of §626.04 and §§635.27-635.33 in *pari materia* to this effect: The provisions of §626.04 are still in force; the remainder of the capital and reserves of a life insurer are required to be invested in pursuance of §§635.27-635.33. We are in accord with that determination by the insurance commissioner.

We have no laws specifying permitted investments for fire, casualty or title companies except with respect to the minimum investments required by §626.04. It is recognized that there are types of securities other than those described in said section in which such insurer may invest capital and surplus funds. So in the absence of statutes, the question of whether any such investments fall within the category of admitted assets depends upon the judgment and decision of examiners of an insurer guided by factors and data not necessary to be here set forth. It is apparent that if, upon an examination of such an insurer, it should develop that so substantial a part of its investments were found to be non-admitted assets as to impair the insurer, the insurance commissioner under our laws would be required to take affirmative action against the insurer. Hence it is that in relation to solvency, reasonably the quoted words in §626.25, "cash or securities of the kind in which by other laws of this state, it is permitted to invest or loan its funds," are to be construed as including those securities prescribed by §626.04 *and also* securities which an examiner will accept as admitted assets of a fire, casualty or title insurer.

It is to be noted that the above list of securities is headed by some Florida state board of education, 2.70% school bonds, series B (Orange county). In pursuance of a previous holding of this office such bonds are to be accepted as state bonds within the

meaning of insurance minimum investment and deposit statutes. With the exception of the Jersey City 3½% school bonds, the remainder of the issues appear to be revenue bonds. For the reasons set forth in the answer below, we have not examined the other mentioned issues.

In my opinion the question is answered as follows:

Securities of a fire, casualty or title insurer which an examiner of Florida insurance department would accept as admitted assets of such an insurer on a regular examination constitute "securities of the kind which by the laws of the state it (such insurer) is permitted to invest or loan its funds," as such words are used in §626.25, F. S. Hence, it is recommended that these securities be delivered to an examiner of the department; and if he shall determine that such securities or any of them would be acceptable as admitted assets on an examination of such an insurer, then such securities, or those that would so qualify, may be accepted by the insurance commissioner as a voluntary deposit of this insurer under §626.25.

Former opinion 050-347, described above, and such other opinions as may have followed said previous opinion, are modified to the extent that their provisions are at variance with this opinion.

056-99—March 27, 1956

INSURANCE

FOREIGN INSURERS—COMPUTING PREMIUM RECEIPTS TAXES—§626.061 F. S. (CH. 29680, 1955)

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTION:

Where under the provisions of Ch. 29680, 1955, it becomes necessary for a foreign insurer operating in this state to pay premium receipts taxes in excess of those provided by the general laws of Florida, in view of the fact that Ch. 29680 did not become law until May 21, 1955, should the tax payable on the increased basis for the calendar year 1955 be computed from Jan. 1 or from May 21, 1955?

Chapter 29680 is a so-called retaliatory statute. It was dealt with in detail in our former opinion 055-276, dated Oct. 19, 1955, to the insurance commissioner. Attention is directed to such opinion. The general purpose of the statute is expressed in the following portion of the title to the act: "An act to impose the same requirements on foreign and alien insurance companies doing business in this state as is required of Florida insurance companies doing business in other states and countries; . . ."

It is to be noted that the question deals with premium receipts taxes required to be paid by a foreign insurer in excess

of the premium receipts taxes otherwise required by the general laws of Florida; and payment of such taxes is prerequisite to renewal of said foreign insurer's certificate of authority. We feel the question is answered by the case of *Larson v. Independent Life & Accident Ins. Co., Fla.*, 29 So. 2d 448.

The mentioned case involved the question of the application of Ch. 22671, 1945, to a domestic life insurer. That chapter amended §205.43, F. S. (imposing premium receipts taxes on insurers) by removing therefrom an exemption in favor of domestic insurers theretofore in effect. Ch. 22671 became effective on May 23, 1945. The question arose as to whether a domestic life insurer was required to pay premium receipts taxes for the calendar year of 1945 computed from Jan. 1 or May 23, 1945. The court held that since the legislature had not made the amended statute retrospective in operation, such tax was to be computed from May 23, 1945. The court, in support of its position, pointed out *Lincoln National Life Insurance Co. v. Reed, Okla.*, 156 P. 2d 368; *Jefferson Standard Life Ins. Co. v. King, S.C.*, 163 S. E. 653.

In view of the foregoing, in my opinion the question is answered as follows:

Where under the provisions of Ch. 29680, 1955, it becomes necessary for a foreign insurer operating in this state to pay premium receipts taxes in excess of those otherwise provided by the general laws of Florida, in view of the fact that Ch. 29680 did not become law until May 21, 1955, the tax payable by such a foreign insurer on the increased basis for the calendar year 1955 shall be computed from May 21, 1955. It is to be understood, of course, that the tax payable by such a foreign insurer for the period Jan. 1 to May 21, 1955, shall be on the basis otherwise prescribed by the general laws of Florida.

056-100—March 27, 1956

REGULATION OF TRADE AND COMMERCE

EXPLOSIVES—LICENSES REQUIRED, USER, BLASTER— CH. 552, F. S. (CH. 29944, 1955)

To: *J. Edwin Larson, State Fire Marshal, Tallahassee*

QUESTION:

Under the provisions of Ch. 29944, 1955, must a person holding a license as a "user" of explosives also obtain a permit as a "blaster" if he does his own blasting?

Chapter 29944 is a comprehensive law regulating the manufacture, transportation, sale, use, etc., of explosives as defined therein.

Section 2 of said chapter provides for the issuance of licenses to "manufacturer-distributor", "dealer", and "user"; and for the issuance of permits to "blasters".

Section 1 of the chapter defines terms used therein. "Person"

is defined as any natural person, partnership, association or corporation; "user" is defined as the person who, as an ultimate consumer of an explosive, purchases same from a dealer or manufacturer-distributor; "blaster" is defined as a person employed by a "user" who detonates or otherwise effects the explosion of an explosive or who is in immediate personal charge and supervision of one or more persons engaged in such activity.

For further comment in the chapter concerning "blasters", read the provisions of §§2 and 3 of the act.

A consideration of the entire act and of its provisions and purposes, reasonably leads to the conclusion that where an individual is licensed as a "user" of explosives, in pursuance of the act, he is not required to obtain a permit as a "blaster" if such "user" does his own blasting; that where license is issued to a "user" other than an individual, reasonably it appears that such legal entity or organization holding such license may engage in blasting operations only through an employee or someone connected with the legal entity or organization who holds a "blaster's" permit.

The above appears to furnish the answer to the question.

056-101—March 27, 1956

REGULATING TRADE AND COMMERCE

STATE FIRE MARSHAL—REGULATIONS PERTAINING TO EXPLOSIVES AND LIQUEFIED PETROLEUM GAS—

CH. 552 AND §§633.05, 120.10-120.17 (CHS. 29944,
29711 AND 29777, 1955) AND §§526.12-
526.20, F. S.

To: *J. Edwin Larson, State Fire Marshal, Tallahassee*

QUESTIONS:

1. Should the issuance and promulgation of regulations relating to explosives under Ch. 29944, 1955, comply with the specific procedural requirements laid down in Ch. 29711, 1955?

2. Should the issuance and promulgation of regulations relating to liquefied petroleum gas under §§526.12-526.20, F. S., comply with the procedural requirements of said Ch. 29711?

Ch. 29711 amends §633.05, F. S. This section prior to its amendment provided: "The insurance commissioner shall make regulations for the keeping, storing, use, manufacture, sale, handling, transportation or other disposition of highly inflammable materials, gunpowder, dynamite, carbide, crude petroleum or any of its products and may prescribe the materials or receptacles and buildings to be used for any of said purposes."

The section as amended adds the term "explosives" to the quoted wording, and defines said word; sets forth the standards to be observed by the commissioner in the promulgating of such regulations; and provides that such regulations shall

be adopted only after full public hearing, 60 days' notice in a newspaper of general circulation, and copy of said notice to designated persons, firms and corporations, all as detailed therein. Section 2 of Ch. 29711 is quoted: "The provisions of this act are cumulative and shall not be construed as repealing or affecting any other law of this state particularly relating to the regulation of any other materials or products described in said amended §633.05, F. S." By its terms this chapter became effective on May 30, 1955.

The reason for the amendment of §633.05 is quite apparent. The original section attempted to grant rule-making powers without the legislative outlining of a governmental scheme, policy, or purpose required to sustain validity. See *State v. Fowler*, Fla., 114 So. 435; *State v. A.C.L. R. Co.*, Fla., 47 So. 969; and *Richardson v. Baldwin*, Fla., 168 So. 255.

Ch. 29944, 1955, is a comprehensive law relating to manufacture, transportation, sale, storage, etc., of explosives. Section 6 of the act authorizes and requires the state fire marshal to make, promulgate and enforce regulations setting forth minimum general standards relating to the regulatory features of the act; prescribes the standards of safety to control with respect to such regulations; and provides that, "Such regulations shall be adopted by the state fire marshal only after a public hearing hereon in pursuance of notice previously given to persons he shall deem interested therein." Section 12 provides that the provisions of the act are "cumulative and shall not be construed as repealing or affecting any powers, duties or authority of the state fire marshal under any other law of this state; provided, that with respect to the regulation of explosives as herein provided, in instances where the provisions of this act may conflict with any other such law, the provisions of this act shall control." This chapter was approved by the governor, filed in the office of the secretary of state on June 18, 1955, and by its terms became effective Oct. 1, 1955.

Sections 526.12-526.20, F. S., are concerned with the regulation of the storage, sale, use, etc., of liquefied petroleum gas and derive from original Ch. 24302, 1947, as amended. Section 526.16 empowers and directs the state fire marshal to make, promulgate and enforce regulations setting forth minimum general standards relating to the matters regulated, according to standards as set forth in the section. There is the further provision that, "Such regulations shall be adopted by the state fire marshal only after a public hearing thereon." Section 526.20 states that the provisions of §§526.12-526.20 "are cumulative and shall not be construed as repealing or affecting any powers, duties or authority of the state fire marshal under any other law of this state."

Whether liquefied petroleum gas falls within the wording, "crude petroleum or any of its products" as found in §633.05, would not appear to be so material in view of the wording "highly inflammable materials" found therein. It is known to this office that for the several years since enactment of §§526.12-526.20 there have been regulations of the state fire marshal promulgated in pursuance of said §526.16. We assume that regulations

have also been adopted by the state fire marshal in pursuance of §6 of said Ch. 29944, relating to explosives.

We think that rules of statutory construction applicable to repeals by implication are here relevant. Such repeals are not favored (*State v. Gadsden County, Fla.*, 58 So. 232); the legal presumption is that the legislature does not intend to effect such a repeal without expressing a clear intent to do so (*State ex rel Myers v. Cone, Fla.*, 190 So. 698); but where a statute is repugnant to a previous enactment, the last law prescribes the rule of conduct or procedure (*American Bakeries Co. v. Haines City, Fla.*, 180 So. 524). It is remembered that all 3 of these statutes are by their terms cumulative. In the light of these principles, it reasonably appears that §§526.12-526.20 and §633.05, as amended, should be read in *pari materia* with respect to the procedure to be followed in the adoption of regulations, and that the provisions of §633.05 concerning procedure should be observed with respect to all regulations pertaining to liquefied petroleum gas adopted subsequent to the effective date of amended §633.05. On the other hand, Ch. 29944 was adopted after Ch. 29711 (amending §633.05); and provisions relating to notice required in connection with adoption of regulations under Ch. 29944 and amended §633.05 are different enough reasonably to support the position that they conflict within the meaning and intent of §12 of Ch. 29944.

In view of the foregoing, in my opinion the questions are answered as follows:

1. The issuance and promulgation of regulations by the state fire marshal under Ch. 29944, 1955, are controlled entirely by applicable provisions of that chapter and not by the provisions of Ch. 29711, 1955 (amending §633.05, F. S.).

2. The issuance and promulgation of regulations by the state fire marshal under §§526.12-526.20, F. S., from and after the effective date of said Ch. 29711 (May 30, 1955), should be accomplished in pursuance of the procedural requirements of said chapter (amended §633.05, F. S.).

It is understood, of course, that the provisions of Ch. 29777, 1955, relating to the filing of regulations with the secretary of state, should be observed with respect to the regulations dealt with in both said questions.

056-102—March 28, 1956

AGRICULTURE AND HORTICULTURE

AVOCADO AND LIME COMMISSION—PAYMENT OF UTILITY TAXES—RECORDS, INSPECTION— §§167.431 AND 119.01, F. S.

To: *O. Ralph Matousek, Florida Avocado & Lime Commission,
Homestead*

QUESTIONS:

1. Is the lime and avocado commission subject to

the payment of a utility tax which might be imposed by a city, county or federal government?

2. Are the records of the lime and avocado commission subject to public inspection?

AS TO QUESTION 1:

City utility taxes—§167.431, F. S., relating to authority of municipalities to levy taxes on public services such as electricity and telephone service, provides that a municipality *may* exempt by ordinance any state commission or agency from the payment of such taxes. Therefore, if the charter of the municipality is not in conflict with this provision of the general law, and if there is a duly enacted ordinance providing for such exemption, the commission, as an agency of the state created by Ch. 602, F. S., would be exempt from city utility taxes. See *City of Lake Alfred v. Lawless*, 102 Fla. 84, 135 So. 895.

County utility taxes—A county has no inherent power to impose taxes. That power, if it exists, must be derived from the state. *Amos v. Mathews*, 99 Fla. 1, 126 So. 308. I can find no general law authorizing the levy of a county utility tax; therefore, subject to the existence of a population act granting such power, the commission is not subject to such a tax.

Federal utility taxes—It is my opinion that the lime and avocado commission is an agency of the state government created by Ch. 602, F. S., and as such is entitled to the same exemption status from federal taxation as any other state governmental agency.

Your 1st question is answered accordingly.

AS TO QUESTION 2:

An excise tax is levied on each bushel of avocados or limes commercially grown in the state (§602.09, F. S.). The proceeds of such tax are used to defray the expenses of the lime and avocado commission and to finance the advertising program of the Florida avocado and lime industry (§602.13, F. S.).

The commission has authority to investigate the records of lime and avocado growers and processors and, by regulation, require such growers and processors to submit returns indicating the quantity of limes and avocados handled during certain periods (§602.11, F. S.). A penalty is provided for interfering with any such investigation or the non-compliance with any such regulations (§§602.07 and 602.15, F. S.).

Section 119.01, F. S., provides as follows:

"All state, county and municipal records shall at all times be open for a personal inspection of any citizen of Florida, and those in charge of such records shall not refuse this privilege to any citizen."

It is obvious that the term "state records" used in the quoted statute means "public records." The mere fact that a document is deposited or filed in a public office or with a public officer, even

though required by law to be so deposited, does not make it a public record. In order to be classified as a public record it must contain the essentials of a public record, namely that it be a written memorial made by a public officer authorized to make it. It must be required by law to be kept, or necessary to be kept, in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said or done. (*Amos v. Gunn*, 84 Fla. 285, 94 So. 615; *State v. Pace*, 121 Fla. 871, 164 So. 723, 102 A.L.R. 748; *Parrickman v. Lyman*, 154 Ky. 630, 157 S.W. 924. See also 76 C.J.S., Records §1, p. 112; 45 Am. Jur., Records and Recording Laws §2, p. 420.).

The purpose of §119.01, *supra*, is clear—it makes it mandatory that state, county and municipal records be open for public inspection to citizens (*State v. Couch*, 115 Fla. 115, 155 So. 153). As I have stated in a previous opinion on a related question: "This statute merely gives recognition to one of the basic principles of our form of government, i. e., that the public records, documents and, for that matter, public officials, are for the use of the people. The state boards and agencies are merely servants of the people of this state and the records and documents of these boards are kept by the officers in the capacity as agents for the people. The people themselves are the only safe depositories for our public records." (1951 Attorney Gen. Rept. 216 (051-81)).

However, this does not mean that the right of inspection extends to all records since public policy will demand that some of them, although of public nature, be kept secret (*Lee v. Beach Pub. Co.*, 127 Fla. 600, 173 So. 440). Where the inspection of a public record will provide a business competitor with an unfair advantage in the channels of trade the inspection will be denied (*State v. Pace*, 121 Fla. 871, 164 So. 723, 102 A.L.R. 748). Other examples of public records immune from inspection because of public policy are diplomatic correspondence, investigative reports of police agencies, and records concerning the condition, care and treatment of inmates of public institutions (45 Am. Jur., Records and Recording Laws §26, p. 433). As a further example of a proper restriction on public inspection, I quote as follows from attorney general opinion 053-32:

"Although the public is entitled to inspect public records such inspection is not absolute and must be exercised with due regard to the operation of the duties of the office and the public generally. The right of a member of the public to inspect books and records in a public office is not paramount to the rights of others who have business to transact with the public official. The public official has the right to adopt reasonable rules and regulations for inspection of public records in order to preserve such records and provide for the transaction of the regular business of the office; however, inspection may not be excluded by such rules. Inspection must take its turn with other legitimate official business."

Predicated on the reasoning in the cases cited above, and previous opinions on related questions, it is my opinion that any report, record or writing made by the commission relating to its

functions under the law would be matters of public record and subject to public inspection, unless exempt by reason of public policy. Returns of growers and processors filed with the commission are not matters of public record subject to public inspection; however, any report or record made by the commission based upon such returns would be considered matters of public record. Your 2nd question is answered accordingly.

056-103—March 28, 1956

PROFESSIONS AND VOCATIONS

PHYSICIANS—STATE BOARD OF MEDICAL EXAMINERS— LIMITATION ON NUMBER OF APPLICANTS FOR EXAMINATION—CH. 458, F. S.

To: *Dr. Homer L. Pearson, Secretary-Treasurer, State Board of Medical Examiners, Miami*

QUESTION:

Does the state board of medical examiners have the authority to limit the number of applicants permitted to take the state medical board examination at each examination?

Section 458.05(1), F. S. provides that a person wishing to practice medicine in this state, not theretofore licensed, shall make application to the board. Subsection (2) thereof provides that the board shall admit to examination for license to practice medicine any candidate who pays the fee provided for in this chapter and submits evidence verified by oath, satisfactory to the board, that such applicant:

- (a) Is more than 21 years of age and a citizen of the United States.
- (b) Is of good moral character.
- (c) Is a graduate of a medical school or college maintaining a standard and reputability approved by the board, pursuant to §458.08, F. S.

Section 458.11, F. S., (powers of the board) provides that the board shall issue license to practice medicine to all persons who shall furnish satisfactory evidence of attainments and qualifications under the provisions of Ch. 458, F. S. Section 458.09, F. S., provides that the examination of applicants shall be made by the board of medical examiners "according to the methods deemed by it to be the most practical and expeditious to test the applicants' qualifications."

Under the powers delegated to the board by Ch. 458, F. S., there is no provision which would authorize the board to deny any properly qualified applicant the right to take the examination and receive a license to practice, except as provided by §458.21(1), F. S.

Therefore, it appears that by statute the board has a manda-

tory duty to admit to examination any person fulfilling the requirements of the above statutes regulating examinations.

Inasmuch as the rule-making power of a public administrative body is a delegated legislative power, which it may not use either to abridge the authority given it by the legislature or to enlarge its powers beyond the scope intended by the legislature, statutory provisions control with respect to what rules and regulations may be promulgated by such a body, as well as with respect to what fields are subject to regulation by it.

The powers of a state board vested with authority to grant licenses or certificates for the practice of medicine and surgery, or limited branches thereof, and to determine the qualifications of applicants therefor, extend and are limited to such *express powers* as are conferred on it by statute, and to such implied powers as are necessary to carry into effect the *express powers* conferred and duties enjoined on it by statute (70 C. J. S. 858, §13, c.(1)). And, in a proceeding to review the determination of a state board denying an application for indorsement of a foreign medical license, the sole issue is whether the board's determination was arbitrary, unfair or capricious (70 C. J. S. 865).

In *State v. Rowlett*, 190 So. 59 (Fla. 1939), the court said:

"The right to practice medicine is a valuable property right and must be protected under the constitution and laws of Florida. Likewise, the preservation of public health is one of the duties of the sovereignty, and in a conflict between the right of a citizen to follow a profession and the right of a sovereignty to guard the health and welfare, it logically follows that the rights of the citizen to pursue his profession must yield to the power of the State to prescribe such restrictions and regulations as shall fully protect the people from ignorance, incapacity, deception and fraud."

However, in this case the court further said: "No matter what the form of action taken by the Board may be termed, if the effect is to deprive relator of his professional right, the statute should be followed, and failure to comply with the statute may be an indication of want of merit in the defense."

There appears to be no express authority conferred on the medical board to confine the group of candidates taking an examination for license to practice medicine to a limited number.

As to whether *implied authority* to promulgate such a rule can be found in the statutes, this authority must be found in a strict construction of the applicable statutes. A strict construction of the statutes would require a showing of intent of the legislature to delegate such authority and an applicable policy of the legislature to be followed by the board as a standard provided by the legislature is clearly to protect the health and welfare of the people. The legislature has provided the board with the implements to promulgate this policy by *expressly* defining the practice of medicine and setting up limitations and exceptions as to who can practice.

It is well-settled law that a board or agency cannot invoke

rules and regulations without express or implied authority of the laws of a state, as conferred by the legislature by statute.

Therefore, however beneficial the motives of the board of medical examiners might be in taking such action, the adoption of such a rule would be subject to attack by mandamus or other appropriate proceedings as arbitrary, unfair and capricious, discriminatory and a violation of due process, as well as an illegal enlargement of powers beyond the scope intended by the legislature; *unless* the board could clearly show that such regulation was adopted for the protection, welfare and health of the people, it may be subject to attack on constitutional grounds.

056-104—March 28, 1956

EDUCATION

NURSING EDUCATION SCHOLARSHIPS—ATTENDANCE AT OUT-OF-STATE SCHOOLS AFFILIATED WITH FLORIDA SCHOOLS OF NURSING—§§239.46-239.52, F. S.

To: *Thomas D. Bailey, Superintendent, Department of Education,
Tallahassee*

QUESTION:

Is it the intent of Ch. 29819, 1955, that the attendance of all recipients of nursing scholarships under this law be wholly confined to institutions within the state or may such institutions by affiliation with institutions outside the state send their students outside Florida for that portion of their training not available within the state, provided that a specific out-of-state affiliate has been approved by the Florida state board of nurse registration and nursing education, that its program is considered by that body as a part of the program of the Florida school in question and provided that the student will graduate from the Florida school in which originally enrolled?

It is my understanding that this question is raised because most of the Florida schools of nursing have out-of-state affiliations to which the students go for some courses.

Chapter 29819, 1955, §2(a) (b) and (c), provides for scholarships in nursing education to students for attendance at approved professional diploma schools of nursing in Florida, approved basic collegiate schools of nursing in Florida and approved practical schools of nursing in Florida.

In order that we may have the factual situation before us in attempting to construe the foregoing mentioned statute, I quote the following from a letter dated Feb. 3, 1956, from Miss Hazel Peeples, secretary-treasurer of the state board of nurse registration and nursing education:

"This is in reference to a telephone conversation we had some time ago concerning the necessity for affiliation

programs for students enrolled in diploma or collegiate schools of nursing in Florida.

"The question of eligibility for a student to receive state scholarship aid during an out-of-state affiliation has been brought to my attention. The board establishes minimum educational requirements for schools of nursing and these requirements embrace those essentials which are recognized by the nursing profession as necessary to prepare competent practitioners who can safely serve the public.

"If I may, I would like to state several facts which may clarify this, in order that students qualifying for a scholarship may be granted the full amount of scholarship aid, even though some of their nursing education (clinical experience) may be obtained out of state:

- "1. An affiliation may be in any one of the clinical areas, for example: psychiatry, obstetrics, medical and surgical nursing, pediatrics, etc.
- "2. An affiliation must be approved by the Florida state board of nurse registration and nursing education and is considered part of the school's program. The home school and the affiliating agency have a signed agreement, a copy of which is on file in the board office and may not be changed without board approval.
- "3. Even though the student during her nursing education goes out of state for an affiliation, he or she is still enrolled in the Florida school, will graduate from the school in which enrolled, and will be eligible to take the licensing examination in this state.
- "4. The reason for the necessity of an affiliation is because the Florida school does not have the clinical facility(ies) to provide the proper kind of nursing education in the specific clinical area(s) which the affiliation will provide. (In some instances the clinical facility(ies) may be absent or very poor in quality). In psychiatry specifically, there is not sufficient quality nursing education available in Florida, thus many of the schools send their students out of state for this part of their nursing education. Another example is the Florida state hospital school of nursing, which is associated with a specialty hospital; therefore, their students have affiliations in those clinical areas which the home school does not provide because the hospital is primarily concerned with the care of those patients who are mentally ill".

In view of the foregoing statement of facts, there seems to be a question requiring an equitable construction of the statute in order to arrive at a conclusion to coincide with statutory intent, which raises the further question of whether such student could

be considered in constructive attendance in a Florida school for scholarship requirement purposes.

The word "constructive" has a broad meaning. It is defined by Black's L.D. 4th ed. as "that which is established by the mind of the law in its act of construing facts, conduct, circumstances or instruments; that which has not the character assigned to it in its own essential nature, but acquires such character in which it is regarded as a rule or policy of law; hence, inferred, implied, made out by legal interpretation—the word 'legal' being sometimes used in lieu of constructive".

It is not disputed that intention of the legislature is the cardinal rule. Numerous decisions agree that one of the fundamental canons of construction is that legislative intent will be gleaned from the language of the statute, the subject regulated, the purpose to be accomplished, and the means applied for accomplishing the purpose. Here, the clear purpose of the nurse scholarship law is not to increase attendance in Florida schools, but to increase the number of competent nurses who will practice in Florida, upon graduation.

It is well settled that the function of statutory construction is to further, and not to defeat the purpose of legislation; that the sole object is to discover and fix the true sense and meaning. The language of an act will not be given such a narrow and literal interpretation as to defeat its plain purpose (*State v. Jones Co.*, 108 Fla. 613, 147 So. 230).

A true, equitable construction (of a statute) consists in showing by principles of natural good sense that a particular case is not comprehended within the meaning of the law because if it were so comprehended, some absurdity would necessarily follow; that is, a liberal and extensive construction, as opposed to a literal and restrictive construction (16 C. J. S. 1514, Black's L.D., p. 386).

Therefore, it appears that for the purpose of carrying out the apparent legislative intent in administering the nurse scholarship law and in the light of the rules and regulations of the state board of nurse registration and nursing education for Florida schools of nursing and approved out-of-state affiliations for such Florida schools, which is considered a part of the training necessary and required for graduation from the Florida schools, it is my opinion that sufficient constructive attendance in a Florida school is established to such an extent that the scholarship aid should not be interrupted during that period of training in an out-of-state affiliation.

056-106—March 30, 1956

COUNTY ORGANIZATION

CHANGE OF COUNTY SEAT—PETITION—DUTY OF COUNTY COMMISSIONERS—CH. 138, F. S.

To: *William G. Akridge, County Attorney, Cocoa*

QUESTIONS:

What are the duties of a board of county commis-

sioners, to whom has been presented a petition, pursuant to Ch. 138, F. S., praying for a change in the location of their county seat, and especially in connection with the following specific questions:

1. May such board pass upon the sufficiency of the signatures appearing upon the said petition and the qualifications of the persons signing the same?

2. Where the purported signature of a husband and wife (Mr. and Mrs. John Doe) appears in the signature of one person, should such signature be counted as that of both husband and wife, the signature of the spouse signing, or not counted at all?

3. Where the petition is signed in the name of two persons (John Doe and Richard Doe) but in the handwriting of one of them only, should both names, one of them, or neither be counted?

4. Where the petition is signed with one name (Mrs. John Doe) but the person signing appears by another name (Mary Doe) on the election registration books, should such signature be counted?

5. Where a person signs by his mark ("X"), but without witnesses, should such signature be counted?

6. Where the petition is signed in the name of a person, by his agent or attorney in fact and not personally, should such signature be counted?

7. May a petition under Ch. 138, F. S., for the change of a county seat, be filed in 2 or more parts, including signed copies of the petition taken from newspapers?

8. The tax record of what year or years should be used in determining whether the persons signing the petition are or are not taxpayers on real or personal property within the purview of Ch. 138, F. S.?

9. When determining who are taxpayers, within the purview of Ch. 138, F. S., should the real property tax records, the tangible personal property tax records, or the intangible personal property tax records, or 2 or all of them, be resorted to by the board?

10. Where property is held by 2 or more persons as tenants by the entirety, tenants in common or joint tenants, should the person actually paying the taxes or the several owners of the property be taken and considered as taxpayers?

11. Should signers who have died or moved from the county since signing the petition be counted when determining the sufficiency of the petition?

Under §138.01, F. S., "*the qualified electors in any county in this state, wishing to change the county seat, shall present to the*

board of county commissioners of such county *signed by $\frac{1}{3}$ of the qualified electors, who are taxpayers on real or personal property, praying for a change of the location of such county seat.*" (Emphasis added) Upon receiving such a petition the county commissioners are required by §138.02, F. S., to "order an election to be held at the several precincts of such county for the location of such county seat, giving not less than 30 days' notice thereof, and no person shall be allowed to vote in such election except those qualified to vote under the general election laws of Florida." However, we are not at this time concerned with the holding of the election, but only with the sufficiency of the petition filed as a basis for the calling of such an election. These statutes are authorized under §4, Art. VIII, State Const.

The petition under said Ch. 138, F. S., that has been filed with the board of county commissioners for Brevard county is composed of numerous petitions, identical in form and substance, each having one or more signatures thereon. Some of such petitions have only one signature, others have several, and others have numerous signatures. These several papers or groups of papers, contain identical petitions, signed by numerous persons who claim to be taxpaying registered voters of Brevard county. Several papers or groups of papers, containing identical petitions, signed by qualified electors aggregating $\frac{1}{3}$ of the qualified electors of the county who are taxpayers in the county appear to be sufficient as a "petition" under §138.01, F. S. (*McKinney v. Board of Co. Commissioners*, 26 Fla. 267, 4 So. 855; *Douglas v. Co. Commissioners*, 23 Fla. 419, 2 So. 776). Although the form of the petition before us makes certain other recitals, which we do not here deem material, it does request that the board of county commissioners "call an election at the earliest possible time for the purpose of permitting the electors of Brevard county to vote on the issue of changing the site of the county seat," of the said county. These petition forms (composing the petition now before us) seem to request an election for a change of the location of the county seat, as distinguished from an election to locate the county seat (*Lanier v. Padgett*, 18 Fla. 842, *McKinney v. Co. Commissioners*, 26 Fla. 267, 4 So. 855). The form of the petition, therefore, seems sufficient (see 20 C. J. S. 817, §64).

This seems to lead to the question of the sufficiency of the number of the signers thereof; that is, is the petition before us "signed by $\frac{1}{3}$ of the qualified electors, who are taxpayers on real or personal property," in Brevard county. For example, if there are 2,150 qualified electors in a county, of whom only 1,013 are taxpayers, the requisite $\frac{1}{3}$ of the taxpaying qualified electors of the county would be 338, and the petition would have to be signed by 338 taxpaying qualified electors of the county (*Blocker v. Coachman*, 64 Fla. 478, 60 So. 344). From this example given in *Blocker v. Coachman*, it appears that the board of county commissioners in order to determine the number of qualified electors who are taxpayers must cause the registration list to be compared with the tax records and determine the number of the total qualified electors of the county who are taxpayers, and having determined that number they will have the number of petitioning elector-taxpayers necessary for a qualified petition. The petition must

then be checked to determine whether all the petitioners are elector-taxpayers, and if not then the persons who are not both duly qualified electors and taxpayers must be deleted therefrom when determining whether the requisite number of elector-taxpayers have signed the petition.

As §138.01, F. S., requires that the petition for change of county seat be signed by " $\frac{1}{3}$ of the qualified electors, who are taxpayers on real or personal property," therefore, the board of county commissioners are required to determine this fact before they may call an election under §138.02, F. S. A petition signed by the required number is jurisdictional and there is no authority in the county board to call an election unless the petition be signed by the requisite number, and any proceedings on a petition not having the requisite number of elector-taxpayers would be void (14 Am. Jur. 195-6, §19). The petition must be "signed" by $\frac{1}{3}$ of the "qualified electors" who are taxpayers; this seems to require two things: (1) that the petitioners be "qualified electors" of the county, and that (2) they "sign" the said petition. This raises the question of the meaning of the term "qualified electors" as used in the statute.

The original statute, from which the statute was derived (Ch. 1890, 1872) provided for a petition "by $\frac{1}{3}$ of the registered voters" which provision was amended in 1911 (Ch. 6239, 1911) so as to provide for a petition "by $\frac{1}{3}$ of the qualified electors, who are taxpayers on real or personal property." Both the constitutions of 1868 (§6, Art. XIV) and of 1885 (§2, Art. VI) required that the legislature provide by law for the registration of all legally qualified voters in each county. We feel that the term "qualified voter" (as used in the 1872 act) or "qualified elector" (as used in the 1911 amendment) has reference to those voters qualified by registration as contemplated by §2, Art. VI, State Const., and not those persons having the qualifications for registration under §1, Art. VI, State Const. (See *State v. Culbreath*, 124 Fla. 268, 168 So. 244). Generally, a signature may be made for a person by the hand of another, acting in the presence of such person, and at his direction, or request, or with his acquiescence, unless a statute provides otherwise (80 C. J. S. 1291, §6; *Smith v. Dowling*, 81 Fla. 867, 89 So. 315; *Pierce v. Dekle*, 61 Fla. 390, 54 So. 389); this rule has been applied to petitions for change of county seats (20 C. J. S. 818, §64, note 90). Generally, in the absence of a statute providing otherwise, a signature may be made by the use of a mark, in which case the mark itself, and not the name written near the mark, is the signature (80 C. J. S. 1289, §4). "A signature by mark may be valid at common law, although it is not attested by a witness" (80 C. J. S. 1290, §4, note 13). However, where the board of county commissioners are in doubt as to a purported signature they would be justified in calling upon him for verification of the fact of his signature; in this connection a signature should be presumed to be valid until something casts doubt upon its genuineness. "Ordinarily the prefixes "Mr." and "Mrs." appearing before names of persons are not themselves names or parts of names" (65 C. J. S. 6, §5).

Section 138.01, F. S., provides for a petition signed by " $\frac{1}{3}$ of the qualified electors who are taxpayers on real or personal prop-

erty;" this provision was construed by the court in *Blocker v. Coachman*, 64 Fla. 478, 60 So. 344, text 345, as referring to "those who are both taxpayers and qualified electors of the county. The taxpaying qualified electors . . ." The word "taxpayer" has more than one meaning, ranging from a person owning property subject to taxes to a person paying taxes (61 C. J. 1748; 85 C. J. S. 1122); however, we feel that the legislature by §138.01, F. S., intended to require actual payment of taxes for one to qualify as a "taxpaying qualified elector" under said section. In this connection see 29 C. J. S. 55, § 29, notes 65-68. When the history of §138.01, F. S., is considered in connection with the history of the separate taxation on separate tax rolls of real property, tangible personal property and intangible personal property, we feel that persons paying ad valorem taxes on either real property, tangible personal property or intangible personal property are within the purview of the said section. If a duly registered elector pays an ad valorem tax on real property, tangible personal property or intangible personal property he is a taxpaying qualified elector within the purview of said §138.01, F. S.

This brings us to the question of what tax rolls and receipts are to be used in determining who are taxpaying qualified electors within said §138.01, F. S. All ad valorem taxes (real, tangible personal and intangible personal property) are subject to assessment as of Jan. 1 of the tax year, become payable on Nov. 1 of the tax year and are delinquent on April 1 of the year following the tax year (§§192.04, 193.41, 193.51, 199.15, 199.18, 200.25 and 200.27, F. S.). Although ad valorem taxes are due and payable on Nov. 1 of the tax year they are not delinquent until after April 1 of the following year. The petition or petitions before us appear to have been filed with the board of county commissioners on or about Feb. 23, 1956. We, therefore, feel that any duly qualified elector who paid either his 1954 or 1955 taxes is a taxpaying qualified elector within the purview of said §138.01, F. S. It, therefore, appears necessary to examine the tax records of both the 1954 and 1955 taxes in order to determine who are taxpaying qualified electors under §138.01, F. S. Where two or more persons own property as tenants in common, joint tenants, or by the entireties and the taxes assessed are paid by one or more, but less than all, of such tenants, unless something appears to the contrary, such payment should be construed as a payment of the taxes due for the benefit of all tenants and they should each be deemed a taxpayer within the purview of said §138.01, F. S.

This brings us to the question of the effect of the death or moving from the county of signers of the petition, after their signatures have been affixed to the petition. The petition seems to speak, and its sufficiency should be determined, as of the day it was filed (Feb. 23, 1956). Whether or not it has been signed by $\frac{1}{3}$ of the qualified electors who are taxpayers is to be determined as of the date of filing, and any increase in the number of qualified electors by subsequent registration has no effect on the petition (See 78 C. J. S. 696, et seq., §37, relative to school district petitions). Where a person signing the petition was in life when the petition was filed or was residing in the county when the petition was filed such person, if a taxpaying qualified elector, should

be counted although he may have died or moved from the county after the filing of the petition. Any person signing the petition but dying or moving from the county prior to the filing of the petition should not be counted.

In the light of the above and foregoing statutes, authorities and observations, we answer the above stated questions as follows:

1. Answered in the affirmative.
2. Only the one signing the petition should be counted, the other spouse may not be counted.
3. Only the person signing the names should be counted, unless his authority to sign for the other person is shown to the satisfaction of the board.
4. The signature mentioned in the 4th question should not be counted unless and until it is shown to the satisfaction of the board that the 2 names refer to one and the same person.
5. Answered in the affirmative; although if the board entertains any doubt proof of the signing by mark may be required.
6. Answered in the affirmative; although if the board entertains any doubt proof of the agency or the power of attorney may be required.
7. Answered in the affirmative.
8. The tax payment records of the 1954 and 1955 taxes must be used. This seems to be required in that taxes do not become delinquent until after April 1 and the petition was filed in February.
9. A person is a taxpayer, within the purview of §138.01, F. S., if he paid an ad valorem tax on either real property, tangible personal property, or intangible personal property.
10. All the tenants should be considered as taxpayers, unless there is produced evidence that the payment made was not for the account or benefit of all such tenants.
11. Signers of the petition residing in the county or in life when the petition was filed should be counted, if taxpaying qualified electors, although they may have subsequently moved from the county or died. If they moved from the county or died prior to the filing of the petition they should not be counted.

Where there is any doubt in the mind of the board as to the regularity or sufficiency of a signature or the qualification of the person signing, it may, through its clerk or otherwise, call upon such person, by regular mail or otherwise, for such explanation as the said board may deem necessary.

056-107—April 2, 1956

STATE OFFICERS AND EMPLOYEES

MERIT SYSTEM—CLASSIFIED EMPLOYEES—POLITICAL
ACTIVITIES, CONSTRUCTION OF §110.13(4), F. S.

To: *Angus Laird, Merit System Director, Tallahassee*

QUESTION:

**May classified employees under the merit system
serve on election boards and as deputies at election polls?**

Subsection (4) of §110.13, F. S., relating to restrictions on political activities of classified employees provides:

"No employee in the classified service shall be a member of any national, state or local committee of a political party, or an officer or member of a committee of a partisan political club, or a candidate for nomination or election to any paid public office, or shall take any part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote."

Section 110.14, F. S., provides a fine or imprisonment, or both, for the violation of any provision of the merit system act. Consequently, the above quoted statute would be in the nature of a penal statute and as such requires a strict construction (*Lee v. Walgreen Drug Stores Co.*, 10 So. 2d 314, 151 Fla. 648).

When construing a statute the first duty is to give effect to the intention of the legislature enacting it and the paramount object to be obtained. The intention is derived from the language employed and the apparent purpose to be subserved (*State v. Bearsley*, 94 So. 660, 84 Fla. 109).

The fundamental purpose or intention of the legislature for establishing a merit system in government service is to create a system by which appointments to public service are based on fitness and merit rather than on consideration of one's political activity in behalf of candidates. Consequently, the paramount object to be obtained is the elimination of the evils of the so-called "spoils system" in which appointment to or removal from public service is determined by the consideration of whether the person concerned was a protagonist for the victorious or the defeated party.

The restriction placed on political activities by the quoted statute is, in my opinion, limited and restrained and refers to political activities of a partisan nature usually indulged in by political parties in the nomination and election of candidates for public office. An activity which is non-partisan would be permitted. A person serving temporarily on an election board, or as a deputy at the election polls must be non-partisan while so engaged because of the nature of the work.

The officers and employees in the classified service are tax-

payers and civic-minded citizens of the community in which they live and have the same interests in its welfare as citizens otherwise occupied. The legislature could have no purpose in curtailing the normal participation in community affairs of classified public servants beyond what was necessary to promote the efficiency, integrity and discipline of the public service.

Considered in the light of the foregoing matters, and with the spirit of our merit system legislation in mind, it is my opinion that the answer to your question is in the affirmative.

056-108—April 3, 1956

TAXATION

HOMESTEAD TAX EXEMPTION—EFFECT OF UNRECORDED DEED FROM HOMESTEADER

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where a deed of conveyance from a homesteader in this state, to whom homestead tax exemption has been granted for several years last past, bearing date of Dec. 31, 1951, is filed for record and recorded on March 1, 1956, should the property be back-assessed?

For one to be entitled to homestead tax exemption in this state he must have "the legal title or beneficial title in equity to real property in this state and" must reside thereon and in good faith make the same his or her permanent home or the permanent home of another or others legally or naturally dependent upon such person.

Although the conveyance in question bears the date of Dec. 31, 1951, it took "effect from delivery and without delivery it is not a deed. This principle is well settled by abundant authority." (*Houston v. Adams*, 85 Fla. 291, 95 So. 859, text 860; *Bould v. Coe*, Fla., 63 So. 2d 273, text 274; *Weigel v. Weigel*, 149 Fla. 231, 5 So. 2d 447, text 450). The deed, notwithstanding its date, became effective upon delivery. Although "a deed generally will be presumed to have been delivered on the day it bears date" (26 C. J. S. 595, §185) such presumption is a rebuttable one and may be overcome by competent evidence showing the true date on which the deed was delivered (26 C. J. S. 596, §185, note 92). The tax assessor is justified in presuming that the delivery was on the date of the conveyance until evidence is presented showing otherwise or sufficient to overcome such presumption.

The file tends to show that the grantor in the said deed made application for and was granted homestead tax exemption by the tax assessor for several years following the date of the said conveyance and prior to its recording on March 1, 1956; this of itself seems to raise a presumption that the conveyance had not been delivered, in that the applicant was claiming title to the land notwithstanding such deed. However, this would of itself be subject to rebuttal if other facts and circumstances show an actual delivery of the deed of conveyance. We note the following lan-

guage in a letter, from Angelo M. Rassu to the tax assessor, in the file handed us with the request for opinion "When the deed was drawn I was legally advised that this instrument could be drawn and be recorded years later or not at all, all depending on my mother's wishes." It is possible that the legal advice was that the instrument could be delivered and recorded years later. This language indicates a possible intention to withhold the conveyance, although it was executed on Dec. 31, 1951, for subsequent delivery.

The above question is answered in the affirmative as a general proposition; however, the homestead claimant or the owner of the property may overcome the presumption of delivery of the deed on its date by presenting satisfactory evidence to the tax assessor showing the actual date of delivery.

056-109—April 4, 1956

EDUCATION

COUNTY SCHOOL BOARD—DISPOSAL OF SCHOOL PROPERTY—§235.04, F. S.

To: Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee

QUESTION:

A school board presently owns a small grammar school in a very good location on U. S. 41, which it does not expect to operate for school purposes upon the completion of construction of the new elementary school. The school board is interested in selling this property, with possession to be given upon the vacation of the property in the latter part of this year, and would like to know if it can make a determination that the same is no longer needed from some arbitrary date such as Dec. 1, 1956, and have the usual appraisal made and sell the property at this time, with the condition that possession is not to be given until the completion of the elementary school and its occupancy by the students now attending the school on the property to be sold.

Section 235.04, F. S. 1955, provides:

"Disposal of school property.—The county board may dispose of any school land or property which is by a resolution of such county board determined to be unsuited for school purposes either because of location, condition, or other cause. The county board shall take diligent measures to dispose of school property only on the most advantageous terms by public or private sale and to that end shall not accept a price less than the appraised value placed on such land or property by 3 qualified appraisers. The official minutes of the school board shall set forth the name of the purchaser, the sale price, the appraised value and the identity of the 3 appraisers in each such transaction.

"Each deed conveying any school land under the provisions of this law shall have a certificate attached thereto signed by the county superintendent of public instruction of such county that all the provisions of this law have been complied with. Such certificate shall be proof of the validity of such deeds."

It is my opinion that if the procedure for disposal of school property set forth in this act is complied with, your question must be answered in the affirmative.

056-110—April 4, 1956

TAXATION

EXEMPTION—REAL PROPERTY OF FLORIDA CORPORATION WHOSE STOCK OWNED BY OUT-OF-STATE EDUCATIONAL INSTITUTION

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where real estate in this state is owned and held by a Florida corporation, whose stock is owned and held by an educational institution in another state, is the said real property entitled to exemption from ad valorem taxes assessed in this state?

Section 192.06, F. S. exempts from ad valorem taxes in this state, "such property of education, literary, benevolent, fraternal, charitable and scientific institutions *within this state* as shall be actually occupied and used by them for the purpose for which they may have been organized; provided, not more than 75% of the floor space of said building or property is rented and the rents, issues and profits of said property are used for the educational, literary, benevolent, fraternal or educational purposes of said institutions . . ." (Emphasis supplied.) This statute was enacted under the authority of §1, Art. IX, State Const., which requires the taxation of all property, "excepting such property as may be exempted by law for municipal, education, literary, scientific, religious or charitable purposes," and §16, Art. XVI, State Const., which requires that all corporate property, with certain exceptions not here material, be subjected to taxation "unless such property be held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes." The statute must be construed in the light of these constitutional provisions.

"It is a general rule that the exemption is determined by the use and ownership of the property and not altogether by the character of the institution which owns and uses that property. It is the property that is held and used exclusively for religious, scientific, municipal, educational, literary, or charitable purposes which may be exempted from taxation under the constitution." (University Club v. Lanier, 119 Fla. 146, 161 So. 78, text 79; see also, State v. Doss, 146 Fla. 752, 2 So. 2d 303, text 304; Riverside Military Academy v. Watkins, 155 Fla. 283, 19 So. 2d 870, text 871; Dr. William Howard Hay Foundation, Inc. v. Wilcox, 156 Fla. 704, 24 So. 2d 237).

Charitable and educational institutions conducting their chari-

table and educational activities wholly outside of the state wherein the property claimed as exempt is located are not usually entitled to tax exemption (*Layman Foundation v. Louisville, Ky.*, 22 S. W. 2d 622; *Lloyd Library and Museum v. Chipman, Ky.*, 22 S. W. 2d 597; 51 Am. Jur. 549, §556). A like rule is applicable to religious associations and institutions (Annotations in 17 A. L. R. 1056-1058 and 168 A. L. R. 1231, 1260-1262).

The lands in question are vested in a Florida corporation, which is neither an educational institution nor a non-profit corporation, evidently organized under the general corporate laws of the state as a corporation for profit. Although the stock of the said corporation is owned and held by an educational institution, it is intangible personal property and not real property. Even though we admit that the educational institution is entitled to exemption from taxation (which is not in fact admitted), it does not follow that corporations in which the educational institution holds stock is entitled to tax exemption. There is no evidence that the property of the Florida corporation is being held and used exclusively for educational purposes, although the profits of the corporations may be payable to an educational corporation.

The above question is answered in the negative.

056-111—April 5, 1956

DRIVERS' LICENSES

MINOR'S RESTRICTED LICENSE—POLICE OFFICER,
AUTHORITY TO TAKE UP FOR VIOLATION—§§322.05,
322.16(1), 322.29, 322.39, 39.01 AND 39.03, F. S.

To: *H. N. Kirkman, Director, Department of Public Safety,
Tallahassee*

QUESTION:

May a police officer take into his possession the restricted driver's license issued to a minor between the ages of 14 and 16 years, for a violation of the restrictions contained in said license, or for a traffic violation, prior to a court adjudication concerning such violation?

Previously, I rendered an opinion on a question similar to the one at hand. (1949 Attorney Gen. Rept. 370 (049-464).) However, since then, I have been prompted by a pronouncement of the supreme court of Florida, and an enactment of the legislature relating to the method of apprehending juvenile delinquents by law enforcement officers, to review my previous opinion.

It was the opinion of the supreme court, in *Thornhill v. Kirkman*, 62 So. 2d 740, that the legislature of this state placed a driver's license in "the category of a privilege," and that such privilege is "subject to suspension or revocation for cause," provided opportunity is subsequently given for a hearing. When considering the right and liberty of a person to use the highways as guaranteed by the constitution, the court stated that "none of these liberties are absolutes but all may be regulated in the public interest."

To assure the safe operation of motor vehicles on the public highways, the legislature authorized the department of public safety, whenever it appears necessary, to impose restrictions on a licensee's privilege to use the highways. (§322.16(1), F. S.) At its discretion, the department has authority to issue a restricted operator's license because of age to a minor over 14 years and under 16 years, provided he is accompanied by a licensed operator not less than 18 years of age when driving. (§§322.05(1) and 322.16(2), F. S.) The violation of such restriction is a misdemeanor. (§322.39, F. S.)

A minor under the age of 17 years who violates the law is a juvenile delinquent. (§39.01, F. S.) A minor apprehended for the commission of a crime may be committed either to the custody of the juvenile court or placed in the custody of the parent by the apprehending law enforcement officer, pending a hearing on the charge for which he was apprehended. The officer is required to make a written report to the court indicating the reason for placing the minor in custody. (§39.03, F. S.)

In the process of apprehending a juvenile for violating the law relating to the operation of a motor vehicle on the public highways, a police officer would be justified in picking up the violator's driver's license since it would be evidence of the violation. (79 C. J. S., Searches and Seizures §29, p. 796.)

The officer should, however, as soon as practicable, forward the minor's license to the juvenile authorities with his report. The juvenile authorities should retain the license until the minor is released from custody, at which time the license should be returned. If, however, during this period of custody, the license has been suspended or revoked or is in the process of being suspended or revoked by the department of public safety, it should be forwarded to the department as required by law. (§322.29, F. S.)

Subject to the foregoing restraints, your question is answered in the affirmative.

056-112—April 6, 1956

PUBLIC LANDS

TRUSTEES INTERNAL IMPROVEMENT FUND—POWER TO
AUTHORIZE USE OF LAKE BOTTOMS FOR PUBLIC
USE—LAKE OKEECHOBEE—§253.03, F. S.

To: *Ralph O. Johnson, City Attorney, Pahokee*

QUESTION:

Do the trustees of the internal improvement fund of the state have authority to grant to the city of Pahokee a lease or permit to use submerged land lying in Lake Okeechobee in connection with the construction of a breakwater facility?

This office has held that title to the lands lying beneath Lake Okeechobee is not vested in the trustees of the internal improvement fund (Opinion 055-160, dated July 15, 1955). Title to lands

lying beneath Lake Okeechobee, being navigable, would appear to be vested in the state in its sovereign capacity.

The trustees of the internal improvement fund of Florida are vested and charged with "the administration, management, control, supervision, conservation and protection of lands and products on, under, or growing out of, or connected with, lands owned by" Florida by right of its sovereignty (§253.03, F. S.).

The trustees probably do not have authority to grant to persons for private or non-public purposes a permit to use water bottoms or areas of navigable lakes if such use materially restricts the public's right to use the water affected. However, where such submerged lake bottom lands are to be used for public purposes, I am of the opinion that the trustees would have authority to grant the permit.

In the case of *Hicks v. State ex rel Landis*, Attorney General, et al, 116 Fla. 603, 156 So. 603, the trustees of the internal improvement fund had granted a special and limited use permit to the bond trustees of road and bridge district 1 of Alachua county, to run so long as the premises should be used and maintained for the purposes of public convenience specified in the instrument, or until revoked for cause by the trustees of the internal improvement fund. It was expressly provided in the permit that the privileges thereby conferred on the bond trustees of road and bridge district 1 of Alachua county might be by the latter conferred on any other person occupying said portion of lake bottom for the purpose of erecting, maintaining, and operating thereon a dock, wharf, bathhouses, and boat landing, together with anchorages, all for the use of the public. Judgment of ouster in quo warranto was entered in favor of the state and the respondent, who had pleaded the permit in the trial court, appealed. The respondent's (plaintiff in error) plea was overruled by the trial court. The supreme court reversed the trial court's order and held that the rejected answer interposed was a good defense. The supreme court said:

"The state holds title to lands under navigable waters in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have the liberty of fishing therein free from the obstruction and interference of private parties. The trust devolving upon the state for the public, and which can only be discharged by the management and control of the property in which the state has an interest, cannot be relinquished by a transfer of the property, or by the transfer of any special interest therein, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the waters and lands remaining. *Pembroke v. Peninsular Terminal Co.*, 108 Fla. 46, 146 So. 249.

"The permit pleaded by the respondent in the court below as having been executed and granted by the trustees of the Internal improvement fund is expressly

authorized by a special statute that vests power in the trustees of the internal improvement fund to administer, manage, control, supervise, conserve, and protect all lands owned by the state of Florida by right of sovereignty, when not vested by law in some other state agency. Ch. 15642, 1931 (Ex. Sess.) §1, §1446 (13), Comp. Gen. Laws, 1934 Supplement . . ."

The special statute referred to by the supreme court in that case includes the present §253.03, F. S.

In view of the fact that the breakwater to be constructed by the city of Pahokee is for a public purpose, it is our opinion that the question should be answered in the affirmative.

056-113—April 6, 1956

DRAINAGE

PUBLIC WATERS—USE BY PRIVATE INDUSTRY—
§298.74, F. S.

To: *Florida Development Commission, Tallahassee*

QUESTION:

Under what conditions and limitations, and to what extent, may water be taken from the public lakes, streams and rivers for use by private industry in this state?

There are two types of lakes, streams and rivers in this state: (1) those that were meandered by the government surveyors when surveying the public lands of the state, and (2) those that were not meandered but were surveyed and included in the land areas shown on the survey plats and maps. For the purposes of this opinion we shall consider meandered lakes, streams and rivers as *public lakes, streams and rivers*. This opinion shall not be taken as extending to private lakes and streams; that is the lakes and streams not meandered by the government surveyor but included in the surveys. The fact that a lake, stream or river was meandered and returned by the government surveyor as meandered raises a presumption of navigability but is not conclusive proof of the fact of navigability (65 C. J. S. 53, 60-61, §§5, notes 91 and 92, and 9, note 79; 45 C. J. 416, §15). For the purposes of this opinion we shall presume the navigability of such meandered lakes, streams and rivers; and this being true the title of the upland abutting owners extends to the average high water mark along their shores (Brickell v. Trammell, 77 Fla. 544, 82 So. 221; White v. Hughes, 139 Fla. 54, 190 So. 446) and the lands under such lakes, streams and rivers are sovereign or state lands (Broward v. Mabry, 58 Fla. 398, 50 So. 826; Martin v. Bush, 93 Fla. 535, 112 So. 274; Deering v. Martin, 95 Fla. 224, 116 So. 54) held in trust by the state for the benefit of the people of the state (Broward v. Mabry, supra; Merrill-Stevens Co. v. Durkee, 62 Fla. 549, 57 So. 428).

"One who owns land adjacent to a natural lake is entitled to have the waters therein preserved in their natural state. Thus, a riparian owner is entitled to have the waters of the lake on which

his property abuts remain at their accustomed level without interference; and when the water of a lake has attained an unusual height, due to unusual conditions, a littorial owner may, in order to prevent damage to his land, drain the lake to its normal level." (93 C. J. S. 791, §106; see also *Taylor v. Tampa Coal Co.*, Fla., 46 So. 2d 392, text 394; *Tampa Waterworks Co. v. Cline*, 37 Fla. 586, 20 So. 780). Section 298.74, F. S., which provides as follows:

"It is unlawful for any person to drain or draw water from any lake of greater area than 2 square miles so as to lower the level thereof without first obtaining the written consent of all owners of property abutting on or bounded by said lake; provided, however, this section shall not apply to any lake included wholly within the Everglades drainage district. Courts of equity shall have jurisdiction to enjoin any person from violating the provisions of this section."

seems to be declaratory of this general rule. The purpose of this statute is to prevent the lowering of the normal level of the lake below ordinary high water mark, that is, the normal level of the lake (*Tilden v. Smith*, 94 Fla. 502, 113 So. 708, text 711). The high water mark, or the normal level, of a lake, stream or river is not the highest point they may rise to in abnormal times or times of freshets, but is the line which such lakes, streams and rivers impress upon "the soil by covering it for sufficient periods to deprive it of vegetation and to destroy its value for agriculture purposes." (*Tilden v. Smith*, 94 Fla. 502, 113 So. 708, text 712). The level of the lake, as used in the above statute, has reference to the average or mean level of the lake "obtaining under fairly normal and average weather conditions, allowing the proper range between high and low water mark in average years," not "the abnormally low level of a lake during a series of excessively dry years, or the abnormally high level of a lake during an excessively wet year or series of wet years." (*Tilden v. Smith*, supra).

"The right of a riparian owner to the use of water is not an easement, but is an inherent incident to his property in the soil. It is well settled, however, that such right is a qualified and not an absolute right of property, and that as between different riparian owners, each one is limited to a reasonable use of such water, with due regard to the rights and necessities of all others interested. The right to use the water of a natural stream is common to all riparian proprietors, and it is the common right of all to have the stream substantially preserved in its natural size and flow, and to protection against material diversion. The use by each must therefore be consistent with the rights of the others . . . If any person claims a special right to the use of the water, more beneficial to himself and more burdensome to the riparian proprietors above or below than what may be called the natural or general right to the reasonable use of the stream, he must establish such right by grant or prescription." (56 Am. Jur. 777-779, §342). The above rule as to streams is applicable generally to lakes. "Whoever has lawful access to a stream flowing over a bed owned by the government, and held in trust for the benefit of the people, may use the water as regulated by law. It is well settled that a riparian owner is privileged to make a reason-

able use of the waters of the stream for any necessary and proper purpose incident to the land itself, and essential to its enjoyment, which does not materially interfere with the rights of other riparian owners. This right . . . comes from the situation of the land with respect to the water, the opportunity afforded thereby to divert and use the water upon the land, the natural advantages and benefits resulting from the relative positions, and the presumption that the owner of the land acquired it with a view to the use and enjoyment of these opportunities, advantages and benefits. It follows that in the absence of any conventional or prescriptive right to do so, no one may divert the water of a stream so as to deprive a riparian owner of the benefit of the reasonable use thereof . . ." (56 Am. Jur. 775-6, §341). In this connection see *Ferry Pass Inspectors' and Shippers' Assn. v. White River Inspectors' and Shippers' Assn.*, 57 Fla. 399, 48 So. 643, text 644-5; *Tampa Waterworks Co. v. Cline*, 37 Fla. 586, 20 So. 780, text 783). The wrongful diversion of water has frequently been held to constitute a nuisance (56 Am. Jur. 776, §341, note 20).

The use of such water by a riparian proprietor extends to the supply of natural needs, including the use of the water for domestic purposes of home and farm, and many authorities hold that if necessary for the purposes mentioned all the water of a stream may be consumed (*Tampa Waterworks Co. v. Cline*, 37 Fla. 586, 20 So. 780, text 783). In this case the Tampa Waterworks Co. was taking water from an underground stream for the purpose of supplying water to the city of Tampa and residents and industries within said city, evidently under a franchise from the said city. This did not seem to give such water company any advantage over others through whose lands the said underground stream flowed. "By the common law a distinction was recognized between the right of a riparian owner to the ordinary use of the water for supplying his natural wants for domestic use and for cattle and the right to its use for artificial wants, such as pleasure grounds, manufacturing, etc.; and although, in the exercise of this right, the superior proprietor might make any reasonable use of the flow of the stream for all domestic purposes, irrespective of any diminution caused thereby to the injury of an inferior proprietor, he could not exercise the right for any extraordinary use that would interfere with the rights of inferior proprietors. It is, however, generally recognized that a riparian proprietor has the right to make an extraordinary or artificial use of the water, provided that such use does not materially interfere with the common right of others. Thus, an upper riparian owner may use the water of a natural stream for the purposes of manufacturing, provided the volume of water in the stream warrants such uses above domestic purposes." (56 Am. Jur. 783, §346). A distinction has been drawn between the use of water for the generation of electric power, when the water is returned to the stream after use, and its use for stream for a like purpose, when the water is consumed in the process (56 Am. Jur. 783, §346, notes 16 and 17). "Since the right to use the waters of a stream for mechanical purposes is secondary to the right to use the same for domestic purposes, the use of the water for artificial purposes is subject to the prior call on the water of a stream for the satisfaction of the natural or primary needs of other owners on the stream . . ." (67 C. J. 1448, §1122).

From the above and foregoing authorities, statutes and observations we conclude (1) that the waters of a lake, stream or river may be used for secondary or artificial purposes (such as manufacturing and industrial use) only after the primary or domestic purposes of the abutting owners have been satisfied, (2) no proprietor may use water in excess of his needs, taking into account the requirements of other abutting proprietors, (3) no proprietor may reduce the normal level of a lake in this state without the consent of all other proprietors.

056-114—April 8, 1956

EDUCATION

EXPENDITURE OF CAPITAL OUTLAY BY COUNTY SCHOOL BOARD FOR CONSTRUCTION OF SCHOOL ON LAND TRANSFERRED BY TRUSTEES OF INTERNAL IMPROVEMENT FUND — PROCEDURE FOR TRANSFER—§§270.07-270.09, F. S.

To: *Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee*

QUESTIONS:

1. Can a school board legally expend capital outlay funds for the construction of a school upon a site dedicated to the school board in perpetuity by the trustees of the internal improvement commission, such method being deemed necessary because of an understanding that the trustees are prohibited by law from transferring title to land unless the land is advertised for sale and bids are accepted?

2. Should the answer to question 1 be in the negative, it is requested that the opinion include advice as to how such a transfer might legally be made.

Section 270.07, F. S. requires the trustees of the internal improvement fund to advertise for sale public lands in conveying same.

Sections 270.08 and 270.09 require notice of sale and bids in making such sales.

Section 270.09, however, makes an exception to these restrictions if the quantity of land involved does not exceed a half section of land.

I doubt that a county school board would desire or need a half section of land for school purposes. If this is the case, the trustees can convey the necessary land to the school board without advertisement or bids.

If more than a half section of land is involved and the exceptions above noted do not apply, your 1st question is answered in negative. (See attorney general's opinion 053-12 p. 635; §§9 and 13, Art. XII, Fla. Const.) This opinion is also based on the assumption that the land in question does not come within the exceptions

provided in §270.07, F. S. relating to the sale or conveyance of homestead, railroad or canal grants.

With regard to your 2nd question, it is my opinion that the transfer could only be legally made after enactment of appropriate legislation. I might suggest that the school board accept a dedication of the land in question as proposed, but not expend capital outlay funds for construction on the land until such time as it can secure title as a result of a legislative act.

056-115—April 8, 1956

EDUCATION

LICENSING OF INSTRUCTORS IN MOTOR VEHICLE DRIVING TRAINING IN COUNTY SCHOOL SYSTEM— CH. 488, F. S.

To: *Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee*

QUESTION:

Would it be necessary for a teacher of adult education to be licensed under provisions of Ch. 488, (§488.01 et seq.) F. S., 1955, in order to give driver instruction to adult students enrolled with local public schools where the following conditions obtain: (1) The teacher is employed and paid by the county board of public instruction; (2) The teacher is certificated by the state department of education; (3) Registration fees for students receiving such instruction are payable to the county board of public instruction as school funds and not as compensation to the teacher; (4) The instruction is scheduled at hours convenient to adult students, usually in the evenings and on Saturdays?

Section 488.01, F. S., provides in part, "Every person desiring to engage in the business of conducting a driver's school . . ."

Section 488.02, F. S., provides in part, ". . . rules and regulations controlling commercial driving schools . . ."

Section 488.04, F. S., relating to instructors in driving schools provides in part ". . . such certificate shall be valid for use only in connection with the business of the driver's school or schools listed thereon by the director."

It is apparent from the above quoted provisions included in Ch. 488, F. S., that the legislature intended the act to apply only to privately operated commercial driving schools and not to driving training offered as a part of the curriculum in the public schools.

In my opinion, therefore, school teachers who give driving instruction as a part of their duties in the public schools are not subject to the regulations provided in Ch. 488. This would apply to all four categories listed in your inquiry.

056-116—April 9, 1956

REGULATION OF PUBLIC UTILITIES

PRIVATE WIRE SERVICE—CONSTRUCTION OF §365.08, F. S., IN RELATION TO MUNICIPAL POLICE OFFICER

To: *Olavi M. Hendrickson, City Attorney, Miami*

QUESTION:

Is a police officer of a municipality a state or federal law enforcement officer as the term is used in §365.08, F. S.?

The section of the law to which you have reference is the fifth paragraph of §365.08 F. S., as amended by Ch. 29805, 1955, provides as follows:

"Whenever any such utility is notified in writing by any state or federal law enforcement officer acting within his apparent jurisdiction, either directly or through the railroad and public utilities commission, that certain telephone or telegraph facilities, or any part thereof, are being used or have been used in violation of any federal law or the laws of Florida, then such utility shall disconnect and remove such facilities and discontinue all telephone and telegraph service rendered over said facilities. Provided, however, that no utility shall disconnect and remove such facilities until it has given to the subscriber 48 hours' written notice of its intention to do so and provided further that any such subscriber within 48-hour period, may, upon a showing that special equities are involved and irreparable damage is threatened, apply to the court to stay the discontinuance or removal pending a hearing and determination by such court, whether such service should be discontinued and the facilities removed. The 48-hour period prescribed herein shall commence a run from the time the written notice from the utility to the subscriber is served upon such subscriber by delivering the same to the address at which the telephone service is furnished and the facilities are located. The notice from the utility to the subscriber shall be given within 24 hours after receipt of notice by the utility of illegal use from any of said law enforcement officers."

In March of 1950 the railroad and public utilities commission adopted rule No. 1592 requiring all telephone and telegraph companies of this state to refuse to install any telephone or telegraph facilities when it has reasonable grounds to believe that said facilities will be used in violation of the law, and provided further that such utility when notified in writing by any state or federal law enforcement officer, acting within his apparent jurisdiction, either directly or through the public utilities commission, that certain telephones or telegraph facilities were being used in violation of any federal law or the laws of Florida, that such utility should disconnect such facilities. This rule, No. 1592, was enacted verbatim by the 1951 legislature as §365.08, F. S., with certain additions not here material.

In the case of Dade County Newsdealers Supply Co. v. Florida Railroad and Public Utilities Commission, Fla. 48 So. 2d 89, the supreme court had under consideration the provisions of rule No. 1592 prior to its enactment as a part of the anti-bookie law. It was held in that case that the rule was reasonable and within the authority of the commission to adopt and that the public utility was warranted in disconnecting its telephone service when notified to do so by the attorney general because of its use for unlawful purposes.

In the case of Peters v. Southern Bell Telephone and Telegraph Co., Fla., 70 So. 2d 547, certain telephones were disconnected from a motel by the telephone company on a written notice from the sheriff of Dade county. The court in that case said:

"Pursuant to the authority granted by Ch. 365, F. S., F.S.A., the sheriff of Dade county on 21, 1953, notified the telephone company that the telephones at a motel owned by the appellants had been used in violation of the gambling laws of this state and that such telephone service should be discontinued."

Thus the court is apparently satisfied that both the attorney general and the sheriff of any county are state officers within the terms of the language used in the 5th paragraph of §365.08. This is bolstered somewhat by §364.31(1), F. S., requiring utility companies, their agents and employees to report to the Florida railroad and public utilities commission and to the sheriff of the affected county any information obtained in any manner that any communication or service furnished by the said utility company is being used in violation of the laws of Florida having for their purpose the prohibiting of bookmaking or other gambling.

It is recognized that municipal police officers enforce not only municipal ordinances but many state laws and that they are called upon daily to enforce such state laws.

Action to remove telephones is not permitted for the violation of city ordinances, but only when the said communication facilities are being used in violation of any *federal law or the laws of Florida*.

It will be noted that §365.14, F. S., relates to the construction that should be given the anti-bookie law and provides as follows:

"This chapter shall be deemed an exercise of the police power of the state for the protection of the public welfare, health, peace, safety and morals of the people of the state and all of the provisions of this chapter shall be liberally construed for the accomplishment of this purpose."

This section has been referred to by the supreme court of Florida in *McInerney v. Ervin*, Fla., 46 So. 2d 458, and *Ervin v. Peninsular Tel. Co.*, Fla., 53 So. 2d 647. Our court has refused to interpret and construe the anti-bookie law so as to say in effect that the legislature purposely wrote a "joker" in the law. (See *Southern Bell Tel. & Tel. Co. v. State*, 53 So. 2d 863.)

In the light of the foregoing authorities and observations, it is my opinion that a sheriff is a state law enforcement officer within the meaning of §365.08, F. S., and may proceed directly to order a public utility to discontinue telephone or telegraph service when the same is being used illegally.

As to a municipal police officer, it is my opinion that the statute does not authorize him to act directly, but there is nothing to prevent such officer from reporting his findings to the Florida railroad and public utilities commission, the attorney general or county sheriff who may order the telephone or telegraph service involved discontinued.

056-118—April 17, 1956

EDUCATION

BOARD OF CONTROL—AUTHORITY TO INVEST SCHOLARSHIP FUNDS—§240.27, F. S.

To: *W. G. Hendricks, Business Manager, Board of Control,
Tallahassee*

QUESTION:

The board of control acts as trustee in administering numerous scholarship and loan funds held for the benefit of students in the institutions under its jurisdiction.

May the board of control, acting as trustee under §240.27, F. S., invest such trust funds either in shares or in savings accounts of first federal savings and loan associations?

Section 240.27, F. S., provides, in part:

“... In all such cases the board of control shall have the power and capacity to do and perform all things as fully as any individual trustee or other competent trustee might do or perform, and with the same rights, privileges and duties, including the power, capacity and authority to convey, transfer, mortgage or pledge such property held in trust and to contract and execute all other documents relating to said trust property which may be required for, or appropriate to, the administration of such trust or to accomplish the purposes of any such trust.”

In my opinion, the above cited act authorizes the board of control, as trustee of scholarship and student loan funds, to invest said funds in federal savings and loan associations. Your question is therefore answered in the affirmative.

056-119—April 20, 1956

(See AGO-056-333)

INSURANCE

STATE FIRE INSURANCE FUND—CONTRIBUTION OF PREMIUMS PAID FOR BENEFIT OF AGENCIES NOT FINANCED BY GENERAL REVENUE FUND—\$284.02, F. S.

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*

QUESTIONS:

1. Generally what is the effect of the proviso added to §284.02, F. S. in 1953 requiring that the general revenue fund shall be reimbursed from other funds, the amount of premiums paid into the state fire insurance fund for their benefit?

2. What is the application of said proviso in §284.02 to fire insurance coverage of certain risks constructed by the board of control under a financing plan involving issuance of revenue certificates, as described?

The 1st question came to us from the insurance commissioner's office. The 2nd question derived from the board of control.

On March 8, 1955, there was delivered to the insurance commissioner opinion 055-53, dealing with the question of whether institutions of higher learning under supervision of the board of control were required to reimburse the general revenue fund, under the proviso mentioned in the questions, for fire insurance premiums paid the state fire insurance fund for buildings occupied by various functions operated in part or in whole through various trust funds. A copy of said opinion is attached.

On June 30, 1955, in answer to your request concerning state agencies required to reimburse the general fund, I referred to opinion 055-53, underscored certain wording therein, and suggested that in absence of pointing out particular agencies, that opinion was as good an answer as we could give you. The underscored wording mentioned is quoted:

"The proviso added by Ch. 28092, 1953, to §284.02, F. S., apparently was and is for the purpose of requiring reimbursement to the general revenue fund for the mentioned premiums from funds of state departments and agencies whose activities are supported by funds from designated and provided sources other than the general revenue fund."

Subsequent to delivery of such last letter several conferences were had with Mr. Phillips, director of the state fire insurance fund, and there was delivered to us by him a list of state departments and agencies evidencing those insuring property in the state fire insurance fund supported wholly by appropriations from the general revenue fund, those supported entirely from funds other than from the general revenue fund, and those supported in part by appropriations from the general revenue fund

and from other sources. The first two categories pose no questions; the last does. The data so furnished us is returned herewith.

At this point we state that the above quotation from said opinion is subject to clarification but such clarification in no way departs from the reasoning upon which it was premised or varies the effect of the conclusions set forth therein.

There is involved Ch. 284, F. S., originally Ch. 7974, 1917. Section 284.01 creates the state fire insurance fund, and requires state property of an insurable nature to be insured against loss by fire in said fund as therein set forth. Section 284.02 provides that the board of commissioners of state institutions shall pay premiums on such property so insured, and that there is an appropriation from the general revenue fund for that purpose. The proviso added in 1953 is quoted "provided, that the general revenue fund shall be reimbursed from other funds the amount of premiums paid for their benefit."

The application of the proviso is not to depend necessarily upon the functions of an agency or department, financed from sources other than the general revenue fund, occupying space in a state-owned building, for such would lead to results reasonably not contemplated by the legislature in its enactment of the proviso. For example, by Ch. 29860, 1955, there was created the "state fire marshal fund", deriving from a premium receipts assessment; and such fund is charged with defraying "the expenses of said official (the state treasurer, as ex officio insurance commissioner, and, as such, state fire marshal) in the discharge of his administrative and regulatory powers and duties", including maintenance of offices, necessary supplies and equipment, salaries, etc. The housing of such department in the state capitol reasonably could not subject that department of the state treasurer to the effects of the proviso in relation to insurance coverage on the capitol. Whether the space occupied by such a department is 5% or 95% of a given structure, the principle is the same. Reasonably it would appear that a *fund benefited* by the payment of an insurance premium is the fund from which, if loss should occur without coverage, the damaged or destroyed risk would be repaired or restored (conceding available appropriated money in said fund for such purpose).

Turning now to the second question, the request from the board of control refers to former opinion 055-53 and the exception mentioned therein with respect to buildings financed by revenue certificates. There is available to us copy of one resolution which was adopted in connection with the financing and construction program of such a project as is contemplated by this question.

This resolution relates to Florida state university revenue certificates, series 1950, \$4,130,000, to finance a project consisting of construction and equipping of new dormitories and other repair and construction work specified therein. The resolution provides that all "gross revenues" received from the project shall be deposited in a revenue fund; that payments may be made out of such fund for the purposes and in the order of priority as follows: (1) to the "interest and sinking fund;" (2) to the "repair and maintenance fund;" and (3) the remaining revenue into an "operation

and maintenance fund", it being provided that the monies in this last-mentioned fund "shall be used for the cost of the operation and maintenance of the project to the extent that funds are not available from other sources for such purposes." The provision for "insurance" in the resolution is quoted in part "That the board will carry such insurance, and in such amounts, as is ordinarily carried by private corporations owning and operating similar undertakings . . . with a reputable carrier or carriers against loss or damage by fire . . ." and other described risks; and, "The proceeds of such insurance shall be used only for the reconstruction, repair or replacement of the facilities of the project damaged or destroyed or for the redemption of last maturing certificate or the purchase of last maturing certificates at not more than the then redemption price of such certificate."

We are informed that title to all the property in projects involved in connection with this question is vested in the state board of education. The quoted words in the preceding paragraph relating to "operation and maintenance fund" to the effect that proceeds from such fund are available for stated purposes "to the extent that other funds are not available from other sources" require attention. The buildings and property involved in this particular financing and construction program are such that normally money for their construction or acquisition would derive from the general revenue fund; and were it not for the italicized quoted words in the preceding paragraph, properly coverage against the risk of loss by fire could be furnished by the state fire insurance fund, with premiums therefor in such event chargeable to the general revenue fund. However, the mentioned italicized wording appears to present a bar to this source of coverage against loss by fire. Laws relating to the state fire insurance fund are to be read in connection with the "replacement fund" consisting of proceeds of insurance, in event of loss, as specified in §§255.01-255.03, F. S. Since with respect to fire coverage here, there is permitted the use of insurance proceeds to retire revenue bonds, this would seem to preclude the propriety of fire coverage of this property in the state fire insurance fund.

We are advised that the provisions of the copy of resolution described in relation to insurance requirements may not be characteristic in detail with respect to resolutions providing other financing and construction programs involving property within the limits of this question. The matter of whether or not it is permissible to insure property of any of these projects in this fund, and, if so, whether contribution is required in relation to premiums paid, must depend upon the wording in such resolutions in relation to the specific property involved.

In view of the foregoing, the questions are answered in their numbered order as follows:

1. Quite apparently, the effect of the 1953 proviso to §284.02, F. S., requires no explanation in relation to those agencies or departments financed wholly from the general revenue fund, and to those departments financed wholly from sources other than the general revenue fund. As explained above, a fund benefitted by the payment of premiums on insurable property from the general

revenue fund is the fund from which, in event of partial or total loss of the insured risk, the same would be repaired or restored were there no insurance coverage. It is suggested that the director of the state fire insurance fund send to the agencies or departments as to which this question is involved, a copy of this opinion with request that such agencies list their risks insured in such fire insurance fund, indicating the respective funds benefitted by the payment of premiums for coverage in the state fire insurance fund, according to the standard above set forth. In this connection, it is stated that there is being delivered to said director of the state fire insurance fund a proposed form of letter to be mailed to such agencies or departments.

2. The fire insurance coverage for the state property described and dealt with in the resolution mentioned above should not be placed in the state fire insurance fund for the reasons set forth. Whether other property under the board of control, constructed or acquired as a result of a plan involving issuance of revenue bonds and the pledging of rentals or other income, may be insured against loss by fire in the state fire insurance fund, and, if so, whether there must be reimbursement of premium as contemplated by said §284.02, must depend upon the wording of the several resolutions authorizing the respective issues of revenue bonds in pursuance thereof. We will be glad to examine copies of any of such resolutions which might be delivered to us in relation to this question.

056-120—April 19, 1956

CONSERVATION

GAME AND FRESH WATER FISH—DEFINITION OF "RESIDENT"—§§372.001 AND 372.57, F. S.

To: *Monroe W. Treiman, County Judge, Hernando County, Brooksville*

QUESTIONS:

1. What constitutes a "resident" within the meaning of §§372.001(1), and 372.57, F. S.?

2. Is it necessary for a person over 65 years of age to present a voting registration certificate in order to secure a permit to fish without a license?

3. What is meant by "other fish and game laws" as referred to in §372.001 (1), F. S.?

I am enclosing a copy of my opinion, 054-24, which I believe answers your 1st question.

Replying to your 2nd question, §372.57, F. S., provides that "no person, except residents more than 65 years of age and children under 15 years of age" shall take or attempt to take game or fresh water fish without having first obtained a license. This prerequisite of procuring a license as a condition precedent to the right to fish applies to residents and non-residents alike (except under certain conditions and exceptions set forth in Ch. 372, F. S.).

Resident and non-resident provisions of §372.001 (1), F. S., apply equally to sport and commercial fishermen and there is no distinction made between them.

Opinion 049-192, dated May 4, 1949, held that "an individual home owner does not have to be a registered voter in order to be entitled to homestead exemption, and the tax assessor does not have authority to deny homestead tax exemption merely because the claimants are not registered voters. An analagous situation is the refusal to issue a permit to fish to a resident person over the age of 65 years merely because the person is not a registered voter. There is no law making it mandatory that a person register to vote, or that he vote.

Since the residence requirement for voting rights is residence in the state for 1 year, and in the county of registration for 6 months, and the residence requirement for issuance of a hunting or fishing license is 6 months when applied to the fresh water fish and game laws; it appears that there is no authority to require presentation of voting registration as a condition precedent to issuance of a permit to fish nor is the applicant for permit required to present a voting registration to prove residence, though such documentary proof would be acceptable.

Your 2nd question is answered in the negative.

Replying to your 3rd question, it appears that §372.001 (1), F. S., prior to the adoption of the Florida Statutes 1953, was a part of Ch. 371 which applied to fish and game generally. Some of the sections of Ch. 371 applied to salt water fish under the jurisdiction of the state board of conservation and some sections applied to Florida fresh water fish and game, which are under the jurisdiction of the game and fresh water fish commission.

In 1953 the legislature revised the laws applying to salt water fish and placed them all in Ch. 370. Certain sections of Ch. 371 relating to salt water fish were repealed. Certain provisions relating to fresh water fish and game were placed in Ch. 372, F. S. Chapter 371 as such was repealed and does not appear in the 1955 Florida statutes.

Therefore, it is my opinion that the provisions in §372.001 (1), F. S., "other fish and game laws" was intended to apply to salt water fish or other living resources under the state board of conservation.

056-121—April 20, 1956

TAXATION

ASSESSING REAL PROPERTY TAXES BY REFERENCE TO
PLAT OR MAP NOT PROPERLY OF RECORD—CH. 177,
§§193.12 AND 193.17, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

May real property be assessed for taxes under a description referring to a plat or map not properly of

record in the office of the clerk of the circuit court pursuant to Ch. 177, F. S?

We gather from the request for opinion and the file handed us therewith that subdividers of real property in at least one county in Florida have devised a scheme of attaching a subdivision plat to a conveyance of a lot or other parcel of land in a subdivision and making the said plat a part of the said deed of conveyance by reference, thereby describing the property to be conveyed by the said deed. The plat recorded as a part of the deed aforesaid has not been filed and recorded in conformity with Ch. 177, F. S., which provides for the official filing and recording of subdivision plats in this state. "It is not necessary that the description of the land be contained in the body of the deed. It is sufficient if it refers for identification to some other instrument or document, but the description must be contained in the instrument or its reference, express or implied, with such certainty that the locality of the land can be ascertained . . . The rule has been held to apply to maps and plats . . . and the deed is not void because the plat referred to is incomplete, unacknowledged, unrecorded or even invalid" (26 C. J. S. 219, §30) in the absence of statute. Attention is directed to the following holding by the supreme court of Alabama in *Nixon v. City of Anniston*, 219 Ala. 219, 121 So. 514, text 516:

"In order for a map or plat to be made a part of a conveyance, when it is not recorded as provided by the statute, there must be a certain, definite reference in the instrument to a certain existent map or plat showing the lot intended to be conveyed. Without a recorded map, the mere numbering of lots in the instrument will not suffice to render a then existent private map or plat a part of the conveyance. Further, it is said that 'If the instrument refers with certainty to a particular map or plat, then parol evidence may be received to identify the map or plat so referred to, notwithstanding it may not be attached to the conveyance or may not be filed or received, or may not have been adopted as an official map or plat.' *Thrasher v. Royster*, 187 Ala. 350, 65 So. 796; *State v. Meaher*, 213 Ala. 466, 483, 105 So. 562."

Although we feel that the conveyance above mentioned to which the plat was attached and with which it was recorded is sufficient as a conveyance, any reference to such plat in other deeds, to which no like plat is attached and recorded as a part thereof, for the purpose of description raises the question of the validity of such reference in the light of Ch. 177, F. S. This chapter provides that "whenever maps or plats of any land within this state are brought to a county clerk or other public recording office to be placed on public record, the county clerk or other public recording officer, before filing, shall examine said map or plat and see that it complies in form with all the requirements of" Ch. 177, F. S., and if there is no compliance with said Ch. 177 the clerk is required to return the map or plat to the owner for correction. The map recorded with and as a part of the deed aforesaid was not recorded in accordance with said Ch. 177.

Doubtless the purpose of this chapter was and is to require that the map or plat be properly made and approved, including the requirements deemed necessary by the legislature and included in the said chapter, before it may be put of record in the public records. The request for opinion sets out facts and circumstances that indicate an effort to evade the requirements of said Ch. 177. Said chapter was enacted for the benefit of the public who purchase lands in subdivisions, and seems to be authorized as a police measure. The said plat recorded with the said deed and a part thereof in the county deed record, although properly of record as a part of the said deed, is not a public record for any other purpose; for all other purposes the said plat is an unrecorded plat. Although we entertain some doubt as to the sufficiency of a deed of conveyance making reference to such a plat not properly of record, as constructive notice of the conveyance under our recording statutes, in so far as the description of the land is concerned, we do not think we are called upon to decide such question in order to answer the above stated question.

Although there is authority to the effect that a plat must be legally and duly recorded before it may be used for the purpose of describing real property for ad valorem taxation purposes, there is respectful authority to the contrary (84 C. J. S. 905, §467, notes 2 and 3). It has also been held that the fact that the map referred to has not been recorded as provided by law does not invalidate the assessment if the lands are subject to definite location by a surveyor; and this is true where the plat referred to is well known and generally used in connection with conveyances (84 C. J. S. 905, §467, notes 4 and 5).

Although a county tax assessor may "make the assessments of real estate in cities and town plats and blocks in regular order throughout the original plan of the city or town, and all additional additions thereto, all the lots and blocks to be listed in their regular order under the letter, number or other designation of the blocks as filed and recorded in the office of the clerk of the circuit court . . ." (§193.17, F. S.) we find no statute relative to such assessments when there is no subdivision or municipal plat or map duly and properly recorded in the office of the clerk of the circuit court. We find nothing in the taxing statutes directing the manner of recording subdivision property when there is no subdivision plat duly and properly recorded in the office of the clerk of the circuit court. Statutes relative to the assessment of ad valorem taxes are, under §192.21, F. S., usually directory and not mandatory.

There is no doubt as to the right of the county tax assessor to assess the property in question by metes and bounds; however, when assessing the lands under consideration a tax assessor will be presented with difficulties in obtaining adequate metes and bounds descriptions of each lot or parcel involved. Although §193.12, F. S., requires that owners of taxable property return the same for ad valorem taxes, we know of no statute by which a tax assessor might compel the filing of a tax return, and in the absence of a tax return or the giving of an acceptable description, we know of no method whereby a tax assessor may by law force a landowner to make a return of the lands owned by him. In such

a case it would seem to be the duty of the tax assessor to assess the property although no return be filed by the owner. In such a case we see no objection to the tax assessor obtaining an authentic copy of the plat in question and making it a part of the records of his office and assessing the lands in question by reference to such unrecorded plat. As a matter of fact a copy of the plat might be attached to the tax roll for information. The procedure above set out should be used only as a last resort and in order that the lands in question will not miss taxation.

The above observations answer the above question as well as the same may be here answered.

056-122—April 20, 1956

RETIREMENT

SUPREME COURT, JUSTICES' AND CIRCUIT JUDGES' RETIREMENT SYSTEM—INVESTMENT OF RETIREMENT FUND—CH. 123, §§215.30, 215.32, 518.15 AND 554.101, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

In what securities, if any, may the supreme court justices' and circuit judges' retirement fund be invested?

Chapter 123, F. S., sets up the supreme court justices' and circuit judges' retirement system, and §123.02 thereof provides that certain amounts shall be deducted from the salaries of such justices and judges and that "the amount deducted shall be deposited in a special fund in the state treasury, which is hereby established as "the supreme court justices' and circuit judges' retirement fund." The retirement compensation payable to any such justice or judge under said Ch. 123, F. S., is payable from the said "supreme court justices' and circuit judges' retirement fund" (§123.04, F. S.). Nowhere in the said statute do we find any express provision for investing the said retirement fund as is found in the state and county officers' and employees' retirement system (§122.14, F. S.), the retirement system for school teachers (§238.10 F. S.), the highway patrol retirement system (§321.16, F. S.), and other past retirement systems. There was likewise no provision for investing the "circuit judges' retirement fund," provided for in §§38.17 and 38.18, F. S. It seems probable that the justices and judges within the purview of said Ch. 123, F. S. have a vested right or interest in the fund into which their contributions under §123.02, F. S., are deposited (Advisory Opinion, Fla., 82 So. 494, text 497-8); this being true, the fund in question may be a trust fund held by the state for the benefit of the said justices and judges paying into the said fund, and within the purview of §§215.30(5) and 215.32(5), F. S.

State officers and boards having public funds in their custody and control are without authority or power to depart from the literal statutory requirements as to loans and investments of such funds; such statutory requirements are usually construed strictly (42 Am. Jur. 724, §10; 81 C. J. S.

1191, §155; 59 C. J. 228, §374; Annotation in 104 A. L. R. 628). Here the statute in question (§123.02, F. S.) provides for the collection of the fund and requires that it shall "be deposited in a special fund in the state treasury" to be used for the purpose of paying the retirement compensation provided by said Ch. 123, F. S. This statute makes no provision for the investment of said fund. We find no statute making express provision for the investment of such fund. However, attention is directed to §518.15, F. S., which provides in part that

"Notwithstanding any restrictions on investments contained in any law of this state, the state and all public officers . . . may legally invest any sinking funds, moneys or other funds belonging to them or in their control in bonds or motor vehicle anticipation certificates issued under authority of §18, Art. XII, of the state constitution"

Your attention is also directed to §554.101, F. S.; however, we are inclined to construe this section as being applicable only where investment is expressly authorized as an additional source of investment.

The supreme court justices' and circuit judges' retirement fund, being a special fund in the state treasury without any specific statute authorizing its investment, has the same status as to investment as do other similar funds in the said treasury. We doubt that there is any authority to invest such funds unless they be invested in accordance with the authority given in §518.15, F. S.

056-123—April 23, 1956

COURTS

CIRCUIT COURT TRIALS AND HEARINGS HELD AWAY FROM COUNTY SEAT—§20, ART. III; §4, ART. VIII AND §12, ART. V, STATE CONST.; CHS. 18786, 1937; 24819, 1947; AND §125.221, F. S.

To: *Miami Beach Bar Association, Miami Beach*

QUESTIONS:

1. May a circuit judge hear contested or uncontested equity matters away from the county seat?
2. May a circuit judge hear motions in common law cases away from the county seat?
3. May a circuit judge hear ex parte matters, in either common law or in equity, away from the county seat?
4. May the circuit court hold common law civil trials away from the county seat under any or all of the following conditions:
 - (a) With a jury where none of the parties agree thereto?

(b) With a jury where the parties agree thereto by proper stipulation?

(c) Without a jury where none of the parties agrees thereto? and

(d) Without a jury where the parties agree thereto by proper stipulation?

The 1st, 2nd and 3rd above questions were posed by the Miami Beach bar association, through Harry Zukernick as chairman of one of its special committees, and the 4th by the Volusia county bar association, through Melvin Orfinger as its secretary.

Although we find provision in §125.221, F. S. (Ch. 29795, 1955) for the holding of court and meeting of grand juries in locations in the county seat other than the courthouse where there is no "suitable available space in the courthouse due to construction or reconstruction, destruction or other good reasons," we find no statute or constitutional provision expressly authorizing the holding of the circuit court at locations not within the county seat. The authorities are not numerous; however, it seems to be agreed in the few cases in which the question has arisen that, in the absence of statute, a court is authorized to hear and determine issues of fact at the county seat only, and that it has no authority or jurisdiction to try such issues at any other place (Annotation in 8 Ann. Cas. 939-940).

Section 20, Art. III, State Const., provides that "the legislature shall not pass special or local laws . . . regulating the practice of courts of justice, except municipal courts . . ." Chapter 18786, 1937, divided Pinellas county into 2 parts, so arranged that Clearwater was in the northern part and St. Petersburg in the southern part, and provided that civil actions arising in, or involving property located in the northern part should be tried in Clearwater, and those arising in, or involving property located in the southern part should be tried in St. Petersburg; however, by stipulation of the parties such cases might be tried either in Clearwater or in St. Petersburg. This act was involved in *Mack v. Carter*, 133 Fla. 313, 183 So. 478, text 479, concerning which the court remarked:

"It is next contended that Chapter 18786, Sp. Acts of 1937, regulates the practice and jurisdiction of the Circuit Courts contrary to Section Twenty, Article Three of the Constitution.

"In some jurisdictions, it is held that 'all that relates to the manner and time in which a case shall be conducted and tried, from its inception to final judgment and execution, is generally embraced under the title of practice.' *Wright v. State*, 5 Ind. 290, 61 Am. Dec. 90; *Bishop on Criminal Procedure*, Vol. 1, Section 2; 6 Words and Phrases, First Series, 5486; 2 Bouv. Law Dict., Rawle's Third Revision, p. 2649.

"Some of the holdings on this question are not so liberal but certainly in the view as expressed in the foregoing authorities, the act assailed attempts to regu-

late the procedure of the Circuit Court of Pinellas County which can be done only by general law."

It, therefore, seems that any provision for the trial of civil cases at common law in any location other than at the county seat, *if otherwise valid*, must be by general statute and not a special or local law.

Section 4, Art. VIII, State Const., provides that "the legislature shall have no power to remove the county seat of any county, but shall provide by general law for such removal." Reference is again made to said Ch. 18786 and the said case of Mack v. Carter, where the court, concerning the operation and effect of the said act, said:

"It is first contended that the act brought in question is violative of Section Four, Article Eight of the Constitution wherein it is provided that 'the Legislature shall have no power to remove the County Seat of any County, but shall provide by general law for such removal.'

"St. Petersburg is located in Pinellas County but Clearwater is the County seat. It cannot be said that the act removes the County seat of Pinellas County other than for a very limited purpose. Holding terms of the Circuit Court is one of the functions for which a County seat is created and in so far as the act provides for terms of the Circuit Court at St. Petersburg for the trial of specific cases it amounts to a change of the County seat. It is admitted that the act is a local rather than a general law and applies to no other county."

We gather from the above quotation from Mack v. Carter, *supra*, that any act of the legislature providing for the trial of common law civil cases at any location in the county other than the county seat amounts to a change of the county seat, although for a very limited purpose, in violation of said §4, Art. VIII, State Const.

Upon cursory examination it might appear that State v. Pinellas County, 160 Fla. 549, 36 So. 2d 216, is in conflict with Mack v. Carter, *supra*; however, we feel that upon mature examination and study the cases are to be clearly distinguished. Under Ch. 18786, if terms of the circuit court were to be held in St. Petersburg, "it would necessitate the removal of these (trial docket and other books and records) and other volumes constituting their 'official books' to that point," thereby violating §4, Art. XVI, State Const., requiring that county officers "keep their official books and records at the county seats of their respective counties." This question confronted the court in Mack v. Carter, *supra*, but in Ch. 24819, 1947, involved in State v. Pinellas County, *supra*, although it provided for the establishment of an auxiliary county building in St. Petersburg, provided that "no county records or activities required by the constitution of Florida to be retained or carried on at the county seat shall be maintained in any such building . . .," which act was upheld in State v. Pinellas County, *supra*. We, therefore, see no reasonable reason for holding that State v. Pinellas County overruled Mack v. Carter.

Turning now to the general law upon the question, it seems that to constitute a circuit court "the circuit judge must be in

the discharge of his judicial duties, at the time and in the place prescribed by law for the sitting of the court." (McClerkin v. State, 20 Fla. 879, text 885; Annotation in 43 A. L. R. 1519-20). No examination of witnesses or other proceeding "should be had outside of the courtroom," except as authorized by statute (Garcia v. State, 34 Fla. 311, 16 So. 223, text 230; O'Berry v. State, 47 Fla. 75, 36 So. 440, text 444; Annotation 43 A. L. R. 1520-1522). We are not here interested in trials held away from the courtroom but in the courthouse (Annotation in 43 A. L. R. 1525-1529) or in some other place within the county seat (Annotation in 43 A. L. R. 1529-1546), but with hearings and trials held outside of the county seat. One group of authorities hold that the trial of a case away from the county seat, without constitutional or statutory authority results in reversible error (Annotation in 43 A. L. R. 1548-1553), while the other group holds that reversible error does not occur (Annotation in 43 A. L. R. 1553-1554). The weight of authority seems to hold that reversible error occurs in such cases (see 21 C. J. S. 253-4, §164). It is stated in 21 C. J. S. 255, §165, that "a constitutional or statutory provision that a court shall be held at the county seat is mandatory and the court cannot be held elsewhere . . ."

We know of no general statute providing for the trial of cases pending in the circuit court outside of the county seat of the county wherein it may be pending. However, §12, Art. V, State Const., provides that "the circuit courts and circuit judges shall have such extra territorial jurisdiction in chancery cases as may be prescribed by law." This provision was new in the 1885 state constitution. Under this provision a circuit judge of one judicial circuit appointed to hear a chancery cause in lieu of a disqualified judge may dispose of such case either in his own circuit or any other circuit (Sommers v. Apalachicola Northern Railroad Co., 85 Fla. 9, 96 So. 151, text 153). By reason of said §12, Art. V, State Const., there is a distinction between the trial of common law cases and of equity cases. It may be that a common law cause must be tried at the county seat where it is pending, or to which it has been transferred, and that an equity cause may be tried in another location by reason of said §12 of Art. V.

Some courts seem to draw a distinction between trials of causes of action and hearings and decisions on demurrers and motions to dismiss and other motions (88 C. J. S. 22, §3; 53 Am. Jur. 28, §2). The term "trial" has been distinguished from the term "hearing" as applied to equity and certain other cases. "Moreover the hearing of evidence after default in a divorce proceeding is not a 'trial' as that term is used in statutory provisions for new trial." (53 Am. Jur. 28, §2).

Although we understand that in some counties certain court hearings are being held at locations other than the county seat we are not advised whether or not such hearings are being held pursuant to statute or not. The question of the right of circuit courts and circuit judges to hold contested and uncontested hearings and trials, in both common law and equity, away from the county seat presents constitutional questions (see Mack v. Carter, 133 Fla. 313, 183 So. 478, text 479) which must be answered before the above questions may be answered. It has been the long standing policy of this office to refrain from rendering opinions

on constitutional questions, and to leave such questions to the courts. We must, by reason of the long standing rule of the office, refrain from answering the above questions; however, we have attempted to collect some of the applicable constitutional provisions, statutes and authorities bearing upon the question for your information. It may be that constitutional amendments, especially in connection with common law actions, may be necessary to authorize the trial of causes away from the county seat and in other parts of the county.

056-124—April 25, 1956

COURTS

CORONER'S INQUEST — JUVENILE DEFENDANT — TRANSFER OF CASE TO JUVENILE COURT—§§39.01, 39.02, 936.02, 936.03, 936.08, 936.12 AND 936.15, F. S.

To: *W. Marion Hendry, Justice of Peace District 1, Hillsborough County, Tampa*

QUESTION:

In view of the provisions of the juvenile court law (Ch. 39, F. S.) does a justice of the peace, acting as coroner pursuant to the provisions of Ch. 936, F. S., have jurisdiction to hold an inquest where all parties involved are children within the meaning of the juvenile court law?

Pursuant to the provisions of Art. V, §50 Fla. Const., empowering the legislature to create and establish juvenile courts, "and to vest in such courts exclusive original jurisdiction of all or any criminal cases where minors under any age specified by the legislature . . . are accused . . .", it enacted what is now Ch. 39, F. S. Section 39.01 (11) F. S. defines a delinquent child as "a child who commits a violation of law . . .", while sub §(12) thereof defines violation of law to mean violation of any law of the U. S., the state, or a city or town ordinance. Section 39.01 (6), F. S., declares that a "child" means any married or unmarried person under the age of 17 years, or any person who is charged with a violation of law occurring prior to the time that person reached the age of 17 years."

Section 39.02 (1), F. S., in part provides: "The juvenile court shall have *exclusive original jurisdiction* of dependent and delinquent children domiciled, living or found within the county . . ." (Emphasis supplied.) Subsection (2) of said section reads "All proceedings against a child for alleged violation of law must be brought in the juvenile court, except as provided in sub §(6) in this section." The provisions of sub §(6) are not material for consideration of the question presented since we are not concerned with transfer of delinquent children from the juvenile court to any other court.

For the purpose of this opinion we assume that the juvenile involved is under the age of 17 years.

Section 936.02, F. S., outlines the situations where inquests

may be taken. Under the provisions of §936.03 (1), F. S., the coroner, under certain circumstances, is required to conduct a preliminary investigation into the facts and circumstances of the death and to report the same "to the judge, the prosecuting attorney or some assistant prosecuting attorney of any court having trial jurisdiction of felonies committed in the county where the dead body . . . is found." If the judge or prosecuting attorney has reasonable grounds for believing a criminal act has been committed or there is criminal negligence and finds that an inquest is necessary, the judge or prosecuting attorney, as the case may be, shall direct the coroner to summons a jury to inquire into "what manner and by whom the deceased came to death."

Section 936.08, F. S., details the charge to be given the jurors, among which is to determine, concerning the decedent, ". . . whether he died of felony, mischance, or accident; if of felony, who were the principals and who were the accessories . . ." and all other details and circumstances surrounding the death.

Where it appears to the satisfaction of the jury ". . . that a felony has been committed . . .", the coroner ". . . shall forthwith . . . issue his warrant to be directed to any lawful officer to execute . . . and to apprehend the person suspected of such felony and bring him before some justice of the peace to be dealt with according to law."

It is clearly apparent that the legislature, pursuant to constitutional power, has divested all other courts who might have jurisdiction of criminal offenses involving persons under 17 years of age of that jurisdiction and placed the same in the juvenile court.

There is no defendant in the true meaning of the term in a coroner's inquest, for no person is then charged with crime. The statute requires that the jury inquire into the death and make the determination pursuant to the charge contained in §936.08, F. S. However, when it appears that a felony has been committed, §936.15, F. S., requires the coroner to issue a warrant of an arrest directed to the person suspected thereof. The juvenile court act specifically provides that a child may be taken into custody by a law enforcement officer without an order of a juvenile court where the child is alleged to have committed a violation of law. That person shall notify the parents or legal custodian and shall deliver the child to the juvenile court where the child is taken into custody.

Section 39.02 (3), F. S., provides that if during the pendency of any criminal charge "in any court of the state, against any person presumed to be an adult, it shall be ascertained that the person is a child, or was a child at the time the offense was committed, that court shall forthwith transfer the case, . . . to the appropriate juvenile court; . . ."

As mentioned above, there is no criminal charge technically pending against anyone at the outset of the inquest, which is held for the purpose of investigating into the circumstances of a death. When the coroner's verdict rendered under §936.12, F. S., indicates that a felony has been committed, the coroner in lieu of issuing

his warrant required by §936.15, F. S., where the accused is a child within the purview of the juvenile court act, should follow the provisions of §39.02 (3), F. S., by transferring the case to the appropriate juvenile court.

Subject to these observations, the question is answered in the affirmative.

056-125—April 25, 1956

BAIL BONDS

LICENSE AND QUALIFICATION OF BAIL BOND RUNNER— AMOUNT—§§903.37-903.58, and 205.45, F. S.

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*

QUESTION:

What is the amount of license and qualification taxes required of a bail bondsman's "runner" under the provisions of §§903.37-903.58, F. S.?

Sections 903.37-903.58 derived from Ch. 29621, 1955, and comprehensively regulate bail bondsmen and their "runners".

Section 903.37(6) defines such a "runner" as a person employed by a bail bondsman for the purpose of assisting the bail bondsman in presenting a defendant in court when required, or employed by the bail bondsman to assist in the apprehension and surrender by a defendant to the court or keeping the defendant under necessary surveillance. Section 903.45, F. S., sets forth provisions concerning applications to the insurance commissioner of persons desiring to qualify as such "runners".

Section 903.40, F. S., provides that no person shall act in the capacity of a "runner" unless he shall be "qualified and licensed" as required. Section 903.41, F. S., provides that the issuance of any license in accordance with the provisions of §§903.37-903.58 "shall be subject to the same taxes and fees as required of fire and casualty agents as provided by §205.45, F. S." At this point it is well to observe that §205.45 not only provides for licenses for insurance agents but also for insurance solicitors; however, by reason of the wording of §903.41, the latter are to be here disregarded. We construe §903.41 as meaning: (1) License and qualification taxes required by §205.45 of fire and casualty agents are applicable to a bail bondsman's "runner". (2) Such fees and taxes for a "runner" are payable to and distributable by the officer, and in the manner designated, in §205.45.

In view of the foregoing, in my opinion the question is answered as follows:

License and qualification taxes required for a bail bondsman's "runner" by §§205.45 and 903.41 are as follows:

(1) An annual license tax of \$6 payable to the state treasurer.

(2) An annual county license tax of \$3 payable to the state

treasurer and distributable in the manner prescribed in §205.45 (2), F. S.

(3) An annual qualification tax of \$1.50.

The foregoing taxes when collected are required to be deposited in the general revenue fund.

(4) Mention is made in §205.45(6), F. S., of the tax required by §627.81, F. S., of fire and casualty agents applying for examination (\$10). A comparable tax of \$10 is required of an applicant for license as a bail bondsman's "runner". (§903.46.)

056-128—April 30, 1956

CORPORATIONS AND BUSINESS TRUSTS

CORPORATIONS—MEMBERSHIP IN LIMITED PARTNERSHIP PROHIBITED—§§620.01, 620.02 and 1.01, F. S.

To: R. A. Gray, Secretary of State, Tallahassee

QUESTION:

May a corporation be a limited partner in a limited partnership under the provisions of Ch. 620, F. S.?

Chapter 620, F. S., is the uniform limited partnership law of Florida. Section 620.01 defines a limited partnership as a partnership formed by 2 or more "persons" under the provisions of §620.02, F. S., having as members one or more general partners and one or more limited partners; that the limited partners as such shall not be bound by the obligations of the partnership.

The question does not differentiate between domestic and foreign corporations operating in this state. There appears to be no statutory grant of power to domestic corporations to engage in a partnership enterprise, limited or general. Whether a foreign corporation operating in this state is granted such power must depend upon the laws of its domiciliary state and its charter or other evidence of incorporation issued in pursuance of such laws; however, by reason of the conclusion reached below, inquiry concerning such grant of power does not seem required.

There has long been the general rule in other jurisdictions that a corporation has no implied power to become a partner with another corporation or an individual in a general partnership. (13 Am. Jur. 830.) This rule appears to derive from public policy: since a general partnership's members may be obligated by the acts of others, such is incompatible with the policy of law that corporations shall manage their own affairs. (E.g., *Whittington Mills v. Upton*, Mass., 71 Am. Dec. 681.)

It is recognized that without forming partnerships, corporations may enter into agreements with others in relation to transactions which fall within the categories of joint adventures, provided that such transactions are within the scope of the powers of such a participating corporation. (*Wyoming-Indiana Oil & Gas Company v. Weston*, Wyo., 7 P. 2d 206, 80 A. L. R. 1037.) While it is not necessary here to deal with the matter, it is doubtful that there is any difference in the legal status of

a corporation engaging in an enterprise as a joint adventurer and as a limited partner, were the latter permitted under our statutes.

Section 1.01, F. S., defines the word "person" (where the context will permit) as including, among others, "individuals" and "corporations". A careful study of Ch. 620 reasonably leads to the conclusion that a "person" who is a member of a limited partnership as therein provided, is a natural person as distinguished from a corporation; and unless and until our courts shall construe the effect of the chapter otherwise, that position is assumed and maintained by this office.

Hence, the question is answered in the negative.

056-129—April 30, 1956

PUBLIC HEALTH

AUTOPSIES—AUTHORITY TO PERFORM—§932.57, F. S.

To: *State Tuberculosis Board, Tallahassee*

QUESTION:

Who may, under the laws of this state, consent to the performance of an autopsy of a deceased person, and in what manner may such consent be evidenced?

Although your request for opinion states 3 questions, we have condensed them into one question which we feel will cover the same field as the questions in the request. To the extent not otherwise provided by statute, an autopsy or post-mortem examination of a human body may be performed only upon the consent of the person having the right of sepulture or burial and in accordance with such consent (25 C. J. S. 1027, §8; 15 Am. Jur. 848, §27). This brings up the question of who has the right of sepulture or burial of a dead body.

There was no universal common law as to who has the right of burial; however, generally, except where the deceased has made his wishes known, in which case they will ordinarily be followed, the right of burial belongs to the surviving spouse, or, if there be none, to the next of kin (25 C. J. S. 1017, §3; 15 Am. Jur. 834, et seq., §§9 and 10). It was stated in *Kirksey v. Jernigan*, Fla., 45 So. 2d 188, text 189, that "it is well settled, in the absence of testamentary disposition to the contrary, a surviving spouse or next of kin has the right to the possession of the body of a deceased person for the purpose of burial, sepulture or other lawful disposition which they may see fit." See also *Dunahoo v. Bess*, 146 Fla. 182, 200 So. 541, text 542, to the same effect.

From the above and foregoing it seems that, in the absence of testamentary provisions to the contrary which will ordinarily be followed, the surviving spouse, or if there be no surviving spouse then the next of kin, may give consent to the performance of an autopsy on the body of a decedent. Except where the statute provides otherwise, such as, for example, §932.57, F. S.

Telegraphic messages when relevant are admissible in evidence and are governed by the same rules which govern admissibility of other private writings. In sending telegraphic messages it is usual practice to deliver a written message to the telegraph company, after which it is transmitted and a company written message delivered to the addressee. Usually the written message is the original and the one delivered is the duplicate. Under some circumstances the company may be the agent of the sender so that the message delivered is the original (20 Am. Jur. 372, 810 and 811, §§414, 962 and 963). Usually a telegram from the surviving spouse, or if there be no surviving spouse, from the next of kin, or other person having statutory authority, is sufficient authority to perform an autopsy or post-mortem examination.

Where the identity of the speaker is established, communications through the medium of the telephone may be shown in the same manner, and with like effect, as conversations had between individuals face to face. However, before a telephone conversation may be admitted in evidence, the identity of the parties must be established, either by identification of voice or by other sufficient proof. Calls made in regular course of business may be admissible (20 Am. Jur. 333-337, §§365-370). A recording of a telephone conversation may be used only after sufficient identification of the parties to the same.

If there is no surviving spouse or next of kin, it would seem that the person or persons charged with the responsibility of burial might give consent for an autopsy or post-mortem examination. However, we doubt that the fact that surviving spouse or next of kin is difficult to contact would justify an autopsy without his consent, except when authorized under some statute.

The above authorities and observations seem to answer the above question as well as the same may here be answered.

056-130—May 3, 1956

SOCIAL SECURITY

AUTHORITY FOR REFERENDUM CONCERNING OASI FOR PUBLIC EMPLOYEES—§650.10, F. S.

To: *Herbert W. Miller, Florida Industrial Commission, Tallahassee*

QUESTION:

Is it the duty of the governor, under the provisions of §650.10, F. S., to authorize a referendum upon the request of the governing body of such political subdivision?

It is sufficient here to state that among the 1954 amendments to the federal social security act there is the provision permitting OASI coverage of public employees in positions now covered by a retirement system, "if the governor of the state certifies to the secretary of health, education and welfare that the following conditions have been met: (A) A referendum by secret written ballot was held on the question of whether serv-

ice in positions covered by such retirement system should be excluded from or included under an agreement under this section; (B) An opportunity to vote in such referendum was given (and was limited) to eligible employees; (C) Not less than 90 days' notice of such referendum was given to all such employees; (D) Such referendum was conducted under the supervision of the governor or any agency or individual designated by him; and (E) A majority of the eligible employees voted in favor of including service in such positions under an agreement under this section." (§218(d) (3), Social Security Act; 42 U.S.C.A., §418 (d) (3).)

In January of 1955 (opinion 055-11, dated Jan. 25, 1955), in response to inquiry, this office evidenced its opinion, in substance, that the governor or an agency or individual designated by him did not have authority, under then existing law, to call, conduct, supervise or certify the results of a referendum election for social security coverage purposes, in the absence of such a referendum being authorized by state law.

In that opinion it was suggested that, since the 1955 session of the legislature would soon convene, appropriate legislation on this matter should be sought to remove any doubts.

The legislature, during the 1955 session, enacted Ch. 29824, 1955. Section 12, thereof (appearing as §650.10, F. S., 1955) reads as follows:

"(1) With respect to employees of the state the governor is empowered to authorize a referendum, and *with respect to the employees of any political subdivision he shall authorize a referendum upon request of the governing body of such subdivision*; and in either case the referendum shall be conducted, and the governor shall designate an agency or individual to supervise its conduct, in accordance with the requirements of §218 (d) (3) of the social security act, on the question of whether service in positions covered by a retirement system established by the state or by a political subdivision thereof should be excluded from or included under an agreement under this chapter. The notice of referendum required by §218 (d) (3) (C) of the social security act to be given to employees shall contain or shall be accompanied by a statement, in such form and such detail as the agency or individual designated to supervise the referendum shall deem necessary and sufficient, to inform the employees of the rights which will accrue to them and their dependents and survivors, and the liabilities to which they will be subject, if their services are included under an agreement under this chapter.

"(2) Upon receiving evidence satisfactory to him that with respect to any such referendum the conditions specified in Section 218 (d) (3) of the Social Security Act have been met, the Governor shall so certify to the Secretary of Health, Education, and Welfare." (Emphasis supplied.)

The italicized language above, noting particularly the use

of the mandatory "shall", would seem to clearly indicate the propriety of the governor authorizing such a referendum.

Where the language of a statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to rules of statutory interpretation and construction, and the language must be given its plain and obvious meaning. (*Ross v. Gore*, Fla., 48 So. 2d 412; *Miami Bridge Co. v. Railroad Commission*, 155 Fla. 366, 20 So. 2d 356, certiorari denied, 325 U.S. 867, 89 L. Ed. 1987.)

The language of §650.10, F. S., set forth above, with respect to authorizing a referendum appears to be clear, unambiguous and conveys a clear and definite meaning. Hence your question with respect to a referendum is answered in the affirmative.

In so answering the question, I am not unaware of the additional problems, raised by your inquiry of April 23, 1956, with respect to social security coverage of state and county employees. The complexity of such problems requires considerable further study and, in the final analysis, may require seeking a judicial declaration because of the importance and necessity for finality on the subject. However, the express language of §650.10, F. S., with respect to a referendum, would seem to leave little room for doubt as to when a referendum should be authorized by the governor.

056-131—May 9, 1956

STATE OFFICERS AND EMPLOYEES

CITRUS COMMISSION—PER DIEM MEMBERS AND EMPLOYEES—§§601.06 and 112.061, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. What per diem are members of the Florida citrus commission entitled to receive while engaged in official travel?

2. What per diem are employees and representatives of the Florida citrus commission entitled to receive while engaged in official travel?

In order to reveal the intent of the legislature, and thereby determine the answers to the above questions, I would like to consider chronologically the law relating to per diem as it appeared in the citrus code and in the general statutes. The scope of a legislative act may be determined by resort to its history and a comparison with cognate laws to determine its meaning and effect. *Liggett Co. v. Amos*, 104 Fla. 609, 141 So. 153; *State ex rel Parker v. Lee*, 113 Fla. 40, 151 So. 491.

AS TO QUESTION 1:

The act establishing the citrus commission as an agency of state government authorized per diem allowance for members of the commission at \$10 per day for official travel within and with-

out the state. (Ch. 16854, 1935.) The per diem allowed other state officers and employees generally at the time was \$4.50. (Ch. 16184, 1933.) This clearly indicated the intent of the legislature in 1935 to treat commission members differently from other state officers and employees in relation to the subject of per diem allowance.

The enactment of the citrus code in 1949 consisted of a consolidation of all the statutes relating to the citrus industry, revised and implemented for the purpose of providing a workable and up-to-date body of law relating to one of the most important industries in the state. (Ch. 25149, 1949.) The allowance in the code for per diem was the same as existed prior to the codification and revision: \$10 per day. An earlier act passed during the same session of the legislature authorized the payment of per diem to state officers and employees generally at the rate of \$7.50 per day for official travel within the state and \$10 per day for official travel outside the state. (Ch. 25040, 1949.) In this manner the legislature affirmed its previous indication of intent to treat commission members differently from other state officers and employees in relation to per diem allowance.

The previously mentioned act of 1949, relating to per diem allowance for state officers and employees generally, expired in 1951. An act was passed in 1951 authorizing the same amount for per diem for state officers and employees, generally, as the former act of 1949 allowed. (Ch. 26910, 1951, §112.061, F. S.) The citrus code provision relating to per diem remained unchanged and commission members continued to be paid in accordance with such provision. (§601.06, F. S.)

At the 1953 legislative session no change was made in the citrus code as to per diem allowance but an act was passed repealing the expiration date contained in the 1951 act relating to per diem allowance for state officers and employees generally. (Ch. 28303, 1953.) As in the past, commission members continued to be paid according to the provision of the citrus code, since there was nothing to indicate a change in the original intent of the legislature. Inaction of the legislature in this regard indicated a willingness on the part of the legislature to continue the policy of allowing commission members per diem at a different rate than state officers and employees generally. (*Wayne Co. Dep't of Public Welfare v. Scott's Estate*, 55 N. E. 2d 337, 115 Ind. App. 28, cf. *Virginia Elec. and Power Co. v. Commonwealth*, 194 S. E. 775, 169 Va. 688.) It is also true that after long usage the construction placed on a statute is entitled to great weight and should not be abrogated unless clearly in conflict with the plain intent of the act. (*State ex rel Fronton Exhibition Co. v. Stein*, 198 So. 82, 144 Fla. 387.)

At the 1955 legislative session, the act relating to per diem allowance of state officers and employees generally was amended to provide a different rate. (Ch. 29628, 1955.) This amendment was applicable to the amount or rate of per diem allowed in the act and not to the persons affected by the act; therefore, the original intent of the legislature as to whom the act applied subsists. Where an amendment leaves certain portions of an original act unchanged, such portions continue to have the same meaning as

before the amendment. In effect, it is a continuation of the existing law and not a new enactment. (82 C. J. S., Statutes §384, p. 903.) The intent of the legislature as to the applicability of the per diem allowance remains unchanged. The rate is the only part altered. (See *Miami Bridge Co. v. Railroad Commission*, 20 So. 2d 356, 155 Fla. 366.)

From the foregoing, it appears that there is nothing to indicate a change in the original intent of the legislature; therefore, it is my opinion that the per diem of members of the commission should continue to be paid according to the provision of the citrus code relating thereto. The 1st question is answered accordingly.

AS TO QUESTION 2:

Having determined in the answer to the 1st question that the provision of the citrus code relating to per diem is still valid and controlling, I consider it appropriate to refer to such provision in my answer to the 2nd question. This section, in addition to providing the per diem allowed for members of the commission for official travel within and outside the state, provides the per diem allowance for other representatives and employees of the commission for official travel outside the state, but does not provide a per diem allowance for official travel within the state. Assuming the legislature intended other representatives and employees of the commission to be reimbursed for official travel within, as well as outside, the state, and inasmuch as the pertinent section of the citrus code is silent as to per diem allowance of representatives and employees for official travel within the state, it is my opinion that the statute relating to per diem of state officers and employees generally is controlling as to such per diem allowance. The 2nd question is answered accordingly.

056-133—May 10, 1956

CRIMINAL LAW AND PROCEDURE

TRIALS—COMPENSATION OF EXPERT WITNESSES BEFORE GRAND JURY—CH. 917, §§932.30, 932.31, 90.14, 90.15, 90.23 and 90.231, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

What compensation may be paid to an expert witness summoned to appear before a grand jury to testify concerning the mental condition or status of a person held for grand jury action on a criminal charge or who is being investigated by the grand jury upon its own motion?

The case from which the above question arose involved a charge against a woman who murdered her infant child under circumstances strongly indicating insanity; however, she was held by the magistrate for grand jury action on a charge of murder of the child. When the charge indicating insanity came to the attention of the grand jury and a psychiatrist was called to ex-

amine the accused and report his findings as to her mental condition, after examination and study of her condition, it was determined by the psychiatrist, to the satisfaction of the grand jury, that the accused was insane to the extent that she was not criminally responsible for the crime committed. Upon the evidence produced, a no true bill was returned and the accused was committed to the state hospital for the insane.

"The generally accepted American rule is that in the absence of statute an expert witness stands the same as any other witness and may be compelled to testify without being paid for his testimony as for a professional opinion, although his knowledge of the facts may have been acquired through scientific study and professional practice" (58 Am. Jur. 503, §880; see also 70 C. J. S. 75, §86; 4 Wigmore on Evidence, 2985, §2203; 3 Jones Commentaries on Evidence, 2415, §1320). However, he may not be required to make examination or engage in experimentation to enable him to testify upon a professional question, although he may be required to so testify when he has otherwise acquired such information.

In the light of the above authorities, unless there is a Florida statute providing for additional compensation a witness appearing before a grand jury to testify as to the mental condition or status of a person being investigated by the said jury such witness may be paid only the usual compensation. The proceedings under Ch. 917, F. S., to determine the mental condition of a person charged with crime relate to proceedings after a person has been charged with a crime, either by information or by indictment, and not one being investigated but not yet indicted or informed against. Neither does §932.30, F. S., which applies only to witnesses testifying at the trial of any person charged with a felony and not to grand jury investigations, relate to proceedings before a grand jury.

Section 932.31, F. S., provides that "the provisions of law relative to the compensation of witnesses and evidence in civil cases shall also obtain in criminal cases, except in cases otherwise provided by law." This section of the statutes refers to §§90.14 and 90.15, F. S., which fix the compensation of witnesses generally. We doubt that §§90.23 and 90.231, F. S., have any application here, in that §90.23 provides for the taking of the depositions of expert witnesses and §90.231 relates to testimony given in a pending cause.

We do not construe the order of the circuit judge of March 27, 1956, made in *State of Florida v. Gloria L. Parker*, case 9390-c, as determining the authority for the payment of the \$50 fee therein mentioned, but, presuming the existence of such authority and not deciding the same, merely directed its payment. We do not construe the said order as foreclosing the determination by the state comptroller, upon the advice of this office, when the claim for the payment of the fees is presented and audited.

Our research fails to find any statute authorizing the payment of a fee in the amount mentioned in said order, and so far as we are able to ascertain the witness fee is payable under §90.14, F. S.

This seems to answer the above stated question.

056-134—May 9, 1956

PUBLIC WELFARE

FLORIDA COUNCIL FOR THE BLIND—DESTRUCTION OF RECORDS—§§409.26, 409.34, F. S.

To: *Harry E. Simmons, Florida Council for the Blind, Tampa*

QUESTION:

Is the Florida council for the blind authorized to destroy obsolete records which have no present or future use or value?

Section 409.26, F. S., provides that the Florida council for the blind "shall continue under the department" (Department of Public Welfare).

Section 409.34 provides for the destruction of records by the department of public welfare. It provides as follows:

"Destruction of records.—

"(1) The department is hereby authorized to destroy correspondence, documents and records relating to surplus commodities which are more than 2 years old, if permission is obtained from the federal government.

"(2) The state board, in its discretion, and in pursuance of appropriate resolution, may authorize the destruction of any other correspondence, documents, or records where the matters or things therein involved have been closed or terminated and the department is not required by federal laws, rules or regulations to preserve such correspondence, documents or records, but no agent, employee or servant of the department shall destroy any of said correspondence, documents or records unless such authority is given by a resolution, rule or regulation duly adopted by the state board."

It is my opinion that the council for the blind may destroy the kinds of records defined in §409.34, F. S., provided the provisions and requirements of said section are carefully carried out and permission of the state board of public welfare is obtained by proper resolution of said board.

Subject to the above limitations, your question is answered in the affirmative.

056-135—May 10, 1956

CRIMES

GAMBLING—STATE LOTTERY LAWS—§849.09, F. S. and §23, ART. III, STATE CONST.

To: *W. P. Joyce, Sheriff, Leon County, Tallahassee*

QUESTION:

Is the following proposed promotion scheme in violation of our state lottery statutes:

For every \$25 (or some other amount yet to be established) on deposit or deposited in a savings account in a particular savings bank within a set period of time (perhaps 60 days) the depositor will receive one chance toward becoming the proud owner of a new 1956 automobile. At the end of the established time period a drawing will be held to determine the lucky owner.

The elements which constitute a lottery and which must all be present are (1) an award or prize, (2) the award or prize being distributed by chance and (3) consideration.

In the above proposed promotion there is no doubt that a prize (a new 1956 automobile) exists and that the said prize is to be obtained by chance (a drawing).

Whether or not consideration is also present is a question for judicial interpretation, however, from our understanding of the authorities interpreting "consideration", this 3rd element may also, very readily be present. Consideration may either be direct or indirect and this element may be present, within the contemplation of the lottery statute, without any direct payment for the right to participate. It was so held in *Little River Theatre Corp. v. State ex rel Hodge*, 135 Fla. 854, 185 So. 855. The supreme court of Florida, therein, held that a theatre bank night was a lottery even though it was not necessary for a person to buy a theatre ticket or pay anything in order to participate in the drawings for prizes. The court held that the element of consideration, which must be present to constitute a lottery, was present because the scheme advertised the theatre, increased the attendance, and materially enhanced the receipts.

It is apparent that the proposed promotion about which you inquired would advertise the bank and make it more attractive to new depositors as well as induce all the depositors, both new and old, to deposit "a little more in order to obtain an extra chance." This extra inducement to deposit coupled with the additional benefits the bank will utilize from more deposits may be termed "consideration" within the contemplation of the lottery law.

In my opinion, your question is properly answered in the affirmative.

056-136—May 10, 1956

BEVERAGE LAW

SALE OF BEVERAGE TAX STAMPS BY DIRECTOR—§§561.46, 561.461, 561.47, 561.51 and 561.64, F. S.

To: J. D. Williamson, State Beverage Dept., Tallahassee

QUESTION:

Does the state beverage director have the authority under the law to sell tax stamps required by law to be affixed to containers and packages containing intoxicating liquors at the intrinsic value of the stamps rather than at the face or par value of said stamps and

wait until the liquor is actually sold by the distributor to a vendor before collecting the actual tax?

The statutes which impose a tax on all types of alcoholic beverages in Florida are §§561.46, 561.461 and 561.64. From a cursory examination of these statutes it immediately appears that all types of beer and wine containing less than 14% of alcohol by weight are taxed by the gallon and the means of determining the tax due and owing to the state is accomplished by the state beverage department by employing the so-called "inventory system," that is to say, inventorying the stock of merchandise of the various manufacturers, wholesalers and distributors in warehouses and other storage places.

Where hard liquors are concerned, meaning all alcoholic beverages containing 14% or more of alcohol by weight, the tax on such alcoholic beverages must be paid by the manufacturers or distributors at a \$1.20, \$2.40, plus an additional tax per gallon, dependent upon the alcoholic content of the beverage, and this tax *shall be evidenced by stamps affixed to the containers.*

Section 561.47 allows the state beverage director to sell stamps to distributors licensed in Florida who have furnished a bond to the state guaranteeing payment of all beverage taxes due and owing to the state that the particular distributor might sell or distribute under his license. These stamps are permitted to be sold to such distributors at a 2% discount. This provision in the beverage law is quite similar to §210.05, F. S., relating to the sale of tax stamps on cigarettes and the regulation and control of the two systems have been carried out over the years by the beverage department in a similar manner. Distributors of cigarettes are allowed a discount of 4% on the par value of cigarette stamps.

Section 561.51, F. S., provides as follows:

"No stamp shall be sold by the beverage department, as provided by the beverage laws of this state, in denomination of less than 7½¢, and no container of beverages containing alcohol of 14% or more by weight except wines, shall be sold in this state, except that there be affixed thereto a stamp of not less than 7½¢, or a stamp of such larger denomination as may be required by said beverage laws."

There is no doubt that before a package of alcoholic beverages containing more than 14% of alcohol by weight can be legally sold in the state, said container must have affixed thereto tax stamps as required by the statute, *supra*.

We are not unmindful of the suggestions made in the memorandum submitted by Mr. J. R. Hunter, Jr., suggesting that the stamps could be purchased by the various distributors at their intrinsic value and at the time the beverage was actually sold to the vendor the distributor could then submit the actual tax on the beverage concerned. This construction, however, is contrary to a long established construction of the state beverage department, both as to intoxicating liquors containing more than 14% alcohol by weight and as to cigarettes under Ch. 210, F. S. Such

a construction would make the enforcement of the law cumbersome and unwieldy and could lead to abuse and tax evasion.

Therefore, it is my opinion that the tax stamps for liquors must be purchased by the distributor at their full par value, and the fact that the legislature saw fit to allow the distributor a 2% discount on said purchases, which amounts in a sense to an interest rate on his money, supports this opinion and view of the law.

056-137—May 10, 1956

WELFARE

DEPARTMENT OF PUBLIC WELFARE—ADOPTION PROCEEDINGS—APPEALS FROM CIRCUIT COURT TO SUPREME COURT—§§72.07 and 72.15, F. S.

To: Charles G. Lavin, State Director, Department of Public Welfare, Jacksonville

QUESTION:

Does the state welfare board have any responsibility in an appeal to the supreme court of Florida from the decision of the circuit court in an adoption proceeding where a social investigation and recommendations to the circuit court have been made by the state welfare board and where the child was not placed by a licensed child-placing agency?

The state welfare board, for purposes of adoption of minor children, is the official guardian for minors who have no natural parents, who have been abandoned by their parents, or whose parents have voluntarily relinquished their rights, and who have no legal guardian and have not been permanently committed to a licensed child-placing agency. (§72.07, F. S.)

The board is made a party to any adoption proceedings relating to such minor children, and for such purposes is the guardian ad litem. (§72.15, F. S.) This indicates a duty on the part of the welfare board to take any necessary steps to safeguard and protect the interests of the child.

In a case involving the adoption of a minor child, whose temporary guardian was the state welfare board, the supreme court of Florida stated: "The court and the state welfare board are required to investigate and approve the character of the child, the character of those who propose to adopt it, and every step leading to the adoption." (Emphasis added.) (In *Re Brock*, 157 Fla. 291, 25 So. 2d 659.) In previous cases relating to appeals to the supreme court from adoption proceedings in the circuit court, the state welfare board has consistently represented the interests of the minor child. This would also indicate that the board realized its duty toward the child in these matters.

In light of the foregoing it is my opinion that the state welfare board, in the situation presented in your question, would be required to do all things necessary to safeguard the interest of the minor child in such adoption proceedings.

056-138—May 10, 1956

STATE OFFICERS AND EMPLOYEES

MERIT SYSTEM REGULATIONS—APPEALS FROM TRANSFERS—CH. 110, F. S.

To: *Angus Laird, Director, Florida Merit System, Tallahassee*

QUESTION:

Is the state personnel board authorized to adopt a merit system regulation providing for an appeal from a transfer?

In my opinion, the answer to this question should be in the affirmative.

Chapter 110, F. S., established a framework for a state merit system and created a personnel board composed of the cabinet members to administer the program. Considering certain aspects as minimum essentials for the proper operation of a merit system the legislature directed the personnel board to specifically adopt certain regulations, such as: appeals from demotions, suspensions, reductions in pay and discharges. (§110.09(1), F. S.) In addition, the board was given authority "to adopt and amend such rules and regulations as may be necessary to effect the purposes of this chapter." (§110.03(2), F. S.)

In order that the merit system may function properly, the personnel board must anticipate and overcome any possible weaknesses in the system. It can accomplish this purpose only through the use of its authority to adopt necessary rules and regulations. The unjustifiable transfer to a locality disagreeable to the employee has proven to be an effective device used in other states to avoid the merit system principle that an employee may not be discharged without cause. (See 8 Vand. L. Rev. 838, 841.) This would indicate a need and perhaps a duty on the part of the personnel board to adopt a regulation designed to overcome the possible use of any such device.

The operation of an agency would not be interfered with by any such regulation since the appeal would not act as a supersedeas to the transfer. Its only purpose would be to provide a method whereby the employee may properly complain if he considers the transfer as a means of harassment. It is understood that some agencies, by the nature of their work, must of necessity transfer employees from one locality to another. Provisions for such transfers could be made in the job classification, or job description, so that any person accepting an appointment to such a position would be informed in advance that he was subject to such transfers. Such agencies would therefore encounter no difficulty in showing the necessity for the transfer if one were made and objected to. Your question is answered accordingly.

056-139—May 11, 1956

COURTS

JUDICIAL COUNCIL OF FLORIDA—EXPENDITURE OF APPROPRIATED FUNDS FOR DISSEMINATION OF INFORMATION—§43.15, F. S.—HJR 810, 1955

To: Ray E. Green, Comptroller, Tallahassee

QUESTIONS:

1. May a reasonable sum from the appropriation of the judicial council advisory committee for the current biennium be expended by the judicial council of Florida to publicize certain data in connection with committee substitute for house joint resolution 810 of the 1955 legislature, a proposed constitutional revision of Art. V, Florida constitution, which article will be submitted to the electors for approval or rejection at the 1956 general election?

2. If the 1st question is answered in the affirmative, what is the general nature of the expenditures which may properly be made for that purpose?

The judicial council created by Ch. 28062, 1953 (§43.15, F. S.) is charged with various duties, among which are: "(a) To make a continuous survey and study . . . of each and all courts in this state . . . (b) To collect, compile, analyze and *publish statistics showing the work of the court.* . . . (c) To receive, consider, and in its discretion, investigate criticisms and suggestions . . . pertaining to the administration of justice and to make recommendations and references thereto." (Emphasis supplied.)

Briefly, then, the council is concerned with all matters which may simplify, expedite and improve the administration of justice. In the pursuit of such end, the council submitted to the 1955 legislature a revision of so much of the judiciary article of the Fla. Const., as affects the appellate court. The proposed constitutional revision of Art. V is, as amended by the 1955 legislature, to be submitted to the electors at the next general election.

The sum of \$20,000 is, by item 66, §1, Ch. 29966, 1955 (general appropriations act) appropriated for the judicial council advisory committee, for the biennium 1955-1957, "to pay administrative and other expenses".

It is made the duty of the council "to publish statistics showing the work of the courts" and to make recommendations "pertaining to the administration of justice". "Publish" means to put in general circulation (*City of Des Moines v. Meredith*, 294 N. W. 574); to bring before the public, to make public (*State ex rel Donnell v. Osburn*, 147 S. W. 2d 1065); "to disseminate" (*State ex rel Emmert v. Union Trust Co. of Indianapolis*, 74 N. E. 2d 833); making known of something to the public for a purpose (*Estill County v. Noland*, 175 S. W. 341). "Published" is to make public in a newspaper, book, circular or the like". (*Forde v. Owens*, 158 S. E. 147). For other definitions, see *Words and Phrases*, perm. ed., vol. 35. Webster's International dictionary, 2d ed., de-

finer "statistics" as "classified facts respecting the condition in various respects of the people in a state, or respecting any particular class or interest; especially those facts which can be stated in numbers, or in tables of numbers".

It is an accepted fact that the most effective means of acquainting the public with matters of public interest is through the press, radio and television. Hence, I believe that the council, in its sound judgment and wisdom, may expend reasonable sums to disseminate factual data by way of statistics and matters properly connected therewith through the medium of newspaper, radio, television advertising, or pamphlets, circulars and the like, so long as that expenditure of appropriated funds does not hinder or jeopardize the other duties and functions of the council. The nature of the publication or advertising should be to show the work of the courts of the state within the contemplation of subsections (b) and (c) of §43.15, F. S.

This answers the questions as definitely as seems possible.

056-141—May 11, 1956

CIVIL DEFENSE

SURPLUS PROPERTIES—FLORIDA DEVELOPMENT COMMISSION, AGENT FOR THE STATE AS ACQUISITOR AND DISPOSER—§§218.07, 218.08, 218.11, 252.06, 288.03(17), 288.09, 288.13 AND 288.15(9), F. S.

To: *Florida Development Commission, Tallahassee*

QUESTION:

May the Florida development commission act as agent of the state, its agencies and subdivisions in acquiring and disposing of surplus properties for civil defense purposes?

We are advised that the above question arises because of an attempt to amend the federal property and administrative services act so as to include the distribution of surplus properties for civil defense purposes.

We have examined §§218.07, 218.08, 218.11, 252.06, 252.06(2)(g), 288.03(17), 288.09, 288.13 and 288.15(9), F. S., and feel that there is ample authority in said statutes for answering the above question in the affirmative.

056-142—May 11, 1956

STATE AND COUNTY OFFICERS & EMPLOYEES

RETIREMENT—BACK COMPENSATION WHERE EMPLOYEE MORE THAN 60 YEARS OF AGE—CH. 122, F. S.

To: *Ray E. Green, Comptroller, Tallahassee*

QUESTION:

Where a member of the state and county officers' and employees' retirement system, although duly quali-

fied to retire upon reaching the age of 60, fails to retire upon attaining such age but at a later age elects to retire, may he be paid back compensation from the date he attained the age of 60 years?

This question seems to present two circumstances where a person retires after having attained the age of 60 years: (1) where he is state or county employed and elects to continue in such employment until a later date, and (2) where, although duly qualified to retire upon attaining the age of 60, he neglects to retire until more than 60 years of age.

Section 122.16, F. S., prohibits state or county employment and the drawing of retirement compensation at the same time. Under said section although reemployment after retirement is not absolutely prohibited, the payment of such compensation is suspended during state or county employment. The retired officer or employee is required to give notice of such subsequent employment, under penalty of having his said employment forfeited for failure to so notify the department. For one to be paid both a salary or wages and retirement compensation, although the retirement compensation be in the nature of back compensation from the age of 60, would be violative of the spirit of this section if not a direct violation.

Retirement from state or county service, under Ch. 122, F. S., is voluntary and not mandatory; there is no provision for mandatory or enforced retirement under said Ch. 122, F. S. Where a state or county officer or employee remains in state or county employment or service after he has sufficient age and service to qualify for retirement, the additional service will increase his retirement pay by approximately 2% for each additional year of such service or employment. Retirement is voluntary and not compulsory. We find nothing in the statutes authorizing the payment of retirement compensation for any period of time prior to the actual filing of the application to retire.

We, therefore, feel that the above question should be answered in the negative.

056-143—May 11, 1956

TAXATION

INTANGIBLE PERSONAL PROPERTY TAX—UNITED STATES REAL ESTATE MORTGAGE, FORM FHA-967.8—§199.11, F. S.

To: *Ray E. Green, Comptroller, Tallahassee*

QUESTION:

Are mortgages made and executed upon U. S. real estate mortgage form FHA-967.8, a copy of which was submitted with the said request for opinion, subject to the mortgage recording tax imposed by §199.11(3), F. S.?

The above described mortgage form appears to be designed for use in connection with loans made to persons, firms and

corporations, under §§590r-590x-3, Title 16, of the U. S. Code, by others than the U. S. (§590x-3, Title 16, U. S. Code) but which loans are insured or guaranteed by the U. S. (§590x-3, Title 16, U. S. Code) from the insurance fund set up by §1005a, Title 7, of the U. S. Code.

The above mortgage form shows on its face that a loan has been made by a 3rd person (called the lender) to the landowner (called the mortgagor) which loan has been insured or guaranteed by the U. S. (called the mortgagee), for which the U. S. is to be paid an insurance or guarantee fee equal to 1% per annum of the loan made. The entire amount of the loan is underwritten by the U. S. and will be paid by the United States in event of default by the mortgagor. The lender's security is the promise of the U. S.; the security of the U. S. is the mortgage. Although the promissory note evidencing the loan is made payable to the lender, the mortgage is made to the U. S., not only to secure the payment of the note but also as security for the payment of any sums paid by the U. S. in case of default.

Here the U. S., and not the lender of the funds, is the mortgagee and holder of the mortgage, although the promissory note given by the mortgagor may be held by the lender of the money, whose indebtedness is insured or guaranteed by the U. S. We find nothing in the federal statutes and laws specifically authorizing the state taxation of mortgages held by the U. S. under the above mentioned federal statutes. In the absence of express federal statutes permitting taxation of property held by the U. S. no taxes may be levied or assessed.

The above question is answered in the negative where such mortgages are held by the U. S. and have not been assigned to some individual, firm or corporation. We do not pass upon the taxability of the promissory note held by the lender of the money so long as it is not held by the U. S.

056-144—May 11, 1956

COUNTY FINANCE

COUNTY COMMISSIONERS—COMPENSATION AND EXPENSES—§§125.16 AND 125.161, F. S., CH. 28364, 1953

To: *Bryan Willis, State Auditor, Tallahassee*

QUESTION:

1. Where a county commissioner's salary is fixed by §125.161, F. S. is such commissioner also entitled to receive the \$6 per day for each day's service in addition to his salary within the limitations fixed by §125.16, F. S.?

2. Where Ch. 28364, 1953 provides that each county commissioner of Jackson county shall receive the sum of \$600 annually for expenses, are these county commissioners entitled to receive the mileage allowance provided by §125.16, F. S., in addition to such expense money?

AS TO QUESTION 1:

Chapter 28192, 1953, as amended, now §125.161, F. S., fixes the annual salary of each county commissioner in the several counties of the state upon a population basis and is statewide in effect. The repealing clause found in §3 of said Ch. 28192 in part provided: "All laws and parts of laws relating to salaries of county commissioners in conflict herewith, be, and the same are hereby repealed . . ." The act clearly indicates a legislative intent that all local and population acts of the several counties of the state were intended to be repealed, except as to those particular items designated in the repealing clause.

In opinion 053-272, dated Oct. 14, 1953 (AGO 1953-1954, p. 144) we, in question 2, dealt with legislative acts fixing mileage or expense allowance for members of boards of county commissioners as affected by a later legislative act fixing solely the per diem or salary of the members of boards of county commissioners. We also, in question 3 of said opinion, treated the proposition of extra compensation for the chairman of the board of county commissioners provided by local or population act at the time of passage of Ch. 28192, 1953.

The per diem provided by §125.16, F. S. was in lieu of other compensation, except mileage travelled to and from the courthouse in connection with county business. What is now §125.16, F. S., was last amended by Ch. 11914, 1927. Said §125.161 was amended by Chs. 29752 and 29985, 1955. There is nothing in either the 1953 or the 1955 acts indicating that the legislature intended to save from repeal the per diem provisions of §125.16, F. S. Rather, there is indicated a legislative intent that the salaries provided should be the entire compensation for members of boards of county commissioners, except as specifically noted therein. While implied repeals are not favored, the legislature, by general act, completely revised the salaries of county commissioners and thereby repealed conflicting provisions of general or special acts, saving from repeal legislative acts covering the subjects designated in the act. Upon the enactment of §125.161, F. S., the salaries provided therein superseded the per diem provided by §125.16, F. S.

The question is, therefore, answered in the negative.

AS TO QUESTION 2:

Chapter 28364, 1953 is a local act and insofar as here material reads: "Section 1. That in addition to all other compensation payable to the county commissioners of Jackson county, Florida, each county commissioner of said county shall receive the sum of *SIX HUNDRED DOLLARS* per annum as expenses." (Emphasis supplied.) For the purpose of this discussion we assume the constitutionality of said Ch. 28364 and our conclusion is based upon that assumption.

Both Ch. 28192, 1953 and Ch. 29752, 1955, now §125.161, F. S. as amended, fix the annual salary of each county commissioner in the population bracket from 34,000 to 34,700 inclusive at \$1,800. Jackson county, according to the 1950 federal cen-

sus, has a population of 34,645. There is a clause in each of these acts saving from repeal or modification "any law relating to expense allowance to county commissioners . . ."

Opinion 053-272, dated Oct. 14, 1953 (AGO 1953-1954, p. 144), referred to previously, holds that an earlier legislative enactment providing for mileage is not repealed by a later act fixing a per diem or salary. The saving clause in the 1953 and 1955 general acts indicates the legislature intended to save the mileage provisions in §125.16, F. S., from repeal. The expense allowance in the special act, Ch. 28364, 1953, is "in addition to all other compensation payable to the county commissioners of Jackson county, Florida."

The question is answered in the affirmative.

056-145—May 11, 1956

CRIMINAL PROCEDURE

TRIALS—ACCIDENT REPORTS MADE UNDER PROVISIONS OF CH. 317, F. S.—ADMISSIONS, CORPUS DELICTI

To: *Gene Williams, Judge, Court of Crimes, Miami*

QUESTION:

1. Where, as the outgrowth of an automobile accident a person is charged with driving while under the influence of intoxicating liquor to the extent that his normal faculties were impaired, does §317.17, F. S., render privileged the admission of such person that he was the driver of the motor vehicle involved in the accident, when such admission is made to an officer investigating the accident in the regular course of duty?

2. Aside from §317.17, may such an admission be proved in court without first adducing prima facie proof of the corpus delicti, that is, without first proving prima facie that the motor vehicle was being driven by some person while that person was under the influence of intoxicating liquor?

AS TO QUESTION 1:

I have given careful and extended consideration to this question and have reached the conclusion that the law on the subject is so uncertain that the question ought to be decided by the courts instead of by this office.

AS TO QUESTION 2:

It is well settled that there must be prima facie proof of the corpus delicti before a confession can be admitted in evidence. Also, I find authorities indicating that an admission against interest made by a defendant cannot be placed in evidence against him without first putting on prima facie proof of the corpus delicti. (See *Deiterle v. State*, 101 Fla. 79, 134 So. 42, 43; 22 C. J. S. 1248-1249, Criminal Law, §730-b.)

To prove the corpus delicti is to prove that the crime was committed by somebody. Proof of the corpus delicti does not require proof that the defendant was the person who committed the crime. Once the corpus delicti is proved prima facie, the defendant's confession or admission is admissible to show that he was the person who committed the crime. To establish the corpus delicti in a drunk driving case requires, in addition to proof of venue, proof that (1) a motor vehicle was driven by somebody; and (2) that whoever was the driver was under the influence of intoxicating liquor to such an extent that his or her normal faculties were impaired. These elements of the corpus delicti must be proved prima facie by either direct or circumstantial evidence before, under the above cited authorities, the defendant's admission that he was the driver of the motor vehicle can be put in evidence. Proof that the defendant was drunk and that some unidentified person drove a particular motor vehicle is not sufficient to establish the corpus delicti because it does not show that whoever drove the vehicle was under the influence of intoxicating liquor to such extent as to impair his normal faculties.

Therefore, your question 2 is answered in the negative.

I suggest that in certain cases, although the state cannot establish by proof dehors the defendant's admission that he drove the automobile at all, the circumstances may show that he was "*in the actual physical control*" of the automobile. In such cases, the question of whether the defendant drove the car may be eliminated by alleging under §317.20(1), F. S., that he was in the actual physical control of it instead of alleging that he drove it.

056-146—May 14, 1956

STATE AND COUNTY OFFICERS AND EMPLOYEES

RETIREMENT SYSTEMS—EFFECT OF RETIREMENT UNDER §112.05, F. S. UPON RIGHTS UNDER OTHER RETIREMENT SYSTEMS—§112.05, CHS. 121 AND 122, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where a member of the state officers and employees retirement system (Ch. 121, F. S.), or of the state and county retirement system (Ch. 122, F. S.), retires under §112.05, F. S., without withdrawing his contributions under said state or state and county officers and employees retirement systems, may he elect to revoke or abandon his retirement under said §112.05, and retire under the state and county officers and employees retirement system?

For the purposes of this opinion we shall presume that the person retiring under §112.05, F. S., was also qualified to have retired under the state officers and employees retirement system (Ch. 121, F. S.), or under the state and county officers and employees retirement system (Ch. 122, F. S.), but elected to

retire under said §112.05, F. S., which section was not repealed by either Ch. 121 (§121.17), or Ch. 122 (§122.18), F. S. However, said §112.05, was amended by §1, Ch. 28148, 1953, so as to limit its application to those "persons retired or persons who are on a state payroll on June 30, 1953, and remain continuously on a state payroll until eligible to retire."

Such an employee who has retired under the old system (§112.05, F. S.) but allows money paid in by him by way of contribution under the new system (Ch. 122, F. S.) to stay in the fund, may later transfer to the new system. This is so because there is nothing in the law prohibiting such transfer or which requires an adjustment if he decides to transfer. It would appear, however, once an employee, who has retired under §112.05, F. S., transfers to the new system (Ch. 122, F. S.), that he cannot re-transfer because his action is then irrevocable.

The question should, therefore, be answered in the affirmative.

056-147—May 14, 1956

BANKS AND BANKING

STATE BANKING CORPORATIONS—DRIVE-IN BANKING FACILITIES—LOCATION—§659.06(1) (2), F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

May a state banking corporation, having its banking house located on one side of a street intersection, acquire property on the other side of the street from its main banking house and construct thereon a building for the purpose of housing a drive-in facility to serve bank patrons from their motor vehicles?

The facts, as stated in your request for this opinion, are: A bank is located on the corner of Orange Ave. and Church St. in Orlando. The bank building runs along the side of Church St. The bank owns property across Church St. from the side of its building and the bank contemplates obtaining a 99-year lease on additional property abutting the property it now owns across Church St. The bank proposes to use the property it now owns and the additional leased property for a drive-in banking facility. The drive-in banking facility, as proposed, will be connected to the main bank building by a private passageway, either under the street, or overhead, so as to enable tellers to pass between the drive-in banking facility and the main banking room without coming in contact with the public. The question more specifically stated is whether such an arrangement would be in violation of §659.06(2), F. S.

"Any bank or trust company shall have only one place of doing business, which shall be located in the community specified in its original articles of incorporation, and the business of the bank or trust company shall be transacted at its banking house located in said community specified, and not elsewhere..."

(§659.06(1), F. S.) Any such banking corporation "may operate a drive-in facility, providing one or more tellers to serve patrons in motor vehicles"; provided such drive-in facility "will be a part of or adjacent to the main banking room," physically connected therewith, by a "private connecting doorway or private enclosed secure passageway connecting the main banking room and the facility enabling tellers to pass between the facility and main banking room without coming in contact with the public." (§659.06(2), F. S.)

It appears from the above statute that a drive-in banking facility, established pursuant to §659.06, F. S. must be designed primarily to serve bank patrons in motor vehicles, not to serve other types of patrons of the bank. Any attempt to design a drive-in facility for general banking use, as well as use by patrons in motor vehicles, would seem to violate the requirements of the above mentioned statute. Another requirement is that such a drive-in facility be "a part of or adjacent to the main banking room." When the facility is a part of the main banking room no question of proximity arises, but when not a part of the main banking room a question of what was intended by the term "adjacent", used in the statute, arises. The term is not defined by the statute. The term "adjacent" is a relative and not a definite and absolute one, and the exact meaning of which, in any particular case, is determinable principally by the context in which it is used, the facts and circumstances of the case, the subject matter to which it is applied. . . ." (1 C. J. S. 1464, note 81.) "The word 'adjacent' means lying near, close, contiguous, neighboring." (Ex Parte Jeffcoat, 109 Fla. 207, 146 So. 827, text 829.)

We are of the opinion that a drive-in banking facility erected directly across the street from the main bank building is adjacent to the main bank building and is within the intent of, and meets the requirements of, §659.06(2), F. S. so long as the drive-in facility is connected to the main banking room by a private passageway so as to enable tellers to pass between the drive-in facility and the main banking room without coming in contact with the public. It is not a distinct facility for general banking use but it is a drive-in facility physically connected with the main banking room as authorized by law. Furthermore, the existence of the street easement under or over which certain private uses may be permitted to an adjacent owner so long as the same does not interfere with pedestrian or vehicular travel would not appear to be inconsistent with the statutory regulation authorizing construction of a closed passageway to the closely adjacent drive-in facility. Such private uses are generally considered in law as integral parts of the adjacent business establishment.

Therefore, your question is answered in the affirmative.

056-148—May 14, 1956

TAXATION

AD VALOREM TAX ROLL—PREPARATION BY ASSESSOR
FOR PURPOSE OF TAX EQUALIZATION—§§193.25,
193.29 AND 193.30, F. S.*To: Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

May the county assessor of taxes use an abbreviated or preliminary tax roll for submission to the tax equalization board, and then, after completion of equalization, prepare and extend the completed roll?

"The county assessors of taxes shall complete the assessment rolls of their respective counties on or before the 1st Monday in July in each year, on which day such assessors shall meet with the board of county commissioners for the purpose of . . . perfecting, reviewing and equalizing the assessment . . . " (§193.25, F. S.). After the tax assessments have been equalized and the tax millages determined, the statutes require that the county assessor of taxes "calculate and carry out the total amount of county taxes, and the total amount of school district and other special taxes, setting opposite to the aggregate sum set down as the valuation of real and personal estate the respective sums assessed as taxes thereon . . . And the said county assessor of taxes shall make out 2 fair copies of the assesment roll when thus completed . . . which copies, with the original, he shall turn over to the board of county commissioners at a meeting to be held on the 1st Monday in October . . . at which meeting the county commissioners shall examine and compare such original and two copies and cause the county assessor of taxes . . . to correct all mistakes and inaccuracies in description and other character . . . " (§193.29 (F. S.)). After the tax rolls have been thus completed they are turned over to the tax collector (§193.30, F. S.), for the purposes of collecting and enforcing collection of such taxes. The above statutory provisions are substantially the same as in Ch. 4322, 1895.

Although the statutes today do not set out the form of the tax roll in as much detail as in former years (§345, Rev. Stat., 1892; §512, Gen. Stat., 1906; and §712, Rev. Gen. Stat., 1920) they still seem to contemplate the partial preparation of the tax roll before the equalization and its completion after equalization; and the making of the copies after the completion of the original. These statutes were designed when tax rolls were prepared by hand or by typewriter and prior to the advent of addressographs and other types of business machines, many of which have either been adopted or specifically manufactured for tax assessment work. Take for example the use of the addressograph machines in tax assessment work whereby a plate is made containing the name of the owner, the description of the lands to be assessed, the valuation of the property for tax purposes and other information. When these plates are made and verified, including the corrections made consequent upon changes made by the equalization board, copies made by use of such plates are free from error. The original and copies made from such plates are

in effect duplicate originals and not an original and copies. When the statutes in question were first enacted (about 1895) any attempt to copy the original would doubtless have resulted in errors; such is not the case with the use of addressograph and similar business machines.

Although the existing statutes seem to contemplate the preparation of an original, part of it to be prepared prior to equalization and the remainder after equalization, we do not think that the statutes in question are mandatory but are directory only (§192.21, F. S.; *Overstreet v. Gordon*, 121 Fla. 180, 163 So. 477; *Rio Vista Hotel and Improvement Co. v. Belle Mead Development Corp.*, 132 Fla. 88, 182 So. 417; *Goodman v. Carter*, 158 Fla. 112, 27 So. 2d 748). Although the statutes seem to contemplate the preparation of a portion of the original tax roll before equalization and the completion of it thereafter, when such statutes were enacted the use of mechanical means for the preparation of tax rolls was not in general use, if at all, we do not think that the preparation of a tax roll in the manner set out in the above request for opinion will invalidate the tax roll or in any way affect the collection of the taxes in the usual manner.

Although the statutes seem to indicate a negative answer to the above question, we feel confident that should the plan set out in the above question be adopted it would not invalidate the tax roll or any of the taxes assessed thereon. At most the plan would be an irregularity.

056-149—May 14, 1956

HOTEL AND RESTAURANT COMMISSION

LICENSES—LODGING ESTABLISHMENTS—INDIVIDUAL UNITS RENTED ON MONTHLY BASIS—EXEMPTIONS— §509.241, F. S.

To: *Richard Edgerton, State Hotel and Restaurant Commissioner,
Tallahassee*

QUESTION:

Is it necessary that the owner of a garage apartment obtain a license from the hotel and restaurant commission, when he rents his apartment on a monthly rental basis for periods of not less than 1 month and usually not more than 4 months?

The pertinent statutory provision is §509.241, F. S. which provides in part as follows:

"All buildings, groups of buildings, or other structures kept, used, maintained, advertised as, or held out to the public to be places where sleeping or housekeeping accommodations are supplied for pay to transient or permanent guests or tenants are defined as, and shall be licensed as, public lodging establishments . . . The following are exempted from the provisions of paragraph (1) (a) hereof: 1. All individually owned 1, 2, or 3

family dwelling houses unless advertised or held out to the public to be places that are regularly rented to transients by the day or week."

With respect to statutes imposing taxes, the rule is that they must be strictly construed in favor of the rights of the citizen and against the state. (See *Lee v. Wood*, 126 Fla. 104, and *Lovett v. Lee*, 141 Fla. 395, 193 So. 538.) The use of the exemption as to certain dwelling houses implies that they would be required to obtain a license if they came within the definition of a public lodging establishment. The above quoted exemption is conditional. The offering for rent of individually owned 1, 2, or 3 family dwelling houses would not require that such places be licensed by the hotel and restaurant commission unless they were held out to be places that are rented to transients by the day or week.

The conclusion seems inescapable that the owner of a garage apartment who offers it for rent at a monthly rate is not required to obtain a license. If he rented the same place by the day or week, he would be required to obtain a license. The legislature apparently intended that the periods for which the rent is required to be paid should be used as the basis for determining whether the houses are rented to transients. Renters are presumed to be put on notice as to sanitary and safety hazards in individually owned, 1, 2 or 3 family dwelling houses which are rented for periods longer than 1 month, but the state regulates all other public lodging establishments in an effort to protect the guests or tenants from dangers which they would not be expected to recognize.

In view of the foregoing it is my opinion that your question should be answered in the negative.

056-150—May 16, 1956

BEVERAGE LAW

INTOXICATING AND ALCOHOLIC BEVERAGES—ZONING ORDINANCES—TOWN OF LARGO—§§561.44, 562.45, 168.07 AND 176.24, F. S.

To: *Ben Krentzman, Town Attorney, Largo*

QUESTION:

May the town of Largo amend an existing zoning ordinance relating to intoxicating and alcoholic beverages, which amendment has the effect of zoning a certain area of the town so as to prohibit sales of intoxicating liquors in said zoned area?

You have cited §10, Ch. 4 of the code of the town of Largo, which we assume from the wording of said code was adopted under the provisions of §§561.44 and 562.45, F. S., which allow incorporated cities and towns to establish zoning ordinances restricting the location wherein a vendor licensed under the beverage law may be permitted to conduct his place of business. Section 561.44 prohibits the beverage director from granting to any person a

license to conduct a place of business in a location where such place is prohibited from being operated by municipal ordinance.

The supreme court of Florida in *Ellis v. City of Winter Haven*, 60 So. 2d 620, held that §§562.45, 168.07 and 561.44, F. S., reserving to the various cities the power to regulate liquor establishments and to establish zoning ordinances therefor, operate in a field clearly distinct from special zoning laws and in view of the provision of the statewide zoning law (§176.24, F. S.) it should not be construed to repeal, impair or modify any special or general law granting similar powers to municipalities. In the same case the court held that it must be assumed that the language of §176.24, F. S., was intended to reserve to the cities their power to designate areas within their limits wherein alcoholic beverages could or could not be sold in the manner in which this power had theretofore been exercised under the beverage act (§§561.44 and 562.45, F. S.).

It likewise has been held by our court that a municipal ordinance prohibiting the location of liquor stores within 1000 ft. of each other was reasonable and did not violate the Florida declaration of rights or the 14th amendment of the U. S. constitution although it imposed additional restrictions upon a liquor business and the power of the city under §§561.44 and 562.45 to restrict location of liquor stores could not be questioned unless exercised unreasonably and arbitrarily. (*Glackman v. City of Miami Beach*, 51 So. 2d 294.) It also has been held that an ordinance permitting the sale of beer and wine in a designated zone and prohibiting the sale of liquor in the same zone is not invalid as an arbitrary, unreasonable and unlawful discrimination (*State ex rel Reimer v. City of Miami Beach*, 158 Fla. 33, 27 So. 2d 524), and the state, in the exercise of its police power, may enact a valid law forbidding the sale of intoxicating liquors in a particular locality, *and may confer on municipalities similar power* (*State ex rel Dixie Inn v. City of Miami*, 156 Fla. 784, 24 So. 2d 704). In this same case the court held that an ordinance which prohibited an applicant from engaging in the business of a retail liquor store at a location within 2500 ft. of another licensee did not deprive the applicant of any constitutional right to engage in business.

Where liquor licensees conducted their business within 300 ft. of a church and a city ordinance prohibited the sale of liquor within 300 ft. of a church or school, such licenses were unauthorized and municipal officials were directed to cancel said licenses (*State ex rel First Presbyterian Church v. Fuller*, 133 Fla. 554, 182 So. 888.)

Inasmuch as a liquor license is not property in the constitutional sense and a licensee accepting a liquor license becomes bound to abide with and conform to the several provisions of the beverage act, he is put on notice that the city officials may zone a particular area of the city at any time as a so-called "dry" section, and as long as the ordinance establishing such zoning regulation is reasonable it is valid (*State ex rel Hoffman v. Vocelle*, Fla., 31 So. 2d 52).

It is my opinion that under the facts related in your letter the town commission had the authority to adopt the zoning or-

dinance amending Ch. 4, §10 of the city code, which in effect zoned a certain area of the city and prohibited the sale of intoxicating liquor in said area.

The question of the issuance or non-issuance of a permit for a construction of a building may have little or no bearing on the question of zoning the location where liquor may not be sold or dispensed. Zoning regulations usually must relate to the nature of the structure or the nature of the use. The purpose of regulations in respect to the quality of a structure will likely be quite different from the purpose of regulations respecting its use. The public purpose to be served in each instance will likely be different. A permit for the building of a structure would not of necessity be a permit determining the right to its use.

056-151—May 16, 1956

COUNTY FINANCE

EXPENDITURE OF COUNTY FUNDS BY NON-COUNTY AGENCY, ASSOCIATION OR CORPORATION—§§129.08, 129.09, 21.121, 21.18 F. S., AND §15, ART. V, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

1. May a board of county commissioners turn county funds over to a non-county agency, association or corporation to be expended by such agency, association or corporation and at their discretion and not by county warrant?

2. When a state audit report shows that a board of county commissioners has turned over county funds to a non-county agency, association or corporation to be expended as set out in the 1st question, and the funds have been so expended, what is the duty of the state comptroller in this connection?

We have examined state audit report 4361 and the file, submitted with the above mentioned request for the advice or opinion of this office, from which it appears that county funds may have been turned over to the "central welfare committee," the "community welfare league," the "county humane society" and the "John Henry Thomas memorial blood bank," and maybe other similar organizations, to be expended by such non-county agencies, associations or corporations, evidently without specific item by item approval by the board of county commissioners and audit of each claim by the clerk of the circuit court. Nowhere in the said audit report, or the file handed us with the request for advice or opinion, do we find any item by item audit of the accounts of expenditure of such funds by such agencies, associations or corporations.

In this state, boards of county commissioners "have no powers other than those expressly vested in them by statute, or that must

be necessarily implied to carry into effect the powers thus expressly vested, and . . . their governmental powers cannot be delegated" (*Crandon v. Hazlett*, 157 Fla. 574, 26 So. 2d 638, text 642), and their constitutional powers (*State v. Ausley*, 116 Fla. 762, 156 So. 909, text 910). Where there is doubt as to existence of county commissioners' authority it should not be assumed (*White v. Crandon*, 116 Fla. 162, 156 So. 303; *Gessner v. Del-Air Corp.*, 154 Fla. 829, 17 So. 2d 522). The usual powers and authority of boards of county commissioners are set out in Ch. 125, F. S., with other powers and authority set out in other general and local laws.

The clerk of the circuit court is, under §15, Art. V, of the state constitution, ex-officio county auditor, and his county duties under said section of the state constitution, are similar to the state duties of the state comptroller. This constitutional provision contemplates that as "ex-officio auditor of the county" the clerk of the circuit court shall audit all claims against the county that are presented for payment by the county (*State v. Wheat*, 103 Fla. 1, 137, So. 277, text 283). Where county funds are delivered to a non-county agency, association or corporation, although such funds be used for a county purpose, to be paid out and distributed by such agency, association or corporation, this constitutional provision is violated. Sections 129.08 and 129.09, F. S., clearly contemplate that county funds, unless otherwise expressly provided by statute or the constitution, be paid out by the warrant of the county commissioners after the account or claim has been audited and approved by the clerk of the circuit court. Where county funds are turned over to some non-county agency, association or corporation to be paid out and distributed by such agency, association or corporation, the spirit of the above statutory and constitutional provisions is violated in that the county funds involved will be paid out without the approval of the board of county commissioners under the audit of the account by the clerk of the circuit court.

Finding no authority for the delegation of the duties of boards of county commissioners to approve the expenditure of county funds, after each claim for payment has been audited and approved by the clerk of the circuit court, and pay the same by county warrant, the 1st question must be answered in the negative.

The state audit report before us shows a violation of the 1st question and an illegal paying out of county funds; however, we have nothing before us from which it may be determined what part, if any, or if all, of the funds illegally paid out, was used for some county purpose for which payment might have been made by the board of county commissioners, after proper audit and approval by the clerk of the circuit court. In making audits of state or county officers and offices, the state auditing department is required to make special mention of "any violation of the laws within the scope of the audit, and any illegal or improper expenditures . . . and all other inaccuracies, irregularities and shortages," (§21.121, F. S.) and report the same to the governor, the legislative auditing committee and the comptroller (§21.18, F. S.). This has been done in this case. Where a state audit report reflects a shortage in the accounts of a county officer or board, it is customary for the state auditing department to file

a copy of such report with the comptroller, and for the comptroller to forward the same to the proper state attorney for collection or adjustment. There is an inaccuracy or irregularity, if not a shortage, in the accounts of the board of county commissioners, and an indication of a possible liability to the county under §§129.08 and 129.09, F. S.

Under the circumstances, it is suggested that a detailed audit of the expenditures of the funds paid out in an illegal manner be required, showing in detail the uses to which such funds were put, item by item, so that it may be determined whether such funds were actually expended for some county purpose or for some non-county purpose. Should it appear from such detailed audit that such funds were actually expended for a county purpose and one contemplated by the county budget, then it would appear that there has been a technical, illegal method used in paying out county funds actually used for a proper county purpose. Under these circumstances, it would appear that no further positive action should be taken other than a warning that should there be a continuation of such practices that those responsible for such practices will be held liable therefor and the same will be reported to the governor for his consideration and action.

Should, however, it appear that such funds, or a portion thereof, have been paid out for a non-county purpose and not one contemplated by the county budget, there would seem to be a positive liability on the part of the county commissioners and the clerk of the circuit court under §§129.08 and 129.09, F. S., and the matter should be referred to the proper state attorney for the enforcement of the liability, or liabilities, under said sections of the statutes, in the usual manner.

The above observations seem to answer the 2nd question as well as the same may be answered.

056-152—May 17, 1956

SALE OF SECURITIES

QUALIFICATION OF STOCK IN FLORIDA CORPORATION TO
BE SOLD IN OTHER STATES—§§517.02,
517.05-517.07, F. S.

To: *Florida Securities Commission, Tallahassee*

QUESTION:

Is it necessary that stock issued by a Florida corporation, to be sold in another state or states, be qualified under Ch. 517, F. S.?

You give for example certain stock issued by a Florida corporation, the whole issue to be sold in another state, and certain stock of another Florida corporation, where a certain per cent of such stock will be sold in this state and the remainder in other states.

A Blue Sky law cannot be given extra territorial effect, so as to apply to a sale of securities consummated in another state

(87 A.L.R. 60-61; 53 C.J.S., §76, p. 772, and numerous cases there cited). However, a statute directed against negotiation or solicitation will apply to negotiations within the state, even though the sale is not consummated therein (53 C.J.S., §76, p. 772; *People v. Augustine*, 232 Mich. 29, 204 N. W. 747).

No securities except those exempt by §§517.05 and 517.06, F. S., "shall be sold within this state unless such securities shall have been registered by notification or by qualification" (§517.07, F. S.). This leads to a consideration of what constitutes the sale of a security or interest in a security under the Florida Blue Sky law.

"Sale" or "sell", among other things, includes a contract to sell, an exchange, an attempt to sell, an option of sale, a solicitation of a sale, a subscription or an offer to sell directly or by an agent, or a circular letter, advertisement or otherwise (§517.02(3), F. S.). It is true that the Florida statutes can have no application to acts performed without the state. However, it is equally clear that it is not necessary that the sale of a security be consummated in this state for the seller thereof to be in violation of Ch. 517, F. S.

The statute prohibits *the sale, the offering for sale, the taking subscription for, or the negotiating for a sale in any manner whatever*. Therefore, should any person himself, or by others acting for him, perform any of said acts in this state in connection with the sale of a non-exempt security, whether such sale be consummated in this state or outside this state, such person would be in violation of Ch. 517, F. S.

A non-exempt stock issue of a Florida corporation, a portion thereof to be sold in another state and a portion thereof to be sold in this state, is undoubtedly required to be qualified under Ch. 517, F. S. Stock issued by a Florida corporation, the whole issue to be sold in another state, must qualify under Ch. 517, F. S., if any act whatever in connection with the sale thereof is performed in Florida.

Your question, subject to the foregoing observations, is answered in the affirmative.

056-153—May 18, 1956

SHERIFFS

EXPENSES PROPERLY CHARGEABLE AGAINST SHERIFF'S OFFICE—§§30.01, 30.02, 30.09, 455.06, F. S.

To: *Bryan Willis, State Auditor, Tallahassee*

QUESTIONS:

May a sheriff charge to the expense of his office the cost of premiums on insurance or the cost of legal defense for himself or his deputies against actions arising out of:

1. False arrest, false accusation, false imprisonment, unlawful detention, malicious prosecution, assault

and battery, and erroneous service of civil papers?

2. Public liability and property damage arising out of the operation of automotive equipment, the purchase price of which was paid out of the receipts of the office and charged to the expense of the office?

3. Public liability and property damage arising from the operations of automotive equipment owned by himself or his deputies but used wholly or partly in the service of the office?

4. Public liability and property damage arising out of the operation of automotive equipment owned by others but operated by the sheriff or his deputies in the performance of his duties, such as driving to a garage the car of a person arrested?

A statute to be considered is §145.02, F. S., defining net income of fee officers and permitting the payment of "necessary expenditures for the proper operation of said office."

There are several decisions of the supreme court of Florida which should be considered in connection with the answer to question 1.

AS TO QUESTION 1:

The sheriff and his deputies are required to give bonds conditioned upon the faithful performance of the duties of the office (§§30.01, 30.02 and 30.09, F. S.). In *Swenson v. Cahoon*, 111 Fla. 788, 152 So. 203 the court sets out the following principle: "... The rule seems settled by the decided weight of authority that, in the absence of statute to the contrary, only those acts of a deputy that involve an abuse of power reposed in him and not those involving a usurpation of power will the sheriff be required to answer for." (See, also, *Florida sheriffs' manual*, p. 20.) The *Cahoon* case points out that the act performed must be one by virtue of the office of deputy, such as the execution of a writ or process or acting under authority of law giving him the right to arrest. This was an action for false imprisonment for which the sheriff was held not to be responsible, as the act of the deputy was *personal*, not *official*. The case of *Cassidy v. Sholtz*, 124 Fla. 718, 169 So. 487 was an action on the official bond of the sheriff for failure to deliver certain property in his possession by virtue of a writ issued out of a court of competent jurisdiction. The court stated that the failure and refusal of the sheriff to deliver the property in accordance with the final decree of the court "amounted to a failure or refusal on the part of the sheriff to execute the process of the circuit court . . . and was a clear violation of his official duties owed to individuals." It was held that the plaintiff might maintain action upon the sheriff's official bond.

In *Roberts v. Dean*, 133 Fla. 47, 187 So. 571 (action for false imprisonment) the court approved the *Cassidy* and *Cahoon* cases, quoting from the *Cassidy* case to the effect that an official bond binds the sheriff no further than his liability without it and that generally the purpose of the bond is to provide indemnity

against malfeasance and misbehavior in office, the misuse of powers belonging to the office and the assumption of powers not belonging to it. (See, also, 47 Am. Jur., §112, p. 497.)

In *Holland v. Mayes*, 155 Fla. 129, 19 So. 2d 709 the official bond of the sheriff was held responsible for the negligence of one of his deputies in connection with seeking to apprehend a person charged with crime when in so doing he shot a fellow officer assisting him.

From these authorities we can state the rule generally that for acts of a deputy done in a private capacity the sheriff is not liable, but for those by virtue of his office as deputy the sheriff may be liable. It would follow that for false arrest, false imprisonment, unlawful detention, malicious prosecution and assault and battery by his deputy, the sheriff normally would not be held liable since the deputy performed such acts by a usurpation of powers and not in his official capacity as a deputy. As there is no liability upon the sheriff in these instances, the procurement of insurance and payment of premiums affording him protection is not a necessary expenditure for the operation of his office. It would seem that for the erroneous service of civil process or failure to serve the same the sheriff might be held liable upon proof thereof (*Cassidy v. Sholtz*, *supra*; *Swenson v. Cahoon*, *supra*).

AS TO QUESTIONS 2, 3 AND 4:

These questions are so related that they may be properly discussed together.

Section 455.06, F. S. in part provides: "The public officers in charge of governing bodies, as the case may be, of every county, county board of public instruction, governmental unit, department, board or bureau of the state, including tax or other districts, political subdivisions and public and quasi-public corporations, other than incorporated cities and towns, of the several counties of the state . . . which . . . in the performance of their necessary functions own or lease and operate motor vehicles upon the public highways or streets of the cities and towns of the state . . ." are, in their discretion, authorized to provide insurance to cover liability for damage on account of bodily injury, death, or property damage or all these risks ". . . arising from and in connection with the operation of any such motor vehicle; . . ." The statute further permits payment of the premiums from any funds made available for the necessary expense of operation of the office. It appears to have been the intent of the legislature that the motor vehicles owned or leased by a public office, whether county or state, used in the performance of the duties of the office, should come within the purview of the statute. Therefore, I think that the statute is sufficiently broad to include vehicles purchased out of the receipts of the office and charged to office expense when used by the sheriff in connection with the discharge of his official duties, as well as those vehicles which are owned by individuals, but under an arrangement with the sheriff are used exclusively in the performance of the official duties of the office. In other words, it is not necessary that a formal lease agreement be entered into by the parties in order for the vehicle to fall within the purview

of the statute. There may be simply an informal, but bona fide, arrangement between the sheriff and his deputy for the use of the privately owned vehicle to discharge his official duties. It is difficult to arrive at a conclusion in connection with a situation where the vehicle is used partly for official purposes and partly for private use. The common sense conclusion would seem to be that if the vehicle is used occasionally and purely incidentally by the individual in a private capacity and for the balance of the time it is operated in the discharge of his official duties, the insurance premium might properly be paid.

Question 4 pertains to the situation where a deputy of the sheriff makes an arrest and is required to drive the vehicle of the arrested person. While the automobile in such instance is neither owned nor leased by the sheriff, it is being operated in connection with his official duties, and a reasonable construction of the statute, in the public interest, would seem to indicate that liability coverage would also include operation under these circumstances.

This answers the questions as definitely as such be possible.

056-154—May 17, 1956

PROFESSIONS AND VOCATIONS

**BARBERS' SANITARY COMMISSION—BARBER SHOPS ON
UNITED STATES MILITARY BASES IN FLORIDA—
CH. 476, and §§6.04 and 6.05, F. S.**

To: Arthur P. Ellis, Barber's Sanitary Commission, Tallahassee

QUESTION:

**May the laws of the barbers' sanitary commission as
contained in Ch. 476, F. S., be enforced against barbers
and barber shops on U. S. military bases in Florida?**

Replying to a similar question, presented by the state board of beauty culture, my predecessor, on Jan. 3, 1944, in opinion 044-2, said:

"Your attention is called to the circumstances that exclusive jurisdiction over Tyndall Field has been ceded by Florida to the U. S.

"The beauty culture law was enacted under the reserved police power of the state. However, this power does not embrace activities on lands over which the U. S. has by cession or otherwise acquired exclusive jurisdiction and has not relinquished such jurisdiction. (*Pacific Coast Dairy, Inc., v. Dep't of Agri. of Calif.*, decided March 1, 1943, not yet reported.)

"In addition, when there is a cession, by a state to the U. S., of jurisdiction over lands held by the latter for military purposes, a state surrenders its claim of right to exercise legislative authority and puts that area beyond the field of execution of her laws. (*Standard Oil Co. v. California*, 291 U. S. 242, 245, 78 L. Ed.)"

When state lands are ceded to the U. S. for military purposes, the state cedes exclusive jurisdiction over such lands to the U. S., except that the state retains concurrent jurisdiction with the U. S. for the purpose of executing all process, civil or criminal, issuing under authority of the state or of its courts or judicial officers upon persons subject to same (§§6.04 and 6.05, F. S.).

Enforcement of state laws as they apply to barbers and barber shops on U. S. military bases in Florida does not come within the exception to the cession of exclusive jurisdiction of lands ceded by Florida to the U. S. for military purposes. Therefore, I am of the opinion that the laws of Florida pertaining to the barbers' sanitary commission may not be enforced against barbers and barber shops located on U. S. military bases in Florida.

056-155—May 21, 1956

COUNTY FINANCE

COUNTY ADVERTISING AND PUBLICITY—§125.08, F. S.

To: *Bryan Willis, State Auditor, Tallahassee*

QUESTION:

Is §125.08, F. S., applicable to the expenditure of county funds in "advertising and giving publicity to the advantages, facilities and production" of the said county and the municipalities therein?

Many of the counties of this state have been authorized by statute to expend county funds in advertising and giving publicity to the advantages, facilities and production of such counties and the several municipalities and other areas within such county. These statutes make county advertising a public and county purpose, and such advertising a proper and legal county expense. These statutes authorize the letting of contracts, by the boards of county commissioners, for the advertising and giving of publicity to the advantages, facilities and production of the county.

Section 125.08, F. S., prohibits the letting of a contract by boards of county commissioners "for the working of any road or street, the construction or building of any bridge, the erecting or building of any house," or for the purchase of "*any goods, supplies or materials for county purposes or use*" unless such contract is made with the lowest and best bidder after due and proper advertising for such bidders, where the amount of such contract exceeds the sums mentioned in the said statute. For the purposes of this opinion we shall presume that the contract amount in question is in excess of the sum mentioned in the said statute. This leads to the question of whether the methods used to accomplish the "advertising and giving publicity to the advantages, facilities and production" of the county and its municipalities involves the purchase of any goods, supplies or material for county purposes or use.

"Statutes requiring competitive bidding are to be construed strictly, and are not to be extended beyond their clear implication. However, they should receive a construction which effect-

ates their true intent and avoids circumvention." (20 C. J. S. 1020, §183). There are certain types of contracts and provisions ordinarily considered not to be within the purview of competitive bidding statutes, such as the employment of accountants, attorneys, architects, engineers, surveyors, building inspectors, artists, construction superintendents, and the like (Annotation in 44 A.L.R. 1150, et seq., and 142 A.L.R. 542, et seq.) and the purchase of public utility services (Annotation 128 A.L.R. 168, et seq.) have usually been held not to be within such statutes.

When the Florida state advertising commission was created and established in 1945 (Ch. 22558, 1945) for the purpose of advertising the advantages and facilities of the state, its medium of advertising was directed to be by newspaper, magazine, outdoor and radio advertising and the distribution of advertising literature and other materials (See §10 of said 1945 act). This medium of advertising is still in force under the Florida development commission (Ch. 288, F. S.). Advertisement of the citrus industry in Florida may be promoted "by utilizing space in newspapers, magazines, trade papers, billboards, card space or by the purchase of time for radio broadcasts, and other media . . ." (State v. Lee, 150 Fla. 35, 7 So. 2d 110, text 114). The manufacture of booklets by the citrus commission to be distributed as a medium of advertising was held in the above case to be public printing within the purview of §283.03, F. S.

We do not think that advertisements by newspaper, magazine, billboard, card space radio and similar media would constitute "goods, supplies or materials" within the purview of said §125.08, F. S.; however, we are unable to say that the purchase of all types of material or goods for distribution as an advertising media would not be within the statute. The purchase of some type of goods or merchandise, including printed supplies of pamphlets, booklets, leaflets and maps, for free distribution as an advertising media might under some circumstances be within the said statute; however, this is a question that must be resolved from the facts and circumstances in each particular case.

We can answer the above stated question by stating that in our opinion newspaper, magazine, billboard, card space radio, T. V. and similar media used for county advertising would not be goods, supplies and materials within the purview of §125.08, F. S.; however, there may be instances when the media used might be within the statute. The answer to the question must, therefore, be determined from the facts in each case measured by the above announced rules.

056-156—May 21, 1956

TAXATION

LICENSE TAXES—CONSTRUCTION OF §205.37, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are the operators of cocktail lounges, liquor stores, restaurants, and similar establishments, who furnish entertainment, such as instrumental music and singing,

subject to the license taxes imposed by §205.37, F. S., in addition to other applicable license taxes?

We gather from the file handed us with the request for opinion that "there are a number of establishments operating as cocktail lounges and/or restaurants, together with package liquor sales, and in these establishments they furnish their guests with entertainment by having a paid piano or organ player, and in addition to such playing, the player usually sings popular songs for the entertainment of the guests."

Section 205.37, F. S., provides that "every person who operates for profit any place where dancing is permitted or entertainment, such as variety programs or exhibitions, is provided for a charge shall pay a license tax of \$100. The license required by this section shall be in addition to any other license required by law and the operation of such a place as herein described shall not be construed to be incidental to some other business" "This statute may and does require the operator of a place *for profit* to pay the same separate license tax for merely permitting dancing in the place operated for profit, as is required when *entertainment*, such as variety programs or exhibitions, is *provided for a charge* in the place operated for profit" (Emphasis supplied.) We find nothing in either the request for opinion or the file handed us therewith showing or indicating that specific or additional charge is made of the customers by reason of the entertainment furnished. We have no information that any cover charge or admission fee is made or collected by the operator of the said place of business. Unless customers are charged an additional or specific fee because of the entertainment we doubt that the business is liable for a license tax under said §205.37, F. S., unless dancing is permitted.

In *Millinor v. State ex rel.*, Beaver, Fla., 61 So. 2d 377, it was held that a person selling tangible personal property was not brought into a different license tax classification because he furnished entertainment to his customers and prospective customers. Unless the tax collector should determine that some charge is made, either directly or indirectly, for the entertainment furnished, the above question should be answered in the negative, unless it be further determined that dancing is also permitted in such establishments in which case the tax imposed by said §205.37 would be applicable.

056-157—May 23, 1956

STATE AND COUNTY OFFICERS AND EMPLOYEES

RETIREMENT—STATE AND COUNTY SYSTEM—OFFICERS
AND EMPLOYEES OF MOSQUITO CONTROL DISTRICTS—CHS. 388, 389, 390 and 122, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are the officers and employees of mosquito control districts, organized and existing under Ch. 390, F. S.,

within the purview of the state officers and employees retirement system?

The term "state and county officers and employees," as used in the state and county officers and employees retirement system of this state (Ch. 122, F. S.) "includes all full-time officers and employees who receive compensation for services rendered from . . . funds of . . . mosquito control districts of a county or counties . . . or who receive compensation for employment or service from any agency, branch, department, institution or board of the state, or any county of the state, for services rendered . . ."

We feel that mosquito control districts, whether organized under Chs. 388, 389 or 390, F. S., or under local and special acts of the legislature, are within the above definition of "state and county officers and employees" and therefore within the state and county officers and employees retirement system. In *Forbes Pioneer Boat Line v. Everglades Drainage Dist.*, 77 Fla. 742, 82 So. 346, the said drainage district was said to be a governmental agency of the state. Many types of districts established by the legislature have likewise been held to be agencies of the state or its subdivisions (35 Words and Phrases 75 et seq.).

The above question is answered in the affirmative.

056-158—May 23, 1956

CONSERVATION

GAME AND FRESH WATER FISH—ALLIGATORS—HUNTING LICENSES—§§372.57 and 372.66, F. S.

To: *A. D. Aldrich, Director, Game & Fresh Water Fish Commission, Tallahassee*

QUESTIONS:

1. May alligators be included in the list of game animals and all persons who hunt them be required to secure a hunting license, as provided by §372.57, F. S.?

2. Are persons holding alligator hunter's permits of the game and fresh water fish commission, under rule 23 of the rules and regulations of the commission, required to purchase a license as provided by §372.66, F. S.?

3. Can an alligator be classed as a fur-bearing animal, requiring a trapper's license for a person hunting and trapping, as provided by §372.57, F. S.?

Article 4, §30, subparagraph 7, State Const., places birds, game, fur-bearing animals, fresh water fish, reptiles and *amphibians* under the jurisdiction of the game and fresh water fish commission, and further provides that the legislature may enact any laws in aid of, but not inconsistent with, the provisions of the amendment, and all existing laws inconsistent herewith shall no longer remain in force and effect; and that all laws fixing penalties for the violation of the provisions of the amendment and all laws imposing license taxes, "shall be enacted by the legislature from time to time." (Emphasis supplied.)

There is no specific provision in the constitution or the Florida statutes requiring a license to hunt alligators, unless the term "game" as used in the statute includes the alligator. There is no definition of "alligator" in the laws relating to this commission or other parts of the statutes. Therefore, we must resort to some other authority to determine what category an alligator falls in.

Amphibians, over which the commission has jurisdiction is defined by Webster's New International dictionary as "an animal accustomed to life both on land and in the water."

Amphibia is defined as "a class of vertebrates, intermediate in many characters between the fishes and reptiles."

Reptile is defined by Webster as "an animal that crawls or moves on its belly, as snakes, or on small short legs, as lizards and the like."

Reptilia is defined as "a class of air-breathing vertebrates, which includes the *alligators* and crocodiles, lizards, snakes, turtles, and their extinct allies; the reptiles."

In view of the foregoing, it is my opinion that an alligator should be classed as a reptile and not as game. Therefore, your 1st question is answered in the negative.

Replying to your 2nd question, it appears that the only persons required to purchase a license under §372.66 are those that fall into the definition of dealers or buyers of alligator skins or dried or green furs.

Section 372.66, F. S., embracing fur and hide dealers, makes it unlawful for any person to engage in the business of a dealer or buyer in alligator skins within the state until such person has been licensed as provided therein.

A dealer, in the popular sense means one who *buys to sell*, not one who buys to keep or makes to sell. Black's L.D., 3d ed.

It, therefore, appears that persons holding permits to hunt or take alligators, but do not buy or deal in alligators within the purview of §372.66, F. S., are not required to purchase a license as required by said section since this statute covers persons *dealing in and buying alligator skins* and does not contemplate the hunting of alligators by individuals.

Your 2nd question is answered accordingly.

Replying to question 3, it appears that fur is defined by standard dictionaries as "the soft, fine, hairy coat covering the skin of many mammals, or skins of fur-bearing animals," it would be difficult to include the horny hide of an alligator in the category of fur-bearing animals, or to interpret legislative intent as such.

I seriously doubt that the alligator may be classed as a fur-bearing animal so as to come within the purview of §372.57 (11), (12), (13), (14), (15), F. S.

Your 3rd question is answered in the negative.

056-159—May 23, 1956

CORPORATIONS AND BUSINESS TRUSTS

COMMON LAW BUSINESS TRUSTS—WHAT CONSTITUTES UNDER CHAPTER 609, F. S.

To: *R. A. Gray, Secretary of State, Tallahassee*

QUESTION:

Where certain persons take title to real property in the name of a trustee or trustees, and under the agreement in connection therewith the latter would perform only perfunctory duties in connection with such real property, such as payment of taxes, insurance, and granting of easements to public authorities, but with no power of sale except upon written permission from the beneficiaries, would such an agreement constitute a declaration of trust within the intent of Ch. 609, F. S.?

Chapter 609, F. S., deals with common law declarations of trusts and requires compliance therewith for those who fall within the purview of its terms. There have been but 2 decisions of our supreme court which appear to deal directly or indirectly with the provisions of said chapter: *Walker v. Close*, Fla., 125 So. 521, 126 So. 289; *Young v. Victory*, Fla., 150 So. 624. Neither of these cases are of assistance here. Recourse to general authorities upon the subject demonstrates the characteristics of a trust as contemplated by the provisions of the above chapter.

It appears that such a trust is referred to in various jurisdictions as a "business" trust, "common law" trust, or "Massachusetts" trust. A comprehensive definition of such a trust is as follows: "... a form of business organization consisting essentially of an arrangement whereby property is conveyed to trustees in accordance with the terms of an instrument of trust, to be held and managed for the benefit of such persons as may from time to time be holders of the transferable certificates issued by the trustees showing the shares into which the beneficial interest in the property is divided." With respect to other characteristics of such types of trusts see "Business Trusts", 9 Am. Jur., beginning p. 285; and for the sources of the above remarks see §§1 and 2 of said authority.

It is here assumed that it is not the intention of these persons contemplated by the question to incorporate in the mentioned agreement with the trustee or trustees power of the latter to offer for sale "any units, shares, contracts, notes, bonds, mortgages, oil or mineral leases or other security of such association", as described in §609.02, F. S.

In my opinion, such an agreement as described in the question, limited and conditioned as above related, will not constitute a declaration of trust within the purview of the provisions of Ch. 609, F. S.

056-160—May 24, 1956

INSURANCE

RETALIATORY LAW—CREDITS—§626.061, F. S. (Ch. 29680, 1955).

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTIONS:

1. When the domiciliary state of a foreign insurer engaged in business in this state imposes a higher premium receipt tax on insurers than that imposed by Florida, but provides in such law that said taxes shall be in lieu of all other taxes, except ad valorem and (as to California) other described taxes, and prohibits imposition of license taxes by counties, cities and towns, under provisions of Ch. 29680, 1955, may such a foreign company in the computation of premium receipts taxes due this state take credit for license taxes paid political subdivisions in this state?

2. Under like conditions and circumstances, may such a company take credit for amounts paid to this state for licenses for its agents?

On Oct. 19, 1955, we delivered to the insurance commissioner opinion 055-276, concerning the general effect of Ch. 29680.

On April 11, 1956, on the basis of particular factual situations which we then understood to exist, we advised the insurance commissioner by letter that the following were to be disregarded in applying the provisions of Ch. 29680: agents licenses; municipal licenses; ad valorem taxes; discounts permitted by at least one state for early payment of premium receipts tax; and credits for investments allowed by certain states.

On May 4, 1956, presented with the laws of other states and particular factual situations, we advised the insurance commissioner that the following credits or deductions set forth in premium receipts tax laws of certain other states should be considered in applying Ch. 29680 to insurers of other states operating in Florida, to the extent and as set forth in such letter, to wit: where the domiciliary state of the foreign insurer provided deduction of losses from premiums received; where such a domiciliary state had a stated reduction in the premium receipts tax for described investments; where such a domiciliary state provided for deduction of 1st-year premiums. We advised also in said letter that assessments under §440.51, F. S., against carriers of workmen's compensation coverage in excess of 2% were not to be considered in applying the provisions of Ch. 29680.

At this point it is well to mention that certain foreign insurers doing business in this state have construed Ch. 29680 as being reciprocal rather than retaliatory in character. This is understandable by reason of the opening words of the act's title: "An act to impose the same requirements on foreign and alien insurance companies in this state as is required of Florida insurance companies doing business in other states and counties . . ."

The substance of the chapter demonstrates that it is retaliatory and not reciprocal.

Just as under specific factual situations we were called upon to qualify the statement in our letter of April 11 concerning investments, we now qualify the statement in that letter concerning municipal license taxes. Under the situations then presented to us and as we understood them, that statement concerning municipal license taxes is adhered to. Generally, it is stated that there is respectable authority that municipal license taxes are taxes of the state within the contemplation of a law such as ours (E.g., *State v. Reinmund*, Ohio, 13 N. E. 30, 32); however, unqualified as here found in the 1st question above, we do not recede from our previous position. Any foreign insurer affected by that construction may test our position in our courts. However, as qualified above in the 1st question, the matter of municipal license taxes requires special consideration.

In view of the foregoing, in my opinion the questions are answered as follows:

1. We have here statutory or constitutional provisions of other states which specifically provide, in effect, that the state premium receipts tax is in lieu of all other license taxes and prohibiting the imposition of license taxes against insurers by counties, cities and towns. On a comparative basis involving a Florida insurer operating in another state with such constitutional or statutory provisions and an insurer of that state operating in Florida, in applying the provisions of Ch. 29680 to a company of such other state, such constitutional or statutory provisions prohibiting imposition of license taxes by counties, cities or towns are tantamount to credits or deductions in computing the Florida premium receipts taxes of an insurer of that other state and license taxes paid by such an insurer to municipalities should be considered; provided, that in no event shall such a foreign insurer pay less tax in the aggregate than that prescribed by relevant statutes of this state. In support of this position we cite the conclusion reached on the factual situation set forth in *Life and Casualty Ins. Co. of Tennessee v. Coleman, etc., Ky.*, 25 S.W. 2d 748. The case involved a Kentucky retaliatory law and a Tennessee law prescribing that the state premium receipts tax was in lieu of all other of such taxes. The citing of such authority is not to be construed as accepting its reasoning in relation to Kentucky municipal license taxes beyond the actual situation found in this question.

2. While we recognize that this question has its controversial aspects, we adhere to the position set forth in our mentioned letter of April 11, 1956, to the effect that agents' licenses paid by a foreign insurer in Florida are not to be considered in applying the provisions of Ch. 29680. This general position is subject to the following comments and possible qualification: If it can be demonstrated that under the laws of foreign states there is the provision that the premium receipts tax imposed is in lieu of other license taxes, including agents' licenses, or that the annual license tax corresponding to the annual occupational license tax of \$200 imposed by Florida, includes licenses to agents, then such agents' licenses should be given consideration in ap-

plying the provisions of Ch. 29680 to insurers of such states operating in Florida.

056-162—May 31, 1956

INSURANCE

AGREEMENT OF PREMIUM FINANCING COMPANY WITH INSURERS—CHAPTER 629 AND §630.02(4), F. S.

To: J. Edwin Larson, State Treasurer, Tallahassee

QUESTION:

A company engaged in financing of premiums on insurance policies has entered into agreements with certain insurance companies which provide, in effect, among other things, that as to described policies, in event the company exercises its right to cancel such a policy upon default in payment by the insured under the latter's agreement with the company, there shall be returned by the insurer to the financing company the unearned premium applicable to such policy. Does such an agreement conflict with the insurance laws of Florida?

The answer appears so obvious that no necessity exists to discuss it extensively. It is sufficient to point out the following: Under terms of standard fire policies, when the insured exercises the right of cancellation, the insurer, with respect to premium paid in relation to the unexpired portion of the time for which the policy was written, settles on a *short rate* and not a *pro rata basis*; and the assignee of such a policy under a premium financing agreement occupies no more favorable position with respect to policy terms than the insured. For a discussion of anti-discrimination statutes, see Appleman, Insurance Law and Practice, Vol. 12, pp. 47-56, §§7017-7019. Section 629.06, F. S., (part of Ch. 629, F. S., dealing with regulation of rates for fire and other described insurance) provides, among other things, that every rating organization and every insurer which makes its own rates "shall make rates that . . . do not unfairly discriminate between risks in this state involving essentially the same hazards." For a similar provision relating to rates for casualty insurance and other described coverages, see §630.02(4), F. S. Premium rates are related to policy provisions; and an agreement which favors certain insureds with respect to return premium in event of cancellation is discriminatory within the meaning of these rating statutes.

Hence, in my opinion, the provision in the agreement between this financing company and insurers described in the question collides with our rating statutes and is in violation thereof.

056-163—May 31, 1956

TAXATION

LICENSE TAXES—APPLICATION OF §205.53, F. S., TO TELEGRAPH COMPANY LICENSED UNDER §205.56, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where a telegraph company licensed under §205.56, F. S., operates a messenger and parcel delivery service in connection with its telegraph system and service, is such company also required to obtain a license as a public service business under §205.53, F. S.?

Section 205.56, F. S., provides that "each person engaged in the business of owning or operating telegraph systems in this state shall pay a license tax to the comptroller" as is therein provided. What is included within the term "owning or operating telegraph systems" is not defined in the statute. Whether it consists only of receiving, transmitting and delivering messages, or includes other services does not appear from the statute itself. Section 205.53, F. S., provides that "every person engaged in any business, as owner, agent or otherwise, that performs some service for the public in return for a consideration" is required to pay an occupational license tax. Except for §205.56 it seems that telegraph companies would be subject to taxation under said §205.53, F. S. In so far as the services rendered by a telegraph company are within the purview of §205.56, F. S., no tax is required under §205.53, F. S. This leads to the inquiry of whether a messenger and parcel delivery service is a usual and customary service of a telegraph company.

Section 205.56, F. S., was derived from §54, Ch. 6421, 1913, and has remained without substantial change or amendment throughout the years. A similar provision was included in §53, Ch. 5106, 1903. It is indicated in *Toledo v. Western Union Telegraph Co.*, 107 Fed. 10, 46 C. C. A. 111, 52 L. R. A. 730, and *American District Telegraph Co. v. Walker*, 72 Md. 454, 20 Atl. 1, 20 A. S. R. 479, that a telegraph business may have sometimes extended to carrying of packages and running miscellaneous errands (86 C. J. S. 290, §277).

The answer to the above question depends upon what services have grown up with the operation of a telegraph business and whether it is the regular and usual practice of telegraph companies to operate messenger and parcel delivery services as a part of their regular and usual telegraph business. If the operation of a messenger and parcel delivery service is a part of such business through usual and regular practice, then the above question should be answered in the negative, but if not then the question should be answered in the affirmative. The answer to the question, therefore, depends upon a question of fact to be determined.

056-164—June 5, 1956

CIVIL PRACTICE AND PROCEDURE

COURT REGISTRY FUNDS—DEPOSIT WITH AND HANDLING
BY STATE TREASURER—§54.04, F. S.

To: J. Edwin Larson, State Treasurer, Tallahassee

QUESTION:

Under the provisions of §54.04, F. S., relating to the handling and disposition of moneys paid into court (court registry funds) with respect to such funds deposited with the state treasurer, should that officer consider as one fund all deposits of a particular court, without regard to the balance in each particular case, or should that officer keep records on the individual cases?

The request for opinion states that now and heretofore the state treasurer maintains and has maintained records of such funds on individual cases.

Section 54.04, F. S., provides that "all moneys paid into any court of the state and received by the officers thereof, in any cause pending or adjudicated in such court, shall be forthwith deposited with the treasurer of the state or in a designated depository of funds for the state, in the name and credit of such court, and every depository that shall receive such moneys shall forthwith furnish security . . . in an amount necessary to fully protect the full amount of such deposit at all times; and in the event such depository shall not, within 5 days from the date of each and every deposit, advise such court that such security has been deposited with and approved by the treasurer of the state", such deposit shall be withdrawn and deposited elsewhere as provided in the section. (Emphasis supplied.)

It is elementary that a deposit made into court in a cause should be in pursuance of statutory authority or court order (*Phipps v. Watson*, Fla., 147 So. 234; 26 C.J.S. 961, §4b). In absence of statutes controlling, such a deposit of funds must ordinarily come into actual possession of the court, although the court may permit it to remain in a bank. (26 C.J.S. 961, §5a.) The payment of such a fund into court means delivering such fund to the designated officer of the court. (*City of San Antonio v. Burke*, Tex., 65 S. W. 2d 408). And the power of the custodian of such a fund to deposit or invest it must derive from statute or court order (26 C.J.S. 963, §6(2)). When such a deposit is made into the registry of the court by a litigant in pursuance of court order or statute, and such deposit is made by him unconditionally and with release of all control over it, title thereof passes to the adversary litigant (*Phipps v. Watson*, supra; *Masser v. London Operating Co.*, Fla., 145 So. 72). Where the custodian of such a fund handles or deposits it in full compliance with a statute, if loss occurs the same may not be visited upon him.

It is to be observed that the deposit of court registry funds is clearly and comprehensively provided for in said §54.04; that proper officers of courts have the option of depositing said funds

with the state treasurer or "in a designated depository of funds for the state." Attention is directed to the italicized wording in the above-quoted matter from §54.04; and such would seem to refer to individual court registry funds deposited. However, there is a practical aspect here. While such a bank ("designated depository") is required to secure any such deposit, reasonably the words in said quoted matter are not to be construed as requiring such depository to maintain separate accounts for each individual fund deposited, with specific securities pledged with respect to each deposit; rather that the court registry funds deposited with it by a given clerk may be in one account amply secured, as required. In this respect, the same rule applicable to a bank is applicable to the state treasurer.

In my opinion the question is answered as follows:

Where a clerk of a court deposits court registry funds with the state treasurer, there appears to be no requirement that such official shall do other than receive and maintain all such amounts deposited in one fund. In other words, the state treasurer is not charged with keeping books for the benefit of litigants in individual cases. Nevertheless, as stated above, it appears to have been the long-time custom of the state treasurer to so maintain his records as to evidence the particular cases in which court registry funds are deposited; and it is suggested that as a service to the public and particularly the several clerks of our circuit courts that he continue such practice.

056-165—June 5, 1956

CRIMINAL LAW & PROCEDURE

PROSECUTION OF CRIMES—WHERE MAINTAINED—§11, D.R., STATE CONST.

To: John A. Madigan, Jr., Florida Sheriffs Ass'n, Tallahassee

QUESTION:

When a person charged with crime in Hardee county is arrested in Marion county, and when the sheriff of Hardee county takes custody of such person in Marion county and when such person escapes from said sheriff in Marion county, in which of said counties must a prosecution for such escape be maintained?

Section 11 of the declaration of rights of the Florida constitution provides that:

"In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury, *in the county where the crime was committed,*
* * * " (Emphasis supplied.)

In the situation here under consideration, the escape is the crime for which the escapee is to be prosecuted. That crime was committed in Marion county. Therefore, under the above quoted constitutional provision, the prosecution for the escape must be in Marion county, regardless of the place of the commission of the original crime for which the accused was in the sheriff's custody.

056-166—June 5, 1956

LEGISLATURE

CALLING EXTRAORDINARY SESSION PURSUANT TO §8,
ART. IV, STATE CONST. DURING RECESS OF SESSION
CALLED PURSUANT TO §3, ART. VII,
STATE CONST.*To: LeRoy Collins, Governor of Florida, Tallahassee*

QUESTION:

When an extraordinary occasion arises, has the governor the power and authority to convene the legislature in special session, pursuant to §8, Art. IV, State Const., during a recess of a special session previously called by him pursuant to §3, Art. VII, State Const.?

This office, by its opinion to Hon. W. Turner Davis, president of the Florida state senate, under date of July 11, 1955, held that the legislature may, while in extraordinary session under and pursuant to §3, Art. VII, recess or adjourn for a period in excess of 3 days, pursuant to §13, Art. III, State Const., so long as such recess is not designed to evade the requirements of said §3, Art. VII, State Const.

Extraordinary session of the legislature convened under said §3, Art. VII, State Const., is "not limited to expire at the end of 20 days or at all, until reapportionment is effected, and shall consider no business other than such reapportionment." Under §8, Art. IV, State Const., the governor is authorized, on extraordinary occasions, to convene the legislature into extraordinary session and when so called into extraordinary session the business that the legislature may transact is limited. Extraordinary sessions are called under §3, Art. VII, to enforce reapportionment of representation in the legislature; extraordinary sessions are called under §8, Art. IV, to meet extraordinary occasions making legislation necessary to meet emergencies.

During the emergency leading up to World War II, the governor of Maine, during a recess of an extraordinary session of the legislature of that state called by him, finding that certain matters involving state defense and improvement of military facilities of the state had arisen which, in his judgment, created an emergency and extraordinary occasion and made necessary the immediate convening of the legislature of that state for the consideration of such matters, propounded the following question to the justices of the supreme judicial court of that state, to wit:

"When an extraordinary occasion arises, has the governor the power and authority to convene the legislature in special session during a recess of a special session previously called by him?"

The justices replied: "We answer this question in the affirmative." (In Re Question and Answer, 137 Me. 337, 14 A. 2d 11).

The justices of the supreme court of Alabama, where an emergency or extraordinary occasion had arisen making it neces-

sary that the legislature of that state convene, during a lengthy recess of a regular session of the legislature, for the purpose of considering legislation or a constitutional amendment to meet an emergency or an extraordinary occasion concerning state finances, upon request of the legislature for an advisory opinion of the justices, they replied that "should there be a lengthy recess of the regular term and an emergency or necessity should arise, there is no reason why the governor cannot convene the legislature into special session during the recess of said regular term." (In Re Opinion of the Justices, 222 Ala. 353, 132 So. 311). To the same effect see also In Re Opinion of Justices, 249 Ala. 153, 30 So. 2d 391.

The Florida constitution is not a grant or delegation of power, but is a limitation or restriction of power (16 C. J. S. 132, §70; *Harry E. Prettyman, Inc., v. Florida Real Estate Comm.*, 92 Fla. 515, 109 So. 442, text 445; *Fowler v. Turner*, 157 Fla. 529, 26 So. 2d 792, text 794), and should be construed as a whole and effect be given to every part, if possible (16 C. J. S. 62, §23; 11 Am. Jur. 661, §53; *Weinberger v. Board of Public Instruction*, 93 Fla. 470, 112 So. 253, text 256). Constitutional provisions should be considered as a whole and not as separate provisions complete within themselves, unless the context so requires (*Thomas v. State, Fla.*, 58 So. 2d 173; *State v. Couch*, 139 Fla. 353, 190 So. 723). Constitutional amendments become a part of the constitution as a whole and should be read in *pari materia* with all other portions of the constitution, unless the context requires otherwise (*Advisory Opinion*, 152 Fla. 686, 12 So. 2d 876; *Scarborough v. Webb's Cut Rate Drug Co.*, 150 Fla. 754, 8 So. 2d 913; 11 Am. Jur. 663, §54). Reading the state constitution as a whole we reach the conclusion that §3, Art. VII, State Const., was never intended, merely by reason of the legislature being in extended session thereunder, to bar legislation made necessary or imperative, within the purview of §8, Art. IV, from being considered and enacted should there be a recess during the session under §3, Art. VII, of sufficient length to permit an extraordinary session to be held during such recess.

Emergencies or extraordinary occasions such as confronted the state of Maine and which gave rise to the opinion of the justices in 137 Me. 337, 14 A. 2d 11, unless they are promptly met, might endanger public safety and welfare. Other emergencies or extraordinary occasions, of less magnitude, may also arise making it necessary that legislation be promptly enacted. We are, therefore, of the opinion that §3, Art. VII, was never intended to prevent emergency or extraordinary legislation being enacted whenever possible for an extraordinary session of the legislature to be convened during an extended recess of the legislature in excess of 3 days.

The above question is, therefore, answered in the affirmative.

While we have no doubt as to your authority to call such an extraordinary session, it is noted that some of the members of the house committee suggested that an advisory opinion be sought by you from the justices of the supreme court to settle the matter with finality, and that while you also were satisfied as to your authority in the matter, you were willing to seek such

an advisory opinion from the supreme court in the event you were requested to do so by the legislature. Should you desire to follow that course, we will be glad to be of any possible assistance in connection therewith.

056-167—June 6, 1956

SALE OF SECURITIES

EXEMPTION OF CORPORATE STOCK ISSUED IN CONNECTION WITH BANKRUPTCY REORGANIZATION—§517.06, F. S.

To: *Florida Securities Commission, Tallahassee*

QUESTION:

Is corporate stock issued under the supervision and direction of a federal court in connection with a bankruptcy reorganization of a Florida partnership an exempt transaction under §517.06, F. S.?

Here we have a transaction within the purview of the federal bankruptcy statutes and one authorized by such statutes. Such securities are issued and delivered as a part of the proceedings of or approved by the federal court sitting as a court of bankruptcy. On Nov. 4, 1933, this office held that the issuance of corporate stock to mortgagees under a reorganization plan in consideration of the cancellation and satisfaction of their mortgage or mortgages was an exempt transaction when handled without any underwriter or agent being involved and without paying any commission.

Under §517.06(1), F. S., any judicial, executor's, administrator's, guardian's or conservator's sale, or any sale by a receiver or trustee in insolvency or bankruptcy is an exempt transaction. Although reorganization plans in bankruptcy were not provided for when the above mentioned statute was first enacted in 1931 and when suggested as a uniform law in 1930, we feel that it was the intention of the legislature, as well as the commissioners of uniform laws, to include in the statutory provision any securities to be issued and delivered by or under the bankruptcy courts under the bankruptcy statutes.

The above question is answered in the affirmative; however, only the transaction is exempt and not the securities issued as to further sale and transfer.

056-168—June 6, 1956

PROFESSIONS & VOCATIONS

STATE BOARD OF BEAUTY CULTURE—ELIGIBILITY FOR MEMBERSHIP—§§477.02, 477.03 and 477.18, F. S.

To: *LeRoy Collins, Governor of Florida, Tallahassee*

QUESTION:

Is a person who has been licensed to practice beauty culture in Florida less than 5 years, but who has man-

aged a beauty shop without actively following the occupation, eligible for appointment to the state board of beauty culture?

Section 477.18, F. S., provides that the board shall consist of 3 members appointed by the governor for a 3-year term and confirmed by the senate, and further provides that "each member shall be a *practical beautician, who has followed the occupation of beauty culture in this state for at least 5 years* immediately prior to his appointment, and shall have completed 10 grades of school or its equivalent, and be a graduate of a beauty culture school; and further, that "no beautician may be appointed as a member of the board who is not actually engaged in conducting a beauty shop." (Emphasis supplied.)

Section 477.02(4), F. S., makes it unlawful for any person, firm or corporation to operate a beauty shop unless such shop at all times is under the direct *supervision and management of a registered beautician*. Section 477.02(6) makes it unlawful to hire or employ a person not holding a valid certificate of registration to practice, to engage in the practice of beauty culture.

The question arises as to whether a person is deemed to "follow the occupation of beauty culture in this state" when such person has not actually practiced beauty culture as a licensed practitioner under Florida laws. It seems that in order to follow the occupation of beauty culture in this state, legally, one would necessarily have to comply with the statutes regulating the occupation, since one is prevented by law from following certain occupations affecting health, welfare and morals of the citizens until he meets and complies with the statutory requirements affecting such occupation, since such statutes are "health statutes" designed to prevent the spread of contagious diseases. *United Enterprises v. Dubey*, 128 F. 2d 843 (AGO 045-113, p. 593). Such statutes should be given a liberal construction, in spite of any penal provisions contained therein. (Sutherland on Statutory Construction, 3rd ed. §7202).

During the approximate 3 years that the subject was managing the Cohen department store beauty salon, it must be determined whether she was following the occupation of beauty culture of this state, within the purview of Ch. 477 so as to constitute her a practical beautician qualified to be a board member. This is a question of fact, not answered by the record.

"Following an occupation" means to attend upon closely, as a profession or calling. (*Spears v. Ford*, 197 Ky. 575, 247 S. W. 713). As used in a particular connection, the phrase means something more than the doing of one or more acts pertaining to one's occupation. It involves the idea of continuity, and it involves also the doing of all of those things which are an essential part of the work or business in which a person is engaged. (*Carson v. N. Y. Life Ins. Co.*, 162 Minn. 458, 203 N.W. 209; *Monahan v. Supreme Lodge of Columbia Knights*, 88 Minn. 224, 92 N.W. 972; *Winters Mut. Aid. Assn. Circle No. 2 v. Reddin*, Civ. App. 31 S.W. 2d 1103).

"Occupation", employed in the sense of calling or trade, is defined as a relating term in common use with a well-understood

meaning, and very broad in its scope and significance. It compasses the incidental, as well as the main requirements of one's vocation, calling or business, variously defined as meaning the principal business of one's life. (67 C. J. S. 74, 75). The word particularly refers to the vocation, profession, trade, or calling in which a person is engaged for hire or profit, and it has been repeatedly held that *a person's principal business and chief means of obtaining a livelihood, constitutes his occupation* (67 C. J. S. 76, Harper v. England, 124 Fla. 296, 168 So. 403; Texas Co. v. Amos, 77 Fla. 327, 81 So. 471).

"In my opinion, therefore, if a person not having the license required by law, engages in any one or a combination of the practices defined in §477.03, with the public, to such an extent that such person could be said to be pursuing the occupation of a beautician . . . , then such person would be violating the beauty culture law." (1947-8 AGO 466, text 467).

Therefore, it appears that a person who has *followed the occupation* of beauty culture necessarily must have done all of those things which are an essential part of the occupation of a beautician; that a person who manages a beauty shop but *has not worked on customers* as a beauty operator has not "followed the occupation" of a practical beautician within the meaning and intent of §477.18, F. S., for the period of time required by statute (5 years) immediately prior to her appointment to the board of beauty culture, and consequently is ineligible by law to appointment to the board; that the term "following the occupation" is synonymous with "engaging in" as defined by AGO 048-50; that it denotes regular and legal employment, not one that is occasional, irregular or illegal.

It further appears that a person does not meet the statutory requirements to be appointed to the state board of beauty culture if she has not followed the occupation of beauty culture in this state for at least 5 years immediately prior to her appointment, if such appointment is sought to be made prior to the expiration of 5 years from the date in 1953 when she obtained a license to practice and actually began to "follow the occupation."

Your question is answered accordingly.

056-169—June 6, 1956

INSURANCE

AXE INVESTMENT PLAN, AXE-HOUGHTON STOCK FUND, INC.—CONSTRUCTION OF §§646.05 AND 631.151, F. S. (Ch. 29857, 1955)

To: Florida Securities Commission, Tallahassee

QUESTION:

A foreign insurer, authorized to engage in business in Florida, proposes to extend coverage under a group life insurance policy issued in the state of New York to residents of Florida who may purchase shares in Axe-Houghton Stock Fund, Inc., further particulars of which

are set forth below. Would such coverage if issued be in violation of the laws of Florida? Specifically: (1) Will this investment plan with the insurance coverage as an incident thereof, if sold to Florida purchasers constitute sale of insurance in this state? (2) Will the solicitors who sell the mentioned shares be required to be licensed as agents for said insurer in this state?

The master group policy here involved has been issued by the insurer to Axe Securities Corp., the policy containing the provision: "This policy is delivered in the state of New York and is governed by the laws of that jurisdiction." The policy insures the lives of purchasers of the investment plan here involved, over a 10-year period. We assume that this investment plan, consisting of sales of the mentioned shares with its insurance feature, will be sold to Florida residents by salesmen of Axe Securities Corp.

The policy under the heading, "The Contract", provides in part: "This policy, together with the application of the policyholder (Axe Securities Corp.), a copy of which is attached hereto and made a part hereof, constitutes the entire contract between the parties. All statements made by the policyholder shall be deemed representations and not warranties, and no such statement shall avoid the insurance or be used in defense of a claim hereunder unless it is contained in the application signed by the policyholder."

The following appears in the policy under "Purchaser's Statement of Insurance": "The insurance company will issue to the policyholder, for delivery to each purchaser insured hereunder, a statement that the life of the purchaser is insured under the provisions of this policy and that any benefits payable hereunder by reason of his death shall be applied by the policyholder towards the discharge of the obligation to the policyholder." We have not seen form of such statement, but we accept the above wording according to its clear intent,—that is to say, that such a statement shall contain no new, different or additional conditions.

It is apparent for the reasons set forth below that Florida law is not here applicable; however, we do remark that this group life policy with its 10-year \$10,000 limits would not be permitted under §646.05, F. S., with respect to a Florida contract.

Chapter 29857, 1955, provides in effect that delivery in this state to a purchaser of property in this state of an insurance policy, or in event of group coverage by whatever name, of a certificate or other evidence of insurance coverage, as an inducement for or an incident of the sale of such property, and which coverage insures said purchaser "against loss from any fire or casualty hazard or risk in relation to said property, shall constitute the negotiation, sale and delivery of a contract of insurance in this state. While we have here involved insurance coverage incident to the described investment plan, quite apparently it is not included within the wording of Ch. 29857.

We have dealt with several of these investment plans with insurance. Reference is made to former opinions 051-311, 051-419,

054-76 and 054-251, copies of the 2nd and 4th of these being hereto attached. Others could be mentioned, but these are sufficient to demonstrate the reasoning we have employed in relation to these plans with insurance.

On the basis of the reasoning set forth in such opinions, in my judgment the question is answered as follows: The New York laws control with respect to this group life coverage. Since Florida law is not applicable, the coverage is not in violation of Florida laws relating to group life coverage. The sale of these investment plans, with the insurance feature, by the salesmen of the plan to investors in this state will not constitute the sale of insurance by such salesmen contrary to Florida laws, hence, such salesmen will not be required to qualify as agents for said insurer in this state.

056-170—June 12, 1956

COURTS

CLERKS OF CIRCUIT COURT—POWERS AND DUTIES IN PROPRIETARY FUNCTIONS—§§28.12, 136.05-136.06 AND CH. 129, F. S., §15, ART. V, STATE CONST.

To: *Avery W. Gilkerson, Clerk, Circuit Court, Pinellas County, Clearwater*

QUESTION:

Where a county performs certain proprietary functions such as operating a water system and an airport, financed by revenue certificates, is it the duty of the clerk as auditor to provide an accounting system and otherwise supervise the accounts of such projects?

Under the constitution (§15, Art. V), the clerk of the circuit court is "ex-officio auditor of the county."

In *State ex rel Landis v. Wheat*, 103 Fla. 1, 137 So. 277, in the syllabus by the court the following appears:

"The Constitution contemplates that as 'ex-officio Auditor of the County' the clerk of the circuit court shall audit all claims against the county that are presented for payment by the county, not that such clerk as 'ex-officio Auditor of the county' shall audit the books and records of other county officers or perform other auditing duties, or be purchasing agent of the county, unless so required by statute. Section 15, article 5, expressly provides that the duties of such clerk 'shall be prescribed by law'."

Section 28.12, F. S., provides that the clerk of the circuit court shall be clerk of the county commissioners.

In recent years an increasing number of proprietary functions and duties are being performed by county commissioners under statutory authority.

At the time of the adoption of §15, Art. V, State Const., and the passage of §28.12, F. S., the functions of the board of county

commissioners were of a purely governmental nature. Apparently the purpose of the provisions was to provide a check and balance to prevent the illegal expenditure of county funds. This was accomplished by requiring that the accounts prescribed by law should be kept and that each warrant for the disbursement of public funds be attested by an independent authority, the clerk. (§§136.05-136.06, F. S.).

The board of county commissioners is charged with the general management of county affairs and the clerk may properly interfere only to prevent an illegal payment of county funds. The board may provide for additional records and clerical help if it considers them necessary even though some duplication may result.

The responsibility of the clerk, as to proprietary functions, does not extend further than keeping the accounts prescribed by law and attesting the warrants issued. It is necessary for the board, as business manager, to provide for the particular accounts pertaining to the proprietary nature of the function and for the clerical personnel necessary to keep them. Such accounts and personnel are subject to the discretion and direction of the board. The clerk should satisfy himself, by the means he deems appropriate, that all payments made by the board are justified by properly substantiated vouchers and are not illegal. The only accounts that he is required to keep for these activities are the budgetary accounts required by Ch. 129, F. S. For a proprietary function, the accounts required for budgetary purposes could be comparatively simple and need not be in greater detail than prescribed by the comptroller. These accounts should be "control accounts", but do not necessarily include the detail necessary in the accounts kept for management purposes.

This answers the question as definitely as is possible.

056-171—June 12, 1956

TAXATION

OCCUPATIONAL LICENSES FOR RESTAURANTS—PLACES SERVING HEATED SANDWICHES—§§205.34, 509.271 AND 509.241(2), F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Is an occupational license under §205.34, F. S., required of a place that sells packaged sandwiches after warming them in an oven and that is licensed by the hotel and restaurant commission?

It is assumed that the sandwiches in question are prepared and sealed in their packages at the factory; that the sealed sandwiches are warmed and delivered to the customer in the same package; and that there is no other aspect of the operation of the place in question which would require it to obtain a license under §205.34, F. S., or §509.241(2), F. S.

Section 205.34, F. S., provides in part as follows: "Every person engaged in the business of operating a restaurant, cafe, or other public eating place (whether operated in conjunction with some other line of business or not, except dining rooms in hotels) shall pay a license tax based on the number of people for whom he has seats or accommodations for the serving of food at any one time . . ."

The words "other public eating place" take color from the preceding words "restaurant" and "cafe" and mean some place that is primarily known as an eating place similar to a cafe or restaurant even though it is operated in conjunction with a bus station, a department store, a factory, a drug store, or some other type of business. This law does not require that every place where the public can buy and eat food should obtain an occupational license as a restaurant. Places that offer candy, cold drinks, and wrapped sandwiches, whether heated or not, are not sufficiently similar to cafes and restaurants to come within the meaning of §205.34.

Section 509.241(2) requires the securing of a license from the hotel and restaurant commission by all places "where food is regularly prepared and sold for immediate consumption." The terms of this provision are considerably broader than those of §205.34, which apply only to places that are similar to restaurants and cafes. Section 509.271, F. S., provides that "no municipality or county shall originally issue an occupational license to any business coming under the provisions of these chapters until a license has been procured for such business from the hotel and restaurant commissioner." The purpose of this provision is to insure that any establishments, including hotels, which should be licensed by the hotel and restaurant commission will not be given occupational licenses until they have secured the appropriate license from the hotel and restaurant commission. It does not necessarily require that all places licensed by the hotel and restaurant commission must first be licensed under §205.34.

Although the extent of the similarity of a given eating place to a cafe or restaurant is not generally considered here, since it must be determined on the basis of the facts of each situation, it is my opinion that where no other reason exists for requiring a license under §205.34, such a license is not required of a place that merely heats factory-sealed sandwiches and sells them in their wrappers since such a place is not sufficiently similar to a cafe or restaurant to bring it within the meaning of the law; that such a place would not be required to obtain a license under §509.241(2) unless something more was done in preparing the sandwiches than merely heating them in their wrappers; and that the licensing of an establishment by the hotel and restaurant commission does not require it to be licensed also under §205.34.

056-172—June 12, 1956

SHERIFFS

OFFICE EXPENSES—EDUCATIONAL PROGRAMS— §145.02, F. S.

To: *Bryan Willis, State Auditor, Tallahassee*

QUESTIONS:

1. May a sheriff, under §145.02, F. S., charge to the expense of his office expenditures for the cost of booklets, pamphlets, films, radio and television programs, and similar educational and informational materials, designed to promote safety and better law enforcement generally in the public interest, and to prevent or curb crime and juvenile delinquency?

2. May a sheriff, under §145.02, F. S., charge to the expense of his office expenditures for the expenses incurred in connection with sponsorship of auxiliary organizations designed to promote better law enforcement, such as school patrols, junior deputy leagues and similar groups?

"Net income" means the income remaining "... after deducting all reasonable expenditures for salaries of clerks and assistants and for the necessary expenditures for the proper operation of said office." (§145.02, F. S.).

AS TO QUESTION 1:

We held in opinion 055-285, dated Oct. 27, 1955 that reasonable sums might be charged to office expense for the junior deputy program.

Reasonably this might properly be extended to pamphlets, films, radio and television programs, the object of which is to generate public interest in law enforcement, particularly in curbing juvenile delinquency.

Probably no problem in present day law enforcement receives the attention and discussion as does that of juvenile delinquency. In fact, the congress has become so concerned with this nationwide problem that a senate committee has held hearings in many parts of the country on juvenile delinquency seeking information which might possibly lead to enactment of appropriate legislation.

No person could have a more direct interest in combating the juvenile delinquent than the sheriff.

We stated in opinion 055-285, viz:

"Under modern concepts of law enforcement, more and more persons concerned with combating crime are convinced that the proper approach to the problem should be by concentration upon prevention of crime. A sound educational program on crime prevention could share equal importance with good law enforcement."

As in the case of the junior deputy program (055-285) a reasonable amount to provide an educational program can be justified as an incidental item of expense.

As qualified, the question is answered in the affirmative.

AS TO QUESTION 2:

We believe that our opinion 055-285, dated Oct. 27, 1955 answered this question in the affirmative.

056-173—June 13, 1956

TAXATION

STATE LANDS—ASSESSMENT FOR TAXES—VALIDITY OF
TAX SALE CERTIFICATE—§§192.10, 192.21
AND 193.40, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where lands belonging to the state prison farm are assessed in the name of some person, firm or corporation and not to the state or its agency in charge of the said prison farm, and are subsequently sold for taxes and tax sale certificates issued, what is the status of such tax sale certificate and the rights of its purchaser?

Under the constitution, statutes and laws of this state the prison farm being property of the state is not subject to taxation, except to the extent permitted by express statute. Section 192.10, F. S., requires that the board of commissioners of state institutions return the state prison farm, except the 500 acres upon which the prison buildings are located, to the county tax assessor "upon the same basis that similar lands are valued upon the tax books of the county." Upon receiving this return the county tax assessor is required to "enter upon the tax rolls the description and valuations made by the said board, and the county commissioners of said county shall not change or alter such description and valuations." When making such tax returns for the years 1951, 1952 and 1953, an 80-acre tract of the said prison farm was omitted by the said board of commissioners of state institutions; consequently, the said 80-acre tract was assessed to the former owner, the taxes assessed were not paid, and the lands were sold for taxes and tax sale certificates issued therefor. These certificates have passed into the hands of private ownership.

The assessment in question not having been made in the manner provided by §192.10, F. S., for the assessment of prison farm lands, and the lands being state property, may be questionable; however, should we treat the assessment as having been made according to the said statute, we doubt that the lands assessed (under the provisions of said §192.10, F. S.), may be sold for taxes and tax sale certificates issued thereon. The supreme court of this state, in *State v. Caldwell*, 160 Fla. 355, 35 So. 2d 642, text 646, quoted with approval from Page and Jones on *Taxation by Assessment*, as follows: "Property owned by a county, and held

for public purposes, cannot be sold to satisfy the lien of an assessment. Payment of such assessment is to be enforced by proceedings in mandamus, to compel the officers of a county to pay the amount of the assessment out of county funds . . ." and then remarked that "since it is not likely that the ordinary processes for the enforcement of taxation against public lands is available, mandamus is the proper method of enforcing payment when such lands are subject to taxation." To the same effect see also *Hunt v. Everglades Drainage Dist.*, 160 Fla. 955, 37 So. 2d 534, text 535. In the light of these authorities we feel that the tax sale certificates are void and constitute no lien against the state lands assessed.

We further feel that the tax assessor, tax collector, and other taxing officials have, under §192.21, F. S., the power and authority to correct the assessment of the prison farm lands and when such corrections are made the board of commissioners will have, under said §192.10, F. S., to pay the taxes assessed as other prison farm lands were assessed. The effect of the purchase was the payment by the purchaser of a "payment when no tax was due," which payment may be refunded to him in accordance with §193.40, F. S. These observations seem to answer the above question.

056-174—June 14, 1956

PUBLIC HEALTH

COUNTY HEALTH UNITS—SALARIES OF PERSONNEL— EFFECT OF SPECIAL, LOCAL AND POPULATION ACTS—§§216.171, 282.01 (CH. 29966, 1955), CH. 154, F. S., CH. 30266, 1955

To: *State Budget Commission, Tallahassee*

QUESTIONS:

1. Are the personnel of county public health units, established pursuant to Ch. 154, F. S., state or county employees?

2. Do special, local and population acts (such as Ch. 30266, 1955) authorizing the boards of county commissioners to fix the salaries of county health officers, repeal or otherwise affect §154.04, F. S.?

3. Do special, local and population acts (such as Ch. 30266 above) authorizing the boards of county commissioners to fix the salaries of county health officers, repeal or otherwise affect §216.171(3), F. S., and §10, Ch. 29966, 1955?

4. May a board of county commissioners, by resolution duly adopted appropriate moneys received for certified copies of birth and death certificates filed in their county, or earmark such moneys, for use in paying salaries of county health officers and other county health unit personnel?

County health unit personnel as state or county employees.— In order to properly answer the questions posed by you (the 2nd, 3rd and 4th) it will be necessary that we determine the status of employment of the personnel of the county public health units (1st question posed by us). There seems to be some difference between the present county public health units (Ch. 154, F. S.), and the county boards of health appointed by the governor under §§786-800, R. S., 1892, which appear to have been repealed prior to the adoption of the General Statutes, 1906. Chapter 154, F. S., is executed, not by public officers appointed by the governor or elected as was provided by the Revised Statutes, 1892, but by employees employed as provided in and by said Ch. 154, F. S. "The several counties of the state . . . may cooperate with the state board of health in the establishment and maintenance of full-time local health units in such counties." (§154.01, F. S.). The title to Ch. 14906, 1931, which was compiled into the Florida Statutes as Ch. 154, F. S., indicates that one of the purposes of said enactment was to "authorize counties of the state to cooperate with the state board of health in the establishment and maintenance, *by the state board of health*, of full-time local health units therein." (Emphasis supplied.) This provision indicates the establishment of county health units *by the state board of health*, the county cooperating. Section 154.04, F. S., provides that the director and other personnel of a county public health unit "shall be employed by the board of county commissioners; provided, however, that no such personnel shall be employed by the board of county commissioners unless such personnel shall be approved by the state health officer. The duties and compensation of said personnel shall be fixed and determined by the state board of health upon the approval of the board of county commissioners." Counties having public health units are authorized to levy an ad valorem tax on the taxable property in the county, which tax "shall be expended *by the state board of health* solely for the purpose of carrying out the intent and object of" Ch. 154, F. S., in such county (§154.02, F. S.). The state board is required to furnish the county commissioners with "a semi-annual financial statement of the disbursement" of such tax funds.

In addition to the county tax aforesaid appropriations are made by the legislature from the general revenue fund of the state to assist in the operation of such county health units (See item 22, §282.01, F. S., 1955, and pp. 235-262 of the state budget commission's 1955 report to the state legislature).

An allocation of such funds by counties is indicated in the above mentioned report to the legislature. The county funds and the state funds allocated to the county become a fund in the state treasury for the payment, by state warrant, of the expenses of operation of the county public health unit. The county tax must be expended in the county raising them by taxation and may not be expended in other counties. The following decisions by our supreme court bear upon the nature and duties of such county public health units: In *State v. Florida State Improvement Commission*, Fla., 48 So. 2d 165, text 167, it was contended that "the duty of looking after public health is a state rather than a county function," which contention was answered by the court when it

stated that there was no merit to such contention and "it is true, that we have a state board of health with which the county board articulates but the duty is on the county board to administer the local health laws and regulations." In *Whisnant v. Stringfellow*, Fla., 50 So. 2d 885, the court remarked that "a county health unit is the source of benefits to all the people of the county. It is in fact, as much 'a current governmental need' and 'as essential to the public welfare as police protection, education and other functions of local government.'" At their election two or more counties may agree to combine in the establishment of a single local health unit for the agreeing counties (§154.05, F. S.).

In the light of the above statutes and authorities we feel that county public health units are state agencies operated by the state board of health in cooperation with the boards of county commissioners. The personnel of such public health units are, for the purposes of §216.171, F. S., and §10, Ch. 29966, 1955, state employees, or employees of a department or branch of the state government.

Effect of special, local or population acts on §154.04, F. S.—In your request for opinion you use Ch. 30266, 1955, as an example of the class of acts coming within the purview of our 2nd and 3rd questions, your 1st and 2nd questions. This act provides that boards of county commissioners in counties "having a population of not less than 60,000 and not more than 80,000 inhabitants according to the last preceding federal census" may "fix the salary of the director of the county health unit in said counties" within certain limitations not here material, such salaries to be paid "out of funds provided for in the budget of said county's health unit." Volusia county appears to be within the populations mentioned in the said enactment, so that the act, if valid, seems to be applicable to it. Such acts, if valid, would seem to repeal the provisions of §154.04, F. S., which require that the compensation of the personnel (which includes the county health officer) of county public health units "shall be fixed and determined by the state board of health upon the approval of the board of county commissioners." The question of the validity of special, local and population acts will be hereinafter further considered.

Effect of special, local or population acts on §216.171, F. S., etc.—Chapter 30266, above mentioned, is likewise used as an example of the class of acts embraced within our 3rd above question (your 2nd question) in the request for opinion. Section 216.171(3), F. S., and §10, Ch. 29966, 1955, (the 1955-57 biennial appropriations act) are substantially the same, if not identical provisions, except that said §10 of Ch. 29966 will expire June 30, 1957. Chapter 30266 became a law and was effective from and after June 3, 1955; Ch. 29966 became a law on June 23, 1955, and was effective from and after July 1, 1955. This being true, if there is any conflict between said Ch. 29966 and Ch. 30266, Ch. 29966 will control to the extent of the conflict. Section 10 of said Ch. 29966 provides that no salary or other compensation may be paid a state employee or the employee of any department or branch of the state government without the approval of at least 5 members of the state budget commission, unless otherwise expressly provided by law. This section of said Ch. 29966 is applicable to any salaries established

or provided by Ch. 30266, and such salaries must be approved by the state budget commission as provided by said §10 if in excess of \$10,000 per annum. This conclusion as to Ch. 30266 may, or may not, be applicable to other special, local or population acts, depending upon their effective dates and extent of conflict with said §10 of Ch. 29966.

Constitutionality of Ch. 30266 and similar laws.—The attorneys general, past and present, have for many years refrained from passing upon and rendering opinions as to the constitutionality of acts of the legislature; this being true we express no opinion as to the constitutionality of Ch. 30266 and like and similar acts based upon population, and the possible application of §21, Art. III, State Const., to such acts. It is suggested that any interested person examine *Re Rouse*, Fla., 66 So. 2d 42; *State v. Gay*, 159 Fla. 622, 32 So. 2d 282; *State v. Lee*, 146 Fla. 385, 1 So. 2d 193; *State v. Lee*, 146 Fla. 367, 200 So. 909; *Waybright v. Duval County*, 142 Fla. 875, 196 So. 430; *Sivert Co. v. State*, 136 Fla. 179, 186 So. 671; *State v. Foley*, 132 Fla. 595, 182 So. 195; *Barrow v. Smith*, 119 Fla. 468, 158 So. 818; and other cases upon the same question.

Resolution of board of county commissioners.—We find in your file, handed us with the request for opinion, copy of a resolution passed, on Aug. 4, 1955, by the board of county commissioners for Volusia county, fixing the salary of the county health officer for Volusia county at \$13,200 per annum (evidently pursuant to Ch. 30266, 1955). We find another resolution passed by the same board on May 17, 1956, which refers to salaries for county health officers up to \$15,000 per annum; however, we do not construe it as fixing the salary of the county health officer of Volusia county at that figure, but merely as attempting to appropriate \$2,000 of the moneys received from certified copies of birth and death certificates filed in Volusia county. Although the state health officer, by letter of May 28, 1956, appears to have requested a salary of \$15,000 per annum for the county health officer for Volusia county, we find nothing in the file indicating that such salary has been fixed at that amount by the board of county commissioners or jointly by the board of county commissioners and the state board of health.

Funds received for certified copies of death and birth certificates.—We come now to the authority of the board of county commissioners of any county to allocate or appropriate funds received for certified copies of death and birth certificates. Under the provisions of subsection (3) of §382.35, F. S., "certified copies of the original birth certificates or any new or amendatory certificate . . . shall be issued only by the state registrar . . ." and under subsection (5) "the state registrar shall upon request of any person having a proper interest therein supply a certified copy of all or any part of any marriage, divorce or death certificate . . ." Under subsection (7) of said section "the state registrar shall be entitled to fees as follows:" Under subsection (8) of said section all fees required under the said section are required to be paid into the general revenue fund of the state. We find nothing in the statutes giving the county any interest in fees received under Ch. 382, F. S., for certified copies of death and birth certificates.

In the light of the above statutes, laws, authorities and observations the above questions are answered as follows:

1. The personnel of county public health units, including the county health officer, are state employees or employees of a department or branch of the state government created by statute.

2. Although special, local or population acts, if valid, may supersede or limit the application of §154.04, F. S., and permit the fixing of salaries otherwise than as provided in said §154.04, F. S., §10 of Ch. 29966, 1955, would be probably applicable (until July 1, 1957) to salaries in excess of \$10,000 per annum.

3. Although §216.171(3), F. S., may be prior and subject to the special, local and population acts mentioned in the 3rd above question, it does not follow as a matter of course that §10 of Ch. 29966, 1955, is likewise prior and subject to such acts. Said §10 is subsequent and superior to Ch. 30266, 1955, and other like and similar acts which became laws prior to June 23, 1955.

4. The 4th above question is answered in the negative, in the absence of some act of the legislature expressly providing otherwise.

056-175—June 20, 1956

WELFARE

DISTRICT WELFARE BOARDS—QUORUM—§§409.08-409.10,
F. S.

To: *Charles G. Lavin, Director Public Welfare, Jacksonville*

QUESTION:

Does a simple majority present at a regularly called meeting of a district welfare board constitute a quorum for the purpose of transacting official business?

In my opinion the answer to your question should be in the affirmative.

The statutes providing for the creation, membership and function of district welfare boards are silent in respect to the number of members required to be present to constitute a quorum for the official conduct of business at a regularly called meeting (§§409.08-409.10, F. S.).

The common law rule that a simple majority is sufficient to constitute a quorum for the official conduct of a board prevails in the absence of a statutory provision to the contrary (*Scott v. State*, 106 Fla. 275, 143 So. 249; *Gaskins v. Jones*, 18 S. E. 2d 454, 198 S. C. 508; *Hill v. Ponder*, 19 S. E. 2d 5, 221 N. C. 58; cf. 1 Fla.

Your question is answered accordingly.

Jur. Administrative Law §75).

056-176—June 20, 1956

RETIREMENT

STATE AND COUNTY OFFICERS AND EMPLOYEES
RETIREMENT SYSTEM—OKALOOSA COUNTY
GAS DISTRICT—CH. 29334, 1953*To: Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are the full-time officers and employees of the Okaloosa county gas district required to be members of the state and county officers and employees retirement system?

The said gas district was created and established by Ch. 29334, 1953; at the time the said district was established its members were the municipalities of Crestview, Fort Walton, Niceville and Valparaiso. However, the said act further provided that "other municipalities in Okaloosa county may become members of the district by filing with the secretary of state of Florida" resolutions declaring their desire and intention of becoming members. The board of directors of the district is composed of persons appointed by the governing body of the member municipalities.

A careful reading of said Ch. 29334 indicates that the district was designed as an agency of the member municipalities, in the nature of a corporation whose members are the member municipalities. The district is denied powers of ad valorem taxation (§13 of said Ch. 29334). Any unneeded surplus funds may be divided among the member municipalities (§18 of said act).

Officers and employees of municipal corporations in this state have not been deemed to be within the purview of the state and county officers and employees retirement system, although for some purposes agencies of the state (37 Am. Jur. 620, §4; 62 C. J. S. 69, §3; *Loeb v. City of Jacksonville*, 101 Fla. 429, 134 So. 205, text 207). The above gas district is more an agency of the member municipalities than an agency of the state.

The above question is, therefore, answered in the negative.

056-177—June 20, 1956

TAXATION

LICENSES AND LICENSE TAXES—§205.53, F. S., APPLICABILITY TO OUT-OF-STATE NEWSPAPERS AND MAGAZINES SOLICITING ADVERTISEMENTS

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where a newspaper or magazine, published and having its principal office and place of business in another state, maintains in this state an office and agents

and solicitors for the purpose of selling advertisements in such newspapers and magazines, is the publisher of such newspaper, its agents or solicitors, subject to taxation in this state under §205.53, F. S.?

Section 205.53, F. S., requires "every person engaged in any business as owner, agent or otherwise, that performs some service for the public in return for a consideration" to pay a license tax as therein provided. Should we admit that the printing of advertisements for the public is a public service within the purview of said §205.53, we must determine whether contracts for the printing of such advertisements are part and parcel of the printing itself. This leads to the question of whether contracts for the placing of advertisements in newspapers and magazines are a part of the printing and publication of the newspaper or magazine.

Blumenstock Brothers Advertising Agency v. Curtis Publishing Company, 252 U. S. 436, 40 S. Ct. 385, 64 L. Ed. 649, involved an action under the Clayton act based upon the refusal of the publishing company to accept and print advertisements for the advertising company and its clients, which refusal the advertising company claimed involved interstate commerce, but concerning which the court said that "there is no ground for claiming that the transactions (refusal to accept contracts for advertising) which are the basis for the present suit, concerning advertisements in journals to be *subsequently* distributed in interstate commerce, are contracts which directly affect such commerce." News, newspapers and magazines may be items of interstate commerce (15 C. J. S. 277, §17, Note 99; United States v. Shubert, 348 U. S. 222, 75 S. Ct. 277, 99 L. Ed. 279; Associated Press v. United States, 326 U. S. 1, 65 S. Ct. 254, 89 L. Ed. 2013). The court, therefore, draws a sharp distinction between contracts for advertising and printing in newspapers and magazines, and the printing, publication and distribution of such newspapers and magazines, containing the printing and advertisements contracted for, in interstate commerce. We are, therefore, in doubt that such contracts are within the purview of §205.53, F. S.

There is authority that where a person, firm or corporation of one state sends agents and solicitors into another state for the purpose of obtaining contracts for advertising, that such person, firm or corporation is doing business in the state where the applications are procured only when the agent or solicitor, or some other authorized person, has authority to and does accept the said application in this state and gives rise to a binding contract; where the applications must be sent into another state for acceptance or rejection, such person, firm or corporation is not doing business in this state (Annotation in 38 A. L. R. 2d 748-764).

It is indicated from the file that the contention has been made that the rule announced in *Myers v. City of Miami*, 100 Fla. 1537, 131 So. 375, relative to burdens on interstate commerce under the federal constitution, applies only to the sale of tangible personal property. This contention is not supported by the authorities. See 15 C. J. S. 276-279, §17, from which it appears that interstate commerce has been held to involve intangible personal property and many other items and things.

The above question must, therefore, be answered in the negative. We do not pass upon the question of the application of other sections of Ch. 205, F. S., in case the applications for printing and advertising is finally accepted so as to become binding contracts in this state, as such question would depend upon facts not before us.

056-178—June 20, 1956

COMPENSATION OF COUNTY OFFICIALS

ALLOWABLE EXPENSES WHEN ATTENDING ASSOCIATION MEETINGS WITHIN AND WITHOUT THE STATE—

§§145.02, 145.05 and 145.07, F. S.

To: *Bryan Willis, State Auditor, Tallahassee*

QUESTIONS:

1. Are the reasonable expenses of a county judge incurred in attending a meeting of the Florida Bar allowable as an expense of his office?

2. Are the reasonable expenses of a county fee officer when attending meetings of his county officers' association held outside of the state or in a foreign country allowable as an expense of his office?

It is "well settled in this state that fees collected by officers represent the charge which the state makes for services rendered by it through its officers, and constitute a fund subject to the control of the state and to be applied as the Legislature directs." (*State v. Spencer*, 81 Fla. 211, 87 So. 634, text 635; *Flood v. State*, 100 Fla. 70, 129 So. 861, text 864; *Sweat v. Waldon*, 123 Fla. 478, 167 So. 363, text 364-5). The "net income" of county officers is "the residue of the income from such office after deducting all reasonable expenditures for the salaries of clerks and assistants and the necessary expenditures for the proper operation of said office." (§145.02, Florida Statutes). County officers, with certain exceptions not here material, receive the said net income of their offices "not to exceed \$7,500" per year (§145.01, F. S.). Fees in excess of the amount necessary to pay the salaries of clerks and assistants and the necessary expenditures for the proper operation of such offices, and the compensation of the officer, are payable to the county and become county funds (§§145.05 and 145.07, F. S.) and an officer retaining sums in excess of the compensation allowed him by law is guilty of embezzlement (*Martin v. Karel*, 106 Fla. 363, 143 So. 317).

We, therefore, come to the question of whether the expenses of county officers incurred in attending the meetings mentioned in the above questions are "necessary expenditures for the proper operation of said offices." Before the said expenses incurred in attending the meetings mentioned in said questions may be paid they must be within the phrase "necessary expenditures for the proper operation of said offices." The case of *Adams v. Lott*, 112 Fla. 489, 150 So. 596, is authority for paying the expenses from public funds of county officers traveling beyond their county on business necessary or proper for the administration of county af-

fairs and business. It was held in *State v. Lee*, 113 Fla. 40, 151 So. 491, that the necessary expenses incurred by a state attorney in the performance of the duties of office imposed upon him by statute was a necessary and regular expense of the office and might be paid from public funds when authorized by statute. We, therefore, conclude that any expense incurred by a county officer in the performance of his official duties is a necessary and proper expenditure for the proper operation of his office. Neither I nor my predecessors have had any difficulty in approving expenses incurred by county officers in their attendance of the regular scheduled meetings of their respective county office associations held within the state since it has been well accepted that these meetings serve the purpose of affording discussions of the duties and operation of the respective offices of the members and thereby contribute to the uniform and efficient administration of such offices. See AGO 052-244, 053-268, 055-285 and former opinions cited therein.

However, the attendance of county officers to their association meetings outside of the state or in a foreign country and other meetings, such as the county judge attending Florida Bar meetings, may or may not be beneficial to the county, depending largely upon the nature of such meetings and the problems considered and studied. If the meeting is a mere social function, little, if any, benefit will flow to the county by reason of the attendance of county officers; other types of meetings may or may not be beneficial, depending on their nature and problem studied and considered. We do not think that it follows as a matter of law that the attendance of county officers at such meetings is ipso facto beneficial to the county; but before such expenses may be paid from public funds there must be a showing made by the officer, claiming expenses from public funds, of benefits flowing to the county by reason of his having attended such a meeting. This showing may be evidenced by the officer's affidavit or other satisfactory proof.

These observations furnish a formula for the determination of the above two questions in each individual case.

056-179—June 22, 1956

TREASURER

DEPOSIT OF STATE FUNDS—PLEDGED SECURITIES FOR DEPOSITS—§§18.10, 18.11, 344.03, 344.12, 344.17 AND 344.171 F. S., §16, ART. IX, STATE CONST.

To: *J. Edwin Larson, State Treasurer, Tallahassee*

QUESTION:

May collateral security for deposits of funds be pledged by a bank jointly to the state treasurer for deposit of state funds and to the state treasurer as treasurer of state board of administration and county treasurer ex officio to secure deposits of funds in that capacity, under conditions whereby the same bonds could be considered as collateral to secure either or both of said accounts?

The governor, comptroller and state treasurer may deposit moneys of the state, or any other moneys of which either of said state officials is designated by law as custodian, in such banks of the state as will offer satisfactory inducement as to security (§18.10, F. S.). The security to be given by such banks so designated shall consist of bonds of the U. S., bonds of the several states, county and municipal bonds, and county or county school time warrants, issued by any one of the counties or cities of the state of the value thereof as may be agreed to by the governor, comptroller and treasurer (§18.11(1), F. S.). In lieu of the actual depositing of said securities, "the state treasurer may accept a safekeeping receipt issued by any federal reserve bank, or member bank thereof or by any bank incorporated under the laws of the U. S., therefor, provided the member bank or bank incorporated under the laws of the U. S. shall have been previously approved and accepted for such purposes by the governor, comptroller and treasurer."

The constitutional state board of administration was created by §16, Art. IX, Fla. Const.; it consists of the governor, as chairman, state treasurer and state comptroller; it is provided that said board is a body corporate and that it succeeded to all the powers, control and authority of the statutory board of administration; and that the board should have the additional powers specified. The statutory board of administration was originally created by Ch. 14486, 1929, (§344.12, F. S.), the board consisting "of the governor, who shall be president; the state comptroller, who shall be secretary; and the state treasurer, who shall be treasurer." In connection with the powers and duties of the state board of administration, the state treasurer is designated "county treasurer ex officio." (§344.03, F. S.).

All moneys received by the state treasurer as county treasurer ex officio "shall be deposited by him in a solvent bank or banks, to be approved by the board of administration;" that he "shall follow the method for the deposit of state funds and the procurement of the best rate of interest possible in the manner now provided by law;" that each bank "receiving any portion of said deposits shall be required to deposit with the state treasurer satisfactory bonds or treasury certificates of the U. S. or special tax school district bonds, or bonds of any municipality eligible to secure state deposits as now provided by law, or bonds of any county or special road and bridge district of the state entitled to participate under this chapter, which shall be equal to the amount deposited with said bank" (§344.17, F. S.). The treasurer of the board as county treasurer ex officio may accept in lieu of the actual depositing with him of such securities a safe-keeping receipt "issued by any federal reserve bank, or member thereof, or by any bank incorporated under the laws of the U. S.; provided, however, that the member bank or bank incorporated under the laws of the U. S. shall have been previously approved and accepted for such purposes by the state board of administration; and provided further that said trust or safe keeping receipt shall be in substantially the same form as that which the state treasurer is authorized to accept in lieu of securities given to secure deposits of other state funds" (§344.171, F. S.).

It is to be observed that there is involved in each instance (i.e., deposit of state funds and deposit of funds in the hands of the treasurer of the state board of administration as county treasurer *ex officio*) the governor, comptroller and state treasurer; but it must be borne in mind that as to the latter funds they function as the corporate state board of administration.

In my opinion, the above question is answered in the affirmative, conditioned as follows: That with respect to the designation of such a bank, the character of securities pledged to secure deposits, value of such securities, and approval (if required) of a bank which may issue such a safekeeping receipt, on the one hand the governor, comptroller and state treasurer shall meet the full requirements of §§18.10 and 18.11 F. S., in relation to deposits of moneys of the state, within the contemplation of said sections, and on the other hand, said state officers functioning as members of the corporate state board of administration shall meet the full requirements of §§344.17 and 344.171, F. S., in relation to those moneys contemplated by said sections.

056-180—June 22, 1956

TAXATION

EXEMPTIONS—MUNICIPAL HOUSING PROJECT, LEASING SPACE TO COUNCIL FOR BLIND—CHS. 421, 423, F. S.; §§409.17, AND 409.26, F. S.; §1, ART. IX AND §16, ART. XVI, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Does the leasing of space in a municipal housing project, by the housing authority of such municipality, to the council for the blind, cause the property of said housing authority to be subject to ad valorem taxation?

Chapter 423, F. S., declares that public housing projects existing under Ch. 421, F. S., exist "exclusively for public uses and municipal purposes and are not for profit, and are governmental functions for state concern." As a matter of legislative determination, it was found and declared by the legislature (§423.01, F. S.), that "the property and debentures of a housing authority are of such character as may be exempt from taxation."

The tax exemption provisions of Ch. 423, F. S., have been upheld by the court (*Garrett v. Northwest Florida Regional Housing Authority*, 152 Fla. 551, 12 So. 2d 448; *Grubstein v. Cambell*, 146 Fla. 532, 1 So. 2d 483; *Smith v. Housing Authority of Daytona Beach*, 148 Fla. 195, 3 So. 2d 880). Chapter 423, F. S., is based upon §1, Article IX, and §16, Article XVI, State Const., and presumes that before it is applicable that the property will be used for some "religious, scientific, municipal, educational, literary or charitable purposes."

One of the functions of the state department of public welfare (Ch. 409, F. S.), is to render aid to the blind (§409.17, F. S.). To aid and assist the said department of public welfare in ren-

dering aid to the blind, the legislature established an administrative governing board, known as the "Florida Council for the Blind." (§409.26, F. S.). This administrative agency performs many governmental functions, as will more fully appear by reference to §§409.26, et seq., F. S. The rental of space in housing projects, existing under and by virtue of Ch. 421, F. S., is for a state or municipal purpose, when to an agency of the state, such as the council for the blind.

The above question is answered in the negative.

056-181—June 22, 1956

PER DIEM AND TRAVEL EXPENSES

FLORIDA WATER RESOURCES STUDY COMMISSION—APPROPRIATION—PROVISION—CH. 29748, 1955

To: *Florida Water Resources Study Commission, Gainesville*

QUESTION:

May the per diem and travel expenses of persons not directly employed by the commission be paid from the appropriations of the Florida water resources study commission when incurred in obtaining data and information for the commission?

Ch. 29748, 1955, set up the Florida water resources study commission, in the nature of a legislative interim committee to study the water resources and needs of the state and determine whether legislation upon the question is needed or advisable, and if so, make recommendations in that connection to the next regular session of the legislature.

The study authorized by the statute is to be made by the commission in cooperation with the state geologist, with all other state agencies cooperating and furnishing such information as they may have. The commission is directed to consult industrial, municipal and recreational interests of the state in this connection and obtain from them any possible assistance. "The water resources study commission is authorized to engage technical and clerical assistance, purchase supplies and equipment, authorize traveling expenses and make such other expenditures as may be necessary or desirable in making the study and report."

The above statute is broad enough to and does authorize the commission to obtain needed information through employees and agents and to pay the traveling expenses of such employees and agents. In this connection persons may be appointed or authorized to obtain needed information and data, although not employees of the commission but as agents. Agents obtaining information and data for the commission, including those working without compensation from the commission, may be paid their traveling expenses from the appropriation in said Ch. 29748.

056-182—June 25, 1956

LABOR

UNEMPLOYMENT COMPENSATION—SUPPLEMENT BENE-
FIT PLANS—CH. 443, F. S.*To: Florida Industrial Commission, Tallahassee*

QUESTIONS:

1. Will the receipt of benefits contemplated by the so-called guaranteed annual wage plans of the automobile industry and steel industry, which make provision for payment of supplemental unemployment benefits to certain employees, reduce or prevent the receipt by such employees, while unemployed and otherwise eligible, of benefits under the Florida unemployment compensation law (Ch. 443, F. S.)?

2. Are contributions due the Florida unemployment compensation fund with respect to the moneys paid into the funds established by the supplemental benefit agreements?

In connection with the request for opinion, copies of the following were delivered to this office: Opinion of the general counsel of the commission concerning the above questions, dated March 2, 1956; supplemental unemployment benefit plan of Aug. 13, 1955, entered into between American Can Co. and United Steel Workers of America; summary of provisions of such a plan entered into by the Ford Motor Co. and General Motors Corp.; opinions of the attorneys general of the states of Washington, Massachusetts, Michigan, California and Pennsylvania.

Attached hereto is a copy of the described opinion of the general counsel of the commission. We agree with the conclusions set forth therein. That opinion sufficiently describes these plans, relevant provisions thereof, and their general application and operation; distinguishes between "wages" as defined in §443.03(13), F. S., and supplemental benefits payable under these plans; and in effect further points out that under the provisions of Ch. 443, F. S., unemployment benefits payable thereunder may be affected or reduced only by receipt of wages or workmen's compensation for temporary partial disability. It would be highly repetitious to labor the questions further in this opinion, other than to point out certain findings by our supreme court which are relevant and support the reasoning and conclusions set forth in said opinion.

In *Gentile Bros. Co. v. Florida Industrial Commission, et al.*, Fla. 18 So. 2d 568, the court pointed out that courts in certain jurisdictions have disregarded "common law master-servant precepts in dealing with the question of unemployment compensation and have held such acts to be much broader and more exclusive in their scope"; that on the other hand other courts have held these statutes to be merely declaratory of the common law and that they do not abrogate common law concepts unless such purpose is expressed; that the words in our statute "employment", "employee", "wages", "remuneration", "employing units", and others, are not used in a restricted sense, are to be liberally con-

strued to cover the beneficent purpose of the statute, but at the same time are not to be extended to include employing units not contemplated by the legislature. And again in *Florida Industrial Commission, et al., v. Peninsular Life Ins. Co., Fla., 10 So. 2d 793*, the court referred to the *Gentile* case and more specifically stated what previously they had stated in the latter case, to the effect that the words "employment" and "wages" used in Ch. 443, F. S., do not enlarge upon the common law concept of these words. Hence, it is that the terms "employment", "service", "wages" and "remuneration" as used in said chapter are to be construed in the light of that common law concept mentioned by our court; and quite apparently such has been the construction of the general counsel of the commission in reaching the conclusions he did in his said opinion of April 2, 1956.

By reason of the foregoing, in my opinion each of the two questions is answered in the negative.

056-183—June 26, 1956

**STATE AND COUNTY OFFICERS AND EMPLOYEES
RETIREMENT SYSTEM—MEMBERSHIP—CITIZENS OF
OTHER STATES AND COUNTRIES—CH. 122 AND
§§876.05-876.10, F. S.**

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

May a citizen of another state or country, employed by the state of Florida, or one of its agencies or counties, become a member of the state and county officers and employees retirement system?

"All full time officers or employees who receive compensation for services rendered from state or county funds, . . . or who receive compensation for employment or service from any agency, branch, department, institution or board of the state, or any county of the state, for services rendered . . ." are, for the purposes of the state and county officers and employees retirement system deemed "state and county officers and employees . . ." (§122.02(1), F. S.). We find nothing in Ch. 122, F. S., or in prior chapters 121 and 134, F. S., limiting membership in the state and county officers and employment systems to citizens of Florida, or of the U. S., only.

Although §112.02, F. S., generally requires that residents of the state be employed by the state and the counties and their agencies, it does recognize that under given circumstances non-residents may be employed. This statute does not expressly prohibit the employment of nationals of other countries. This section recognizes that some state and county employees may not be residents or citizens of Florida. It is generally known that there are state and county employees who are not citizens of the state or of the U. S. Some of them intend to become citizens of this country and some do not. In this connection see opinions of this office of June 7, 1949 and July 5, 1949 (049-243 and 294), copies of which are handed you herewith. This brings us to a consideration of

§§876.05, et al., F. S., and their effect on the above question, if any.

Section 876.05, F. S., requires that "all persons who are now or hereafter employed by or who now or hereafter are on the payroll of the state, or any of its departments and agencies, subdivisions, counties, cities, school boards and districts of the public free school system of the state or counties, or institutions of higher learning," take the oath of allegiance prescribed by said section. Although the prescribed oath recites that the person taking the same is "a citizen of the State of Florida and of the United States of America," nowhere in the applicable statutes (§§876.05-876.10, F. S.) do we find any clear intention to repeal said §112.02, F. S. We do not think that it was the intention of §876.05, by the form of oath suggested therein, to limit state employment to citizens of Florida (see opinion of June 7, 1949; 049-243). We see no legal reason why an employee of the state or any of its departments or agencies, or of its subdivisions, counties, etc., may not take the oath of allegiance prescribed by making slight changes therein and using in lieu of the term "citizen" the term "resident" or otherwise as the case may be. The purpose of §876.05 was to insure the loyalty of such employees to Florida and the U. S., and not to require that all such employees be citizens of Florida.

Any employee of the state, whether a citizen or non-citizen, who conscientiously makes the oath prescribed by §876.05, F. S., under the rules above mentioned, may become a member of the state and county officers and employees retirement system of this state. This answers the above question in the affirmative with reservations.

056-184—June 26, 1956

CRIMINAL PROCEDURE

BAIL BONDS—GUARANTEED ARREST BOND CERTIFICATES —§§648.19 AND 903.36, F. S.

To: *LeRoy Collins, Governor of Florida, Tallahassee*

QUESTION:

When automobile club membership cards are offered as bond in lieu of cash, as provided in §§648.19 and 903.36, F. S., is the arresting officer required to enter the bail required and the name of the automobile club on the citation or summons?

In my opinion the answer to the above question should be in the affirmative.

Section 648.19, F. S., among other things, provides that any domestic or foreign surety company qualified to do business in the state may, by following the prescribed procedure, become surety in an amount not to exceed \$200 with respect to any guaranteed arrest bond certificates issued by an automobile club or association.

Section 903.36, F. S., relating to guaranteed arrest bond certificates as cash bail provides as follows:

"Any guaranteed arrest bond certificate with respect to which a surety company has become surety, as provided in §648.19, shall, when posted by the person whose signature appears thereon, *be accepted in lieu of cash bail* in an amount not to exceed \$200, as a bail bond, to guarantee the appearance of such person in any court, including municipal courts, in this state, at such time as may be required by the court, when such person is arrested for violation of any motor vehicle law of this state or ordinance of any municipality in this state (except for the offense of driving while intoxicated or for any felony) . . ." (Emphasis supplied.)

In the words of the above quoted statute, a guaranteed arrest bond is acceptable "in lieu of cash bail" except in the case of a felony or driving while intoxicated. It would appear, therefore, that since the law gives a guaranteed arrest bond certificate the same status as cash money, it should be treated as such when accepted as an appearance bond to answer a citation given for an alleged traffic violation. When such certificate is accepted as a bond, the amount guaranteed should be neither more nor less than if cash money was accepted, inasmuch as such certificate possesses the attributes of cash money for the purpose contemplated.

It is the established policy of the department of public safety to require its highway patrol troopers, when accepting a guaranteed arrest bond certificate, to state the amount of the bail required, together with the name of the automobile club, on the citation given for the alleged violation of a traffic law. It is my opinion that this requirement is not restricted to highway patrol troopers, but also applies to *all* peace officers authorized to accept such certificates when engaged in the enforcement of traffic laws.

Your question is answered accordingly.

056-185—June 28, 1956

STATE OFFICERS AND EMPLOYEES

SALARIES—JURISDICTION OF STATE BUDGET COMMISSION—DIRECTOR, FLORIDA DEVELOPMENT COMMISSION—§§288.01-288.04, 216.171 AND 282.10, F. S.

To: Harry Smith, State Budget Director, Tallahassee

QUESTIONS:

1. Does the state budget commission have any jurisdiction or supervision over the salary or compensation of the director of the Florida development commission?
2. If the 1st question is answered in the affirmative, does §288.04, F. S., fix a limit on the amount of compensation or salary that may be allowed the said director?

The Florida development commission was created and established by Ch. 29788, 1955, consisting of one member from each congressional district and a chairman from the state at large. All

members are state officers appointed by the governor (§§288.01 and 288.02, F. S.). The commission is vested with certain specific powers and duties and the powers formerly exercised by the Florida state improvement commission (§288.03, F. S.). The commission, with the approval of the governor, appoints "a director who shall be executive director of the commission and have general charge of the work of the commission . . . compensation of the director shall be fixed by the commission, *but shall not exceed salaries paid by the state to cabinet officers . . .*" (§288.04 F. S.). (Emphasis supplied.) The director is the secretary of the commission (§288.02(4), F. S.). Sections 288.01-288.11, F. S., were derived from Ch. 29788, 1955, which became a law on June 6, 1955, and took effect on July 1, 1955.

Section 216.171, F. S., (Florida Statutes, 1955, became a law and took effect on April 20, 1955) and §10, Ch. 29966, 1955 (which became a law on June 23, 1955, and took effect on July 1, 1955, and now appears as §282.10, F. S.,) places certain limitations upon the salaries of state officers and employees, where not otherwise expressly fixed by statute, which "*shall not exceed the sum of \$10,000 per annum unless otherwise expressly provided by law; provided, however, where it is deemed necessary and to the best interest of the state, the salary and other compensation for executive and professional personnel may exceed the limitation imposed herein by and with the consent and approval of at least 5 members of the state budget commission, one of whom shall be the governor.*" This limitation is applicable to state officers and employees "or employees of any department or branch of the state government." Section 282.10, F. S., is the later in point of time and will control, during the current biennium, in case of conflict, with other applicable statutes or laws.

The Florida development commission is an agency, branch or department of the state government (State v. Love, 99 Fla. 333, 126 So. 374, text 377; State v. Lee, 150 Fla. 35, 7 So. 2d 110, text 114 and 115; Kennard v. State Tuberculosis Board, 129 Fla. 619, 176 So. 872, text 875), and, therefore, within the purview of said §§216.171 and 282.10, F. S.

Should §288.04, F. S., authorizing the fixing of the salary and compensation of the director of the Florida development commission at a sum not in excess of that of state cabinet officers; and §282.10, F. S., requiring approval by at least 5 members of the state budget commission, one of whom must be the governor, before salaries in excess of \$10,000 per annum may be paid unless expressly fixed by statute, be deemed in conflict so that they may not stand together, then §282.10 is the controlling law. Under §288.04, F. S., the salary and compensation of the director of the Florida development commission may be fixed at not exceeding that of cabinet officers; this is not in conflict with the provisions of §282.10, F. S., requiring the approval of the state budget commission where the salary or compensation exceeds \$10,000.

In the light of the above statutes, authorities and observations the two above questions are each answered in the affirmative.

056-186—June 29, 1956

COURTS

JUDGMENT AND SENTENCE—ASSESSING COURT COSTS
BUT WITHHOLDING THE IMPOSITION OF SENTENCE
—§939.01, F. S.

To: *Gene Williams, Judge, Court of Crimes, Dade County, Miami*
QUESTION:

May costs be assessed against a defendant in a criminal case where the imposition of sentence is withheld without, in effect, entering a sentence so that the necessary jurisdiction to impose a sentence, if necessary at a subsequent term not be lost?

Although many jurisdictions hold that courts do not possess the power to delay the imposition of sentence for crimes, while others hold temporary delays permissible, it has always been the law in this state, except in cases involving the suspension of the imposition of sentence on terms and conditions to be kept or of cases involving probation under the statutes, that the trial judge may at the same or later term impose sentence. See *Ex parte Williams*, 26 Fla. 310, 8 So. 425; *Tanner v. Wiggins*, 54 Fla. 203, 45 So. 459, 14 Ann. Cas. 718; *Carnagio v. State*, 106 Fla. 209, 143 So. 162, *Bronson v. State*, 148 Fla. 188, 3 So. 2d 873; *Pinkney v. State*, 160 Fla. 884, 37 So. 2d 157; 24 C.J.S., §1571, p. 47 et seq.

However, it is also the law in this jurisdiction that a trial judge does not have the power to impose a sentence in portions and where a fine had been imposed under a statute authorizing, in the disjunctive, a fine or imprisonment an order placing the defendant on probation was void from its inception. *Ex parte Bosso*, Fla., 41 So. 2d 322.

The question now becomes whether or not the assessment of court costs is a sentence so as to exclude any further imposition of sentence for the same crime?

Section 939.01, F. S., which states:

"In all cases of conviction for crime the costs of prosecution shall be included and entered up in the judgment rendered against the convicted person."

was enacted in 1846 and has remained unrevised to date.

Whether the term "judgment" as used in §939.01, *supra*, includes the term "sentence" may have posed a problem were it not for the case of *Ex parte Williams*, *supra*, decided in 1890. Therein our Florida supreme court at p. 426, held:

"... and we find no case where a requirement to pay costs, with suspension of further sentence, is treated as a sentence in such sense as to forbid a subsequent sentence imposing the penalty prescribed by law for the offense ... We mean only that the order for the payment of costs did not of itself take away the power of the court to pronounce sentence at a subsequent term (even) when a

different judge was presiding . . ." (Parenthetical expression ours).

However, in *Carnagio v. State*, supra, the Florida supreme court said at p. 164:

"The Williams Case presented facts much more favorable to the defendant than does the case at bar. In this case there was no part of the sentence imposed. In the Williams Case there was a part of the sentence imposed and further sentence was deferred to the next term of the court."

The Carnagio case, affirmed on the authority of *Ex parte Williams*, supra, seemingly went too far as the Williams case distinctly held that the costs therein were not part of the sentence.

As previously mentioned the Bosso case, supra, does not authorize the imposition of a piece-meal sentence and cites as its authority the Carnagio and Williams cases, supra.

We shall not attempt to resolve the above three holdings, but point out that the Williams case stated that the costs and the manner in which they were assessed were not part of the sentence. The Williams case has been approvingly cited for the proposition that the withholding of imposition of sentence in this jurisdiction is permitted, and never once since the 1890 decision has our supreme court overruled the holding that the costs and manner in which they were assessed in the Williams case would prohibit the imposition of sentence at a subsequent time.

Because of the aforesaid; because economic policy must approve the defendant's assumption of court costs which would otherwise come from county funds; and because social and judicial interpretation recognize the inherent or implied powers of the court to mete justice by withholding the imposition of sentence, it is my opinion that after a proper adjudication of guilt has been pronounced the trial court may "withhold the imposition of sentence upon payment of costs."

056-187—July 2, 1956

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS
OWNERSHIP, USE AND CONTROL OF OFFICE EQUIPMENT
PURCHASED UNDER \$145.05, F. S.**

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. Where office equipment is purchased from excess fee funds, as authorized by \$145.05, F. S., for a county office, is the title to such property in the county or the incumbent of the office for which purchased?
2. Who has the use, supervision and control of such office equipment?
3. Where addressograph equipment has been pur-

chased by a county, under said \$145.05, F. S., for use by the tax assessor and tax collector, what are their respective rights and duties?

Section 145.05, F. S., requires that county fee officers pay annually into the excess fee fund of the county the excess fees of their office to be used "for the purpose of equipping, maintaining and supplying such office, from which said money is derived, with the necessary books, furniture, fixtures and all other things now supplied or furnished by the board of county commissioners and paid for by them from the general revenue fund of the county . . ." Any funds in the said excess fee fund not needed for books, furniture, fixtures and other things are required to be paid into the county general fund, including the general county school fund. Prior opinions of this office have adopted the rule that such funds should be used for operating capital outlay purposes and not for current office operating expenses. Current office operating expenses should be paid from the current income of the office and not from the excess fee fund.

Where substantial items of equipment are purchased from the excess fee fund or from county general funds, and we include in this list substantial items of equipment purchased by the officer from the income of his office as an office expense (such purchases should be made by the officer only after having obtained the consent of the board of county commissioners), such items become county property, under the supervision and control of the incumbent of the office for which purchased, and not property of the office or its incumbent for which purchased.

We see no legal reason why items of substantial equipment, needed for the use of two or more county offices, may not be purchased from the excess fee fund, or from the county general fund, for the combined or joint use of such offices. For example, an addressograph may be purchased for the joint use of the tax assessor and the tax collector, to be used by the tax assessor in making up the tax roll and by the tax collector in sending out tax notices. In such a case the equipment would be under the joint control and supervision of the incumbents of the two offices, the control and supervision of neither being superior to the other.

Under the statutes tax assessments of property in this state are made as of Jan. 1 of the tax year (§192.04, F. S.). The question of whether a parcel of property is subject to taxation or entitled to a tax exemption is determined as of that date and not some subsequent date (*Thompson v. City of Key West, Fla.*, 82 So. 2d 749; *Delores Land Corp. v. Hillsborough County, Fla.*, 68 So. 2d 393; *Simpson v. Hirshberg*, 159 Fla. 25, 30 So. 2d 912). The tax assessment being made as of Jan. 1 of the tax year, we see little, if any, need for change of a tax assessment after it is made and completed. The description of the property and the name of its owner and its status as taxable or exempt property is determined as of said Jan. 1 and not some subsequent time, notwithstanding change in ownership. There may be a change in the valuation fixed by the assessor on equalization by the board of equalization. We, therefore, doubt the propriety of a tax assessor making any change in the assessment by reason of change of ownership or residence or post office address of the owner.

Although the assessment is made as of Jan. 1 of the tax year, taxes do not become due and payable until some 10 months later (Nov. 1 of the tax year), during which time ownership of taxable property may change and owners may change residence or post office address. Section 193.45, F. S., requires that the tax collector mail tax notices to taxpayers whose addresses "may be known to him." Although changes of ownership and address of taxpayers are material to the tax collector, they are not to the tax assessor, whose tax rolls should not be changed in this connection, although such a change may not invalidate the tax roll.

In this connection, where the tax assessor and the tax collector make joint use of an addressograph machine, one for assessment purposes and the other for sending out notices, it would seem advisable that the tax collector maintain a supplemental file of ownership and address changes which may be included in the addressograph plates after the completion of the tax rolls by the assessor and when the plates will no longer be used by the tax assessor in connection with the rolls for such tax year. After a tax roll has been completed by the tax assessor, only errors in the roll should be corrected, not changes of ownership or addresses.

Answering the above stated questions: 1. The title to the equipment mentioned in the 1st question is vested in the county, 2. but is under the control and supervision, and for the use, of the officers for whose office purchased, and where purchased for two or more offices, such equipment is under the joint control of such offices. 3. The 3rd question is answered by the last above paragraph hereof.

056-189—July 2, 1956

JURIES

JURY LISTS—OMISSION OF NAMES OF CERTAIN CLASSES OF PERSONS NOT EXEMPT BY STATUTE—COMMERCIAL AIR LINE PILOTS

To: *E. B. Leatherman, Clerk Circuit Court, Dade County, Miami*
QUESTION:

Where the statutes do not exempt commercial air line pilots from jury service, may the names of such pilots who possess the required qualifications for jury service lawfully be omitted from jury lists by the jury commissioners or county commissioners preparing the lists, upon the bona fide ground that the business of such pilots is such that it is probable that they would be excused from jury service on application to the judge?

In 50 Corpus Juris Secundum 884, Jury, §159-a, it is said:

"It has been held not necessary to include in the jury list every person possessing qualifications for jury service, and the commissioners, in the exercise of their discretion, may omit from the jury list all persons exempt by law, as well as those whose business or avocation is such that it is reasonably probable that an excuse from jury service would be granted, such as lawyers, ministers, doctors, etc." (Emphasis supplied.)

In 31 Am. Juris. 618, Jury, §85, we find the following statement:

"Any arbitrary exclusion from, or in, jury selection of an eligible class of persons on grounds of occupation is unconstitutional, but the exclusion in the selection of persons for jury service of classes such as lawyers, ministers, doctors, dentists, and railway engineers and firemen, such exclusion not being the result of race or class prejudice, especially where persons so excluded could claim exemption or probably be excused, is of old standing, not uncommon in the United States, and not a ground for challenge to, or motion to quash, the array, and there is nothing in the Fourteenth Amendment to prevent it."

A leading case on this point is *Rawlins et al. v. State* (Ga.), 52 S. E. 1. That case shows that under the laws of Georgia the jury commissioners were limited to the names appearing upon the books of the tax receiver and the jury commissioners were required to select from the names there appearing upright and intelligent men to serve as jurors, and from the number so selected they were required to select not exceeding 2/5 of the most experienced, intelligent and upright men to serve as grand jurors. Rawlins and his co-defendants, on trial for murder, challenged the legality of the grand jury and of the petit jury upon the ground that the jury commissioners had arbitrarily excluded from said juries all lawyers, ministers, doctors, dentists, railroad engineers and firemen, there being 10 or other large number of each class in the county who were citizens and residents possessing the qualifications required by law for jurors. All of the persons thus excluded from the jury box were either entitled under the laws of Georgia to claim an exemption from jury service or their business was of such a character that it was reasonably certain that the judge would excuse them from service upon their application for such excuse. The defendants' said challenges were overruled and, upon appeal, the supreme court of Georgia upheld the ruling and in so doing said in part:

"The jury commissioners should not omit from the jury list persons possessing the qualifications required by law, unless in their opinion the omission of such persons as a class would tend to facilitate the business of the courts. Persons possessing the qualifications required by law should not be excluded because they form a class of persons holding to a particular religious belief, or belonging to a particular political party or society, or because they entertain views, on any matter not affecting the good order of the community or the preservation of the public morals, different from the larger number of the community in which they live. *But if there is a class of persons, some of whom possess the qualifications required and others do not, whose business or avocation is such that they are all entitled under the law to claim an exemption from jury service, or who would probably be excused from jury service on application to the judge, the omission of the entire class from the jury list would not be an abuse of discretion on the part of the commissioners; such exclusion being calculated to facilitate the business of*

the court and avoid the delay incident to the summoning of jurors to take the place of jurors excused from service.

"All of the classes that were alleged to have been excluded from the jury box in the present case belonged to either one or the other of the classes above referred to. They were either exempt, or their business was of such a character that it was reasonably certain that the judge would excuse them from service. There was no averment in the challenge that the exclusion was due to fraud, or any improper motive. There was no suggestion that either the grand or traverse jurors drawn for service did not possess the qualifications required by law. There was no objection to any of the jurors that were on either list. The sole objection was that the list was deficient in number.

* * * * *

"... we think it clear that where the law reposes in a body of public officers the selection of persons of given qualifications for service as jurors, and there is no charge of fraud or purpose to prejudice the rights of the parties on trial, and no objection to any of the jurors thus selected, a challenge to the array should not be sustained merely for the reason that there were other jurors possessing the qualifications required who might have been added to the list if the commissioners had seen proper to include them.

* * * * *

"There was nothing in the action of the jury commissioners complained of which was in violation of any provision of the Constitution or any statute of this state, nor is there anything in the statute providing for the creation of the board of jury commissioners and prescribing its duty which could be held a denial of due process of law or of the equal protection of the laws, or an abridgment of the privileges and immunities of a citizen, within the meaning of the different provisions of the Constitution of the United States." (Emphasis supplied.)

Rawlins and his co-defendants appealed to the U. S. supreme court which, in affirming the decision of the supreme court of Georgia, said in part, in *Rawlins v. Georgia*, 201 U. S. 638, 50 L. ed. 899:

"The nature of the classes excluded was not such as was likely to affect the conduct of the members as jurymen, or to make them act otherwise than those who were drawn would act. The exclusion was not the result of race or class prejudice. It does not even appear that any of the defendants belonged to any of the excluded classes. The ground of omission no doubt was that pointed out by the state court, that the business of the persons omitted was such that either they would have been entitled to claim exemption or that probably they would have been excused. Even when persons liable to jury duty under the state laws are excluded it is no ground

for challenge to the array, if a sufficient number of unexceptionable persons are present. *People v. Jewett*, 3 Wend. 314. But if the state law itself should exclude certain classes on the *bona fide* ground that it was for the good of the community that their regular work should not be interrupted, there is nothing in the Fourteenth Amendment to prevent it. The exemption of lawyers, ministers of the gospel, doctors, and engineers of railroad trains, in short substantially the exemption complained of, is of old standing and not uncommon in the U. S. It could not be denied that the State properly could have excluded these classes had it seen fit, and that undeniable proposition ends the case." (The italicized words are italicized in the U. S. supreme court's opinion.)

I find nothing in the statutes of Florida which exempts commercial air line pilots from jury service. Nevertheless, our statutes do not require that all non-exempt qualified persons must be put on jury lists; nor do they require that every class of non-exempt persons be represented on a jury list even though all or a part of such class of persons possess the necessary qualifications for jury service. Section 40.08(2), F. S., exempts from jury duty all superintendents, engineers and train dispatchers of any railroad in operation. Since the last amendment of said statute in 1941, travel and transportation of the mails and of merchandise on commercial air lines has increased many times over, so that at the present time the regular operation of commercial air lines is commonly considered indispensable to the economy of the nation. Commercial air lines can't operate any more efficiently with their pilots absent on jury duty than railroads can operate with their engineers serving as jurors, and I hold the view that jury commissioners or county commissioners making up jury lists would be justified in omitting the names of all commercial air line pilots upon the *bona fide* ground that it is probable that the judge would excuse them from service upon their application because of the character of their business; and that such omission upon that *bona fide* ground would be lawful.

Therefore, it is my opinion that your question is properly answered in the affirmative.

056-190—July 2, 1956

TAXATION

UNIFORMITY OF ASSESSMENTS—LOTS OF SUBDIVISION WHERE LESS THAN 60% SOLD—§192.31, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where a lot in a subdivision has been sold to an individual, firm or corporation, may the same be valued as platted land so long as less than 60% of the lands in the plat remains unsold as individual lots?

Section 192.31, F. S., which provides that the state comptroller, under the supervision of the state budget commission, compile

and prepare a tax manual for use of the taxing officials, requires that such manual "provide that platted lands *unsold as lots* shall be valued for tax assessment purposes on the same basis as unplatted acreage of similar character, until 60% of such lands included in one plat shall have been sold as individual lots." (Emphasis supplied.) This provision came into the statutes as a part of §22, Ch. 22079, 1943. The language of the said statutory provision seems to make it applicable to "platted lands unsold as lots," which seems to exclude platted lands sold as lots. The language of the statute seems to require that the *unsold portion* of platted lands be assessed as unplatted lands so long as more than 60% of the lands remains unsold; this provision of the statute does not expressly prohibit the assessment of the lots sold as platted lands.

The above question is, therefore, answered in the affirmative. However, no constitutional questions concerning the said section of the statute have been considered, as such questions are left to the courts.

056-191—July 2, 1956

MUNICIPALITIES

FRANCHISE FOR INSTALLATION AND OPERATION OF WATER SYSTEM—RIGHT OF MUNICIPALITY TO PURCHASE FACILITIES UPON EXPIRATION OF FRANCHISE — §167.22, F. S., CH. 9833, 1923 AND CH. 15337, 1931

To: *F. Casper, Vice-Mayor, Melbourne Beach*

QUESTION:

Should a franchise granted by a municipality to another municipality for the installation and operation of a water system provide that the grantor of the franchise shall, upon the expiration of the franchise, have the right to purchase the water works or other property used in connection with such franchise?

The town of Melbourne Beach appears to have been organized and created as a municipal corporation (§1, Ch. 9833, 1923). We find no subsequent act abolishing said municipality and it is our assumption that the town of Melbourne Beach is operating under the charter granted in said Ch. 9833, as amended by Ch. 15337, 1931.

Section 167.22, F. S., provides:

"167.22 *Term for which franchise may be granted; conditions.*—No municipality in the state shall give or grant any franchise or right to use any street for the purpose of operating along or across the same any street railroad, water works, telephone, gas or electric business or other business requiring the use of mains, pipes or wires in any street, for any term exceeding 30 years; or without reserving the right and requiring the grantee of such franchise or right, as a condition precedent of the taking

effect of the grant, to give and grant to the municipality the right at and after the expiration of such term to purchase the street, railroad, water works, telephone, gas or electric plant, or other property used under or in connection with such franchise or right, or such part of such property as the municipality may desire to purchase at a valuation of the property, real and personal, desired, which valuation shall be fixed by arbitration as may be provided by law. Any such franchise or right which shall be granted for a longer time or without conditions herein provided, shall be void."

Although the disjunctive "or" is used in §167.22, F. S., it is our opinion that the disjunctive was not intended. It is not unusual for "or" to be construed as "and". (Vol. 30, Words and Phrases, pp. 39-57.)

It appears to us that it would be unreasonable to assume that the legislature intended that the grantee of a franchise, upon the expiration of the franchise, be allowed to remove water mains, pipes, etc. without the grantor of the franchise first being given an opportunity to purchase such mains, pipes, etc. Therefore, it is our opinion that the disjunctive "or" used in §167.22, F. S., should, in this instance, be construed as "and" and that the statute requires that any franchise granted by a municipality for any of the purposes named in the statute shall provide that the municipality granting the franchise shall, upon the expiration or termination of the franchise, have the right to purchase the property, real and personal, used in connection with the franchise.

Our reasoning and conclusion is based upon the assumption that there are no special acts or provisions in the charter of the town of Melbourne Beach which have any bearing upon this question.

Your question, therefore, is answered in the affirmative.

056-192—July 3, 1956

MOTOR VEHICLES

FINANCIAL RESPONSIBILITY LAW—SERVICE OF WARRANT BY CONSTABLE—§§324.201, 324.221, 901.01 AND 901.04, F. S.

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*

QUESTION:

Under the provisions of §324.201, F. S., when a case has been instituted in a justice of the peace court charging violation of the provisions of Ch. 324, F. S., requiring a person to deliver to the insurance commissioner his driver's license and/or motor vehicle registrations, properly may warrant issued in connection therewith be delivered by such justice of peace to the constable of his district for service upon the person so charged?

The following quoted part of §324.201, F. S., is here relevant:

"... If any person shall fail to return to the commissioner the license or registrations as provided herein, the commissioner shall issue a complaint to a court of competent jurisdiction which shall issue a warrant charging such person with a misdemeanor and any sheriff of this state shall serve the warrant and such person upon conviction shall be fined not less than \$2 or sentenced to not less than 1 day imprisonment or both in the discretion of the court for each day of delay commencing with the date of suspension. For service and execution of such warrant the sheriff shall receive the arrest and other fees as prescribed by §30.23." (Emphasis added.)

It is also relevant to mention the provisions of §324.221, F. S. Generally it may be stated that the provisions thereof prescribe criminal penalties for violation of the provisions of Ch. 324; there is included a penalty for misstatements and forgeries; penalties concerning the same defaults set forth in above §324.201; and there is the following:

"Any person who shall violate ... any other provision of this chapter for which no penalty is otherwise provided, shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$500 and imprisoned for not more than 90 days, or both, in the discretion of the court ..."

While there remain in this state certain justice of the peace courts with jurisdiction to try misdemeanors, the above question derived from a situation involving such a justice functioning only as a committing magistrate. Attention is directed to the italicized words "court of competent jurisdiction" appearing in the above quotation from §324.201. Generally, it may be stated that a "competent court" is one, either civil or criminal, having lawful jurisdiction. *People ex rel Fisher v. Marhaus*, 49 N. Y. S. 2d. 110. Section 901.01, F. S., provides in part that, "All judicial officers of this state shall be conservators of the peace and committing magistrates, and may issue warrants against persons charged on oath with violating the criminal laws of this state and may commit offenders to jail or recognize them to appear before the proper court ..." We see nothing in the wording of §324.201 to make the particular violations mentioned as occupying a peculiar status in the field of criminal law; hence we conclude that a justice of the peace court, functioning as a committing magistrate, is such a "court of competent jurisdiction."

We take notice of the italicized words "any sheriff of this state" appearing in the above quotation from §324.201. There is the recognized rule that when a warrant is addressed to a particular officer by name, it must be served by such officer or his duly authorized deputy, (6 C. J. S. §4(b)(1), pp. 575, 576, and authorities in footnotes). If the quoted words are to be construed as requiring that the warrant be directed to "all and singular the sheriffs of the state," then we must conclude that a particular

type of warrant is required in connection with prosecution of a person charged with the unlawful acts set in §324.201. Now if this is true we are confronted with an apparent inconsistency; certainly there is no indication that a person prosecuted under the above-quoted wording from §324.221 requires a warrant different from the usual and prescribed type for criminal prosecutions. Further, there is the rule in the construction of statutes that the courts are reluctant to declare repeal of statutes by implication, and it is only when the intention is manifest that such a repeal will be recognized, e.g., *State v. Gadsden County, Fla.*, 58 So. 232; *American Bakeries Co. v. Haines City, Fla.*, 180 So. 524. In construing a statute, all laws in *pari materia* should be considered to ascertain legislative intent. *E. G. Howarth v. City of DeLand, Fla.*, 158 So. 300; *Singleton v. Larson, Fla.*, 46 So. 2d 186. And with these principles in mind, we refer to the following provisions of §901.04, F. S. (from our criminal procedure statutes): "*The warrant shall be directed to all and singular the sheriffs and constables of the state. It shall be executed only by a sheriff or constable of the county in which the arrest is made . . .*" (Emphasis added.)

In the light of the foregoing, reasonably it would not appear that it was the legislative intent that the words in §324.201, "any sheriff of this state shall serve the warrant", and "the sheriff shall receive the arrest and other fees as prescribed by §30.23," should restrict service of such a warrant to the sheriff or his deputy; or that for the particular unlawful acts described in §324.201 a form of warrant different from that prescribed by our criminal procedure statutes is required. It is to be noted that by the provisions of said §901.04, a warrant in a criminal case runs throughout the state; yet such quoted words from §324.201 concerning the sheriff must have been employed by the legislature for the sole purpose of indicating that the warrant should run throughout the state.

Hence, in my opinion, a warrant issued against a defendant out of a justice of the peace court in a case charging unlawful acts described in §324.201, shall be in the form prescribed in §901.03, and shall be directed to all and singular the sheriffs and constables of the state, and may be served by a constable of said justice's district in his county, as provided in §901.04.

056-194—July 3, 1956

STATE AND COUNTY OFFICERS AND EMPLOYEES

RETIREMENT—PRIOR SERVICE CREDIT—CONSTRUCTION OF §122.03—CHAPTER 122, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Does Ch. 29801, 1955 (now appearing as Ch. 122, F. S.) which revised and consolidated Chs. 121 and 134, F. S. now authorize prior service for an employee for retirement purposes on showing by affidavit of head of a department (state or county) that such employee was not

advised by the department or officer of his right under Chs. 121 and 134 to claim prior service by going back in 1947 and 1949?

In your request for opinion you state that "prior to the enactment of Ch. 122, F. S., this office, upon affidavits signed by heads of departments or county officers as the case may be, that an employee was not advised by the department or county officer of his rights to go back in 1947 and 1949 and claim prior service and pay into the fund the amount necessary to give him credit for said prior service.

The statutes in force in 1947 and 1949, under which prior service credit might be claimed, were §§121.03 and 134.03, F. S., as amended in 1947 and 1949. Chapters 121 and 134, F. S., were consolidated, amended and revised, and reenacted as Ch. 29801, 1955 (now appearing as Ch. 122, F. S.), so that said Chs. 121 and 134, F. S., are no longer in force and effect, except in so far as the same may be preserved by contract or by statute (see §122.01, F. S.). "The rights of members of the retirement system established by former Chs. 121 and 134, F. S., shall not be impaired, nor shall their benefits be reduced by virtue of any part of this chapter." (§122.01, F. S.).

Subsections (2) and (3) of §122.03, F. S., provide as follows:

"(2) Any officer or employee who held office or was employed by the state or a county of the state on July 1, 1945 or October 1, 1950 and has been holding office or has been continuously employed from April 1, 1955:

"(a) May receive credit for prior service rendered subsequent to 1945;

"(b) Credit for service rendered prior to July 1, 1945 shall be continuous except that one period of absence not more than 5 years shall be allowed, and in computing such service credit, the period of absence shall not be creditable service.

"(c) Provided any person receiving prior service credit under (a) or (b) *pays into the retirement fund the amount he would have paid had he been a member since July 1, 1945, plus 3% interest per annum*; provided further that no officer or employee shall make contributions under this section for less than 10 years or for his total service being claimed, whichever is less.

"(3) Any officer or employee claiming prior service under subsection (2) of this section shall make the required payment to the retirement fund *within 2 years of January 1, 1956.*" (Emphasis supplied.)

"All persons are charged with knowledge of the provisions of statutes and must take notice thereof" (39 Am. Jur. 248, §25). "Ignorance of the law excuses no one" and "Ignorance of the law is no excuse" are well established maxims of the law (42 C. J. S. 380; 31 C. J. 241 and 242). "Ignorance of the law does not excuse even laymen" (State Bank of Orlando v. Macy, 101 Fla. 140, 133 So. 876, text 881). Under this rule each and every state and

county officer and employee stands charged with the requirement of the above quoted statute and may not be excused from complying therewith on the grounds of ignorance of such statutory requirements. These observations answer the above stated question in the negative, except in so far as rights may be preserved by §122.01(3) F. S., which statute preserves to members of the retirement systems, previously existing under Chs. 121 and 134, F. S., which were merged and consolidated into present Ch. 122, F. S., such rights as they had on the effective date of said Ch. 122, F. S., which was July 1, 1955. Such rights are now in the nature of individual rights previously existing under said prior statutes and cannot be generally answered here.

The above question is, therefore, answered in the negative; subject, however, to any existing rights acquired by members under Chs. 121 and 134, F. S., prior to July 1, 1955, and which are such as have continued in such members.

056-196—July 5, 1956

INSURANCE

EMPLOYEE'S BENEVOLENT ASSOCIATION NOT CONSTITUTING BUSINESS OF INSURANCE—CHAPTER 617, F. S.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTION:

Will the functioning of an organization under a charter and by-laws as described below, constitute the engaging in the business of insurance in this state by such organization?

The charter, which is proposed to be presented to the proper circuit judge for approval as provided in Ch. 617, would create an incorporated body entitled "Association of Central Truck Line Drivers and Dock Men of Tampa Area." Qualifications for membership in the association would be that the applicant is an employee of Central Truck Lines, Inc. Purposes of the organization are summarized: To unite fraternally and for mutual benefit such members; to foster and cultivate the social, educational and business relations of the members; to promote the general welfare and prosperity of the members and

"to provide . . . pecuniary aid to members who are unable to work due to illness or injury in order that they may better support themselves, their wives and families, within reasonable limitations, and should the funds of this corporation be accumulated beyond what is reasonably needed for the other purposes herein expressed, to contribute to the aid of members in emergency caused by illness, injury or other disaster, and to the aid of widows and orphans of persons who were members of this organization at the time of their death, and to contribute to like charitable purposes in such event."

Certain relevant provisions of the proposed by-laws are summarized: Membership fee is fixed at \$1, and weekly dues at

50 cents; the secretary-treasurer, beginning with a stated date, shall pay a reasonable sum, not to exceed \$35 a week, for 10 weeks, to each member prevented from working for a period of more than 1 week; death benefits of \$35 each week for 10 weeks to the widow or children of a deceased member; and other benefits as provided; and there is the final provision: "Any matter not covered by these articles, may be presented to a membership meeting in the form of a 'motion regarding new business.'"

At various times this office has been called upon to determine whether a plan of the nature of this constituted the business of insurance. Reference is made to opinion 052-124 (1951-52 A.G.R. 644); opinion 052-294 (1951-52 A.G.R. 651); opinion 052-222 (1951-52 A.G.R. 680); opinion 053-270 (1953-54 A.G.R. 587); opinion 054-48 (1953-54 A.G.R. 578). We have held that certain of these did not constitute the business of insurance (e.g. opinion 054-48), and that others did (e.g. opinion 053-270).

By reason of the lengthy discussion of relevant factors in these previous opinions, no necessity exists here to labor them again. It is sufficient to state that the question has turned upon whether there was involved an indemnification with respect to an insurable risk; that this has entailed inquiry into the definition of "insurance," including our court's discussion of that subject in *State v. DeWitt C. Jones Co., Fla.*, 147 So. 230, and in that case the court's differentiation of certain philanthropic and charitable associations, such as employees' relief departments of business organization; and inquiry with respect to these relief organizations as found in *Couch on Insurance*, Vol. 1, §23; *Commonwealth v. Equitable Ben. Asso. Pa.*, 18 A. 1112; *Wolfstern v. R. R. Relief Department, N. J.*, 74 A. 533; *Burlington Relief Department v. White, Neb.* 59 N. W. 747. This proposed organization appears to fall within the category of such relief organizations.

Hence, the question is answered as follows:

The activation of this plan will not constitute the business of insurance, hence will not violate the laws of Florida relating to insurance, subject to the following being provided and observed:

(1) That the plan is a voluntary one insofar as the individual employees are concerned. We construe the charter and by-laws to provide this; however, it will be well specifically to mention it.

(2) That benefits payable to a member are payable as an incident of membership and not as result of any contract issued to a member. Again, we construe the charter and by-laws to such effect, but again we suggest that this be made clear.

(3) That specifically it be provided that the organization will be liable for payment of benefits only to the extent of funds available or to become available in its treasury for that purpose.

(4) That specifically it be provided that with respect to such benefits, no cause of action shall accrue in favor of any member or of any other person on the basis of a membership. In other words, if a "claim" is enforceable in law, there would exist a contract of indemnity or insurance.

It is noted that the proposed charter will be presented to a proper circuit judge for his approval under Ch. 617, F. S. This opinion is not to be construed as our approval of the charter in anticipation of its consideration by the court; the opinion is to be construed only as dealing with the question of whether activation of the plan will violate our insurance laws.

056-197—July 5, 1956

CORPORATIONS

PROPRIETY OF PROVISION IN CHARTER FOR INFORMAL ACTION BY STOCKHOLDERS—§608.10, F. S.

To: R. A. Gray, Secretary of State, Tallahassee

QUESTION:

Under the provisions of Ch. 608, F. S., properly may there be set forth in a corporate charter a provision as follows: "Any action of the shareholders required by law or the articles of incorporation or by the laws of this corporation or otherwise to be acted upon by them, may be taken without formal meeting or notice thereof by informal written action signed by the holders of all of the shares of this corporation then issued and outstanding, which the holders thereof will be entitled to vote thereon at a formal meeting of the shareholders?"

Section 608.10, F. S., deals with stockholders' meetings, notice, qualification of voters, proxies, etc. The section begins as follows: "Whenever the provisions of this chapter, the certificate of incorporation or the by-laws require or authorize the stockholders to take any action at a meeting . . ."; followed by provisions relating to the holding of such a meeting. Section 608.10(4) provides that, "A majority of the stock entitled to vote shall constitute a quorum at any stockholders meeting unless the certificate of incorporation or by-laws otherwise provide."

The wording in the above-quoted proposed provision, "which the holders thereof will be entitled to vote thereon at a formal meeting of the shareholders," is not too clear. However, construing the words as providing that the informal action, contemplated by the provision, shall be ratified at a formal meeting of the shareholders, the fact remains that the *effective* action sought is the informal action mentioned. This proposed provision requires the action of *all* shareholders at the time such informal action is taken; the provision could just as logically have been limited to the shareholders constituting a quorum; and a quorum, as evidenced above, is "a majority of stock entitled to vote . . . unless the certificate of incorporation or by-laws otherwise provide."

It appears reasonable to us that §608.10(1) is to be construed as meaning that whenever action of stockholders is required in corporate management, such shall be accomplished at a stockholders' meeting. Or to express it another way: by reason of the wording of said subsection, there exists such doubt concerning the legal propriety of the above proposed provision that I cannot approve it.

056-198—July 5, 1956

CORPORATIONS

FOREIGN NON-PROFIT CORPORATION—USE OF WORD
"CLUB" IN NAME—§§608.01, 608.03, 608.13, 608.62-608.67
AND CHAPTERS 613 AND 617, F. S.To: *R. A. Gray, Secretary of State, Tallahassee*

QUESTION:

In view of the provisions of §§608.62-608.67, F. S., properly should the secretary of state accept for filing the charter of a Delaware non-profit corporation (a co-operative housing association to operate an apartment), since the name of such corporation is "The Palm Club, Inc."?

Sections 608.62 to 608.67, F. S., were formerly §§610.31 to 610.36, F. S., and originally derived from Ch. 20840, 1941.

Section 608.62 declares that it is the public policy of the state to prevent abuses and misrepresentations arising from use of the word "club" as a designation, name or style for corporate or other forms of business ventures conducted for profit, so that such ventures may not, as a means of soliciting patronage, be foisted upon federal, state and municipal governments or the public under the guise of social, religious, educational, political, benevolent or similar associations or non-profit corporations to achieve tax benefits or other preferences or advantages intended only for bona fide organizations having merely social, religious, educational, political, benevolent and/or other similar non-profit purposes.

Section 608.63 defines the term "club", and the kind of organization which may use the term, whether such organization is "non-profit incorporated or not," and provides that such word may not be used or employed as a trade name, or as a designation or style for business ventures or enterprises, or as a guise for commercial activities, operated for financial profit; provided, however, that this section shall not apply to racing, jockey or kennel clubs, licensed by and conducted under the control and supervision of the Florida state racing commission.

Section 608.64 provides, in part, that from and after 3 months from the date such Ch. 20840, 1941 became a law, "it shall be unlawful for any person, firm or corporation, directly or indirectly, to do business for profit under any trade name or designation or style which includes the word or term 'club'. . ."; with certain provisos not here considered relevant.

Section 608.65 declares it to be unlawful for any person, firm or corporation to operate as a club "for purposes among which shall be included the objective of obtaining tax or license exemptions, preferences or advantages by virtue of its designation or style as a club," unless expressly entitled thereto because of actual non-profit club activities, as defined.

Section 608.66 provides that §§608.62-608.67 shall not be applicable with respect to those organizations "which have used

designation of the term 'club' for 2 years prior to June 1, 1941; and shall not be construed as prohibiting the use of the term 'club' in the name of country clubs, baseball clubs and golf clubs in this state."

Section 608.67 provides that violation of the mentioned sections shall constitute a misdemeanor punishable by fine of not more than \$1,000 and imprisonment in the county jail for not more than 6 months or both such fine and imprisonment.

Chapter 608, F. S., except as noted, derived from Ch. 28170, 1953, revising our corporation laws. The wording of §608.01, concerning application of the chapter as adopted and as set forth in our statutes, would seem to limit the provisions thereof to corporations organized under the laws of Florida. Whether this is true or not, it is remarked that §§608.62-608.67 were not a part of said Ch. 28170, but evidently were included in Ch. 608 by the statutory revision department. The position is here assumed that the provisions of said last-named sections are equally applicable to domestic corporations and foreign corporations operating or seeking permit to operate in Florida.

It is to be noted that the prohibition against use of the word "club" is directed to "corporate or other forms of business ventures conducted for profit." Further, from the wording of these sections, it would seem apparent that the word "club" may be used by those corporations or organizations operated for profit as specifically authorized, and also by those non-profit organizations composed of 5 or more members associated together for their "mutual advantages to be derived solely from social, educational, religious, political, benevolent or similar purposes and activities, and conducted by and in behalf of the constituent members."

The request for opinion refers to "a foreign corporation organized under the laws of Delaware, which corporation has the name of 'The Palm Club, Inc.,' and is a cooperative non-profit housing association and its main business will be operating co-operative apartments."

In our opinion 055-214, dated Aug. 24, 1955, directed to the secretary of state, dealing with eligibility of a Delaware corporation, as described, for permit under Ch. 613, we stated:

"The form of certificate of incorporation, delivered to the attorneys for those interested in the . . . project by the Secretary of State of Delaware is for the formation of a non-stock corporation. An examination of the 'General Corporation Law of the State of Delaware,' issued in pamphlet form . . . , evidences provisions for the formation of non-profit corporations not authorized to issue capital stock, and in that connection it is provided: 'In the case of such corporations, the fact that they are not to have authority to issue capital stock shall be stated in the certificate of incorporation. The condition of membership of such corporations shall likewise be stated in the certificate of incorporation or the certificate may provide that the conditions of membership shall be stated in the by-laws'. . . It is apparent that such a corporation

would not be a nonprofit corporation within the contemplation of Ch. 617, F. S., but would be of the nature of a co-operative association within the intendment of §§608.03(1)(b) and 608.13(12), F. S."

We have not examined this certificate and consider it unnecessary to do so. Whether this corporation was organized in pursuance of the above Delaware law or not, the operation of apartments on a co-operative basis does not constitute a non-profit purpose within the meaning of Ch. 617, F. S., or §§608.62-608.67, F. S. Certainly it is not a "social, religious, educational, political, benevolent or similar" association or non-profit organization. Furthermore, Ch. 608 deals with corporations for profit; and provision is made therein for the organization of co-operatives, as noted.

It is recognized that certain of the provisions of §§608.62-608.67 refer to an organization for profit using the word "club" for the purposes of misrepresenting its status and to obtain tax benefits and other preferences and advantages, as related. While there is this matter of intent expressed in these sections, we do not consider that intent must be shown to invoke the provisions of these sections; we consider these sections limit use of the word "club" in the name or designation of an organization to those organizations and associations particularly named or described in the sections.

We have been able to locate only two cases dealing with these sections: *Surf Club v. Tatum Surf Club*, Fla., 10 So. 2d 554; *Donovan v. Schott*, Fla., 58 So. 2d 847. While they are not of too much help here, reference is made to them.

Hence, in my opinion, this Delaware corporation falls within the purview and effect of §§608.62-608.67, F. S. Since it has the word "club" in its name, you are authorized to refuse to issue it a permit under the appropriate provisions of Ch. 613, F. S., to engage in business in Florida.

056-199—July 5, 1956

CORRECTIONAL SYSTEM

STATE BOARD OF PARDONS—RESTORATION OF CIVIL RIGHTS OF PERSON CONVICTED BY A COURT OF ANOTHER STATE OR IN A UNITED STATES COURT

To: *LeRoy Collins, Governor of Florida, Tallahassee*

QUESTION:

Does the state board of pardons have the power and authority to restore Florida civil rights lost by reason of a conviction in a court of another state or in a U. S. court?

In opinion 042-427, dated Aug. 28, 1942, (Attorney General's 1941-1942 Biennial Report, pp. 784-785) my immediate predecessor in office held that the pardon board could restore civil rights lost as a consequence of a conviction in another state.

On Sept. 26, 1950, my opinion 050-453 (Attorney General's 1949-1950 Biennial Report, pp. 625-626) held to the same effect and further held that a conviction in a federal court is on the same footing as a conviction in a court of another state insofar as the power of our pardon board to restore Florida civil rights is concerned.

However, on Feb. 19, 1952, my opinion 052-45 (Attorney General's 1951-1952 Biennial Report, pp. 785-786) in effect held to the contrary. This opinion inadvertently failed to take cognizance of or to give consideration to my former above-mentioned opinion 050-453, dated Sept. 26, 1950.

On January 21, 1953, my opinion 053-11 (Attorney General's 1953-1954 Biennial Report, pp. 71-72) took cognizance of all of the foregoing opinions and in effect left the question open.

On Feb. 4, 1953, Hon. Herbert Brownell, Jr., attorney general of the U. S., wrote Congressman Charles E. Bennett in part as follows regarding the restoration of civil rights lost by a Florida resident by reason of a federal court conviction (which letter is in the pardon board's file No. 14369), to wit:

"The forfeiture and regaining of rights lost by reason of conviction of crime, even in Federal Courts, are ordinarily subject to the jurisdiction of the state in which such rights are sought to be exercised." (Emphasis supplied.)

On June 10, 1953, after having said letter placed before it, the pardon board restored full and complete Florida civil rights to the person concerning whom Mr. Brownell's said letter was written.

The opinions in the cases of *Hogan v. Hartwell* (Ala.), 7 So. 2d 889, and *Arnett v. Stumbo* (Ky.), 153 S. W. 2d 889, exhibit persuasive reasoning tending to support the view thus expressed by Mr. Brownell.

On Aug. 24, 1953, in reply to an inquiry from Hon. E. F. P. Brigham, Miami attorney, I wrote him that the board of pardons had recently restored the Florida civil rights of the person mentioned in Mr. Brownell's said letter and that I saw no reason why the board would not consider the application of Mr. Brigham's client for restoration of the Florida civil rights lost by reason of a conviction in another jurisdiction. Since that time I have advised other persons to the same effect and in several instances the board has restored the Florida civil rights of persons convicted in other jurisdictions.

After a careful study of the problem, it is my considered opinion that the state board of pardons possesses full power and authority to restore all Florida civil rights lost by reason of a conviction in either a court of another state or a U. S. court; and that the contrary opinion expressed in said opinion 052-45 should be, and is hereby, receded from.

056-201—July 7, 1956

ELECTORS AND ELECTIONS

FUNCTIONS OF SECRETARY OF STATE UNDER §99.103, F. S.

To: *R. A. Gray, Secretary of State, Tallahassee*

QUESTION:

Section 99.103, F. S., requires the secretary of state to remit to political parties, as defined and conditioned therein, filing fees collected by the secretary of state from candidates of such respective parties. In pursuance of said section, heretofore he remitted to the state executive committee of the Democratic party such fees of its candidates in the 1956 general primary. Under the circumstances set forth below, what action should the secretary of state take with respect to filing fees received from candidates of the Republican party in such primary?

Section 99.103, F. S., was originally §1 of Ch. 29935, 1955. Examination of said chapter furnishes no assistance here. To qualify it to receive such filing fees, the political party must meet certain conditions set forth in this statute. The secretary of state advises he has determined that the Republican party, in relation to such filing fees paid him by its candidates at the 1956 general primary, has met all conditions prescribed in said §99.103, with exception of one, as to which he is uncertain. That condition is quoted: "... if such party shall be declared by the secretary of state to have recorded on the registration books of the counties, as of the first day of February in even-numbered years, one-eighth of the total registrations of such counties when added together . . ." The statute requires such payments to be made to the state executive committee of such respective parties not later than 30 days prior to the 1st primary in even-numbered years.

We are informed by the secretary of state that he attempted to obtain from the several counties of this state data concerning registrations of members of the Republican party as of Feb. 1, 1956. In a sworn statement, the secretary of state gives the inconclusive results of such efforts in relation to certain of our counties and why he has hesitated to declare that registrations of members of the Republican party in the counties of Florida amounted to not less than $\frac{1}{8}$ of the total registrations of all counties of the state. That official makes the further sworn statement that "from all available official information and all estimated figures reported from the several counties of Florida the Republican registrations would have shown more than 10%." However, the secretary of state has refrained from making such declaration because of the confusing and inconclusive reports from certain of the counties.

It is not at all unusual for primary election laws in this and other states, to define political parties subject to said laws on the basis of percentage of votes cast for a named office in the preceding general election, or on the percentage of registrations at

a fixed date. At one time such a political party was defined in this state as one which, at the general election for state and county offices then next preceding a primary, polled more than 5% of the entire vote cast in the state (*State ex rel Merrill v. Gerow*, Fla., 85 S. 144); at another time as any party which, in either of the two general elections next preceding a primary, polled more than 30% of the vote for stated officers (*State ex rel Barnett v. Gray*, Fla., 144 So. 349). At this time, under our primary laws, a political party is one which on Jan. 1 preceding a primary has registered to vote as members more than 5% of total registrations (§97.011(6) (b), F. S.). Certainly previous requirements to constitute such a political party were definitely ascertainable; and it takes no close figuring on the part of the secretary of state to determine in this day and time that on a Jan. 1 preceding a primary, registrants of the Republican party exceed 5%.

It is not apparent why the legislature did not see fit to provide that the provisions of §99.103 F. S., should apply to a political party as defined in our election laws. The secretary of state is called upon to make the determination mentioned above. It is quite understandable that the secretary of state, attempting to perform his full duty as he construes it, has been confronted with the uncertainties mentioned. The date for determination of the percentage of registrants is Feb. 1 of a regular primary election year. On such date the books are not closed but are open for registrations; and excepting Sundays such books are open prior and subsequent to such date. Most of the counties now operate under the permanent registration system; but whether there are the individual records used in such a system or books as heretofore provided, registrations are not handled by dates but alphabetically. The task of computing percentages of party registrations at Feb. 1 in a small county is apparent; and in a large county the task would be formidable indeed. This law speaks of "1/8 of the total registrations"; and to give efficacy to the statute, "registrations" refer to those actually at Feb. 1 who are registrants and qualified electors, not to possible names in such records who for some reason or other have ceased to be qualified electors in the voting districts where registered. For example, the secretary of state points out that the supervisor in one county gave an estimated total registration at Feb. 1 of 8,824; that a few weeks later the supervisor gave a total registration of 5,800. Even in those counties which have permanent systems with recurring processes for purging the lists, there remains a speculative area. If the Republican state executive committee is entitled to these filing fees, it should receive them. By reason of the foregoing, there is here a permissive field for exercise of judgment by the secretary of state; and from data available he may determine that at Feb. 1, 1956, of the total registrations in this state, approximately 1/8, or 12 1/2%, were members of the Republican party.

Hence, from the information furnished and the showing made to the secretary of state, in my opinion the secretary of state will be justified in making such determination; and when he has done so said filing fees paid to him by candidates of the Republican party in the 1956 primary should be remitted by him to the state executive committee of such party.

056-202—July 11, 1956

AGRICULTURE, HORTICULTURE AND ANIMAL INDUSTRY
FLORIDA FEED LAW—APPLICATION OF §578.08(4), F. S. IN
RELATION TO SEED PRODUCED BY REGISTERED
DEALER

To: Nathan Mayo, Commissioner of Agriculture, Tallahassee

QUESTION:

What is the application of §578.08(4) F. S. to a situation where a registered seed dealer is engaged in the business of selling vegetable seeds, a part of which he produces?

The answer to your question lies within the interpretation and construction of §578.08, F. S., known as the Florida seed law. The particular statute is a regulatory one, designed to control the sale, distribution or handling for sale of agricultural or vegetable seeds. It requires every person, before engaging in the business of selling, distributing, or offering for sale, registration with the commissioner of agriculture as a seed dealer. It imposes upon the person a fee in the nature of a license to engage in the business of such selling, which fee is required to be paid at the time of registration, and annually thereafter so long as such business is continued. The amount of the annual fee is based upon the gross receipts realized from the sale of seeds at each place of business, during the last preceding license year, calculated according to the amount of gross receipts realized.

Section 578.08(4) provides that farmers selling seeds produced by themselves, shall be exempt from the payment of all license fees under the statute, but which in all other respects conform to the provisions and regulations imposed therein.

The intent of the legislature would appear to be very clearly expressed that the fees intended to be imposed in the nature of a tax was confined to those persons engaged in the business of seed dealers. It is true that the words "dealer" or "seed dealer" are terms of common use and meaning. Lexicologically, the term is applied to persons who make a business of buying and selling goods, wares or merchandise, as distinguished from manufacturing or producing such goods.

It is clear that the intent was to exempt farmers who had produced seeds in connection with their farming operations from the payment of the fees imposed with respect to the sale of the surplus seeds not required for their own use, but to require them to comply with the statutory regulations in regard to inspection, etc. The meaning of the statute may not reasonably be considered to permit a dealer by the mere expedient of engaging in farming operations, to escape any of the provisions of the statute regarding dealers. It is universally held that statutes exempting persons from the payment of taxation are subject to strict construction. The tax imposed is measured by the gross receipts realized from the sale of seeds by a registered seed dealer, regardless of the source of his supply. Under the provisions of the act, a farmer

is not a seed dealer, and ergo, a seed dealer is not a farmer. The tax is imposed upon seed dealers, the status of whom is established by their registration; it is computed upon the gross receipts realized by the dealer from the sale of seeds, regardless of the source of the supply thereof.

From a practical construction of the statute, your question is answered in the affirmative.

056-203—July 11, 1956

INSURANCE

CONTRACT OF INSURANCE—NATIONAL AUTOMOBILE WARRANTY

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*

QUESTION:

Is "National Automobile Warranty" of National Bonded Cars, Inc., of 1965 Morris Ave., Union, N. Y., as described below, a contract of insurance?

Attached hereto are copies of opinions 055-43, 055-68 and 055-109 dealing with the nature of this warranty. Reference is made to such former opinions for full details concerning the wording of said "warranty" and the suggested changes made therein from time to time to meet objections appearing in said opinions.

In opinion 055-109, we discussed the matter of this warranty against defects in materials, and pointed out the difficulty in applying such warranty in relation to the wide difference in mileage which may be placed upon an automobile by different individuals during the warranted period. However, we are dealing with the wording of this warranty and with the question of whether that wording indemnifies against the element of chance as distinguished from the factor of defective materials. In the concluding paragraph of opinion 055-109 we stated:

"However . . . the wording in the above paragraph, 'any defect in any warranted part not resulting solely from wear,' is a recognition of protection against wear as a contributing factor in event of failure of material. Hence, it is my opinion that the 'warranty' as changed continues to constitute a contract of insurance under our laws . . ."

It is now proposed that the "warranty" be changed to read as follows:

"National Bonded Cars, Inc., certifies that it has inspected the vehicle above described and certifies that in its opinion the parts hereinafter specified are not defective and are in good working order and condition and will require no repairs or replacements for 1 year from the date of purchase. National Bonded Cars, Inc., agrees that if its said certification is in error, and any defect in any warranted part not resulting from wear shall be revealed within 1 year from date of purchase, it will pro-

tect the retail purchaser of this vehicle and holder of this warranty from any costs of repairs or replacements which may arise on the following specific parts subject to the terms and conditions hereinafter set forth to the extent of the total reasonable price for repairs, replacement and labor which became necessary in the normal use therein."

This change in wording would seem to remove this engagement from the field of indemnity to that of a warranty or guaranty. Hence, in my opinion it is not a contract of insurance.

056-204—July 12, 1956

ELECTORS AND ELECTIONS

SCHOOL DISTRICT BOND ELECTIONS — RE-REGISTRATION OF FREEHOLDERS—§§97.081, 100.201-100.351, 230.34, AND CH. 236, F. S., §6, ART. IX, STATE CONST.

To: *Howell L. Watkins, Superintendent of Public Instruction, W. Palm Beach*

QUESTION:

Can a county school board request, and the board of county commissioners call for, a re-registration of freeholders under §97.081(2), F. S., prior to a county school bond election despite the language in the statute which appears to limit its applicability to elections for the approval of county bonds rather than district bonds?

Section 97.081(2) provides as follows:

"The county commissioners of any county may at any time call for a re-registration of freeholder electors for the purpose of securing a new and up-to-date list of freeholders to be used for qualifying freeholder electors to participate in any election called for the purpose of approving the issuance of *bonds of such county* or for the purpose of approving an act with reference thereto." (Emphasis supplied.)

The words "bonds of such county" do not appear elsewhere in §97.081, and other references therein are to "any bond election."

Section 6, Art. IX, State Const., provides in part as follows:

"... the Counties, Districts, or Municipalities of the State of Florida shall have power to issue bonds only after the same have been approved by a majority of the votes cast in an election in which a majority of the freeholders who are qualified electors residing in such Counties, Districts, or Municipalities shall participate, to be held in the manner to be prescribed by law..."

Sections 100.201-100.351, F. S., prescribe the procedure to be followed at bond elections. Chapter 236, F. S., sets forth the manner in which school district bond issues may be instigated and prescribes the duties of the county school board in regard to such bond issues.

With regard to the question at hand it is well to observe that under §230.34, F. S., all school districts in Florida have been consolidated so that there is now only one school district in each county with boundaries that are identical to those of the county. Taxes levied by the school board to pay the interest and principal of school district bonds are levied against all of the taxable property in the entire county (§236.53, F. S.).

There is no valid reason for assuming that the legislature in §97.081, F. S. intended that school bond elections should be deprived of the benefit of a re-registration of freeholders if the board of county commissioners considers such action to be necessary. Certainly the adequate financing of a county's school program is equally important as any other program that the county might finance through the issuance of bonds.

In *State v. Co. of Sarasota*, 62 So. 2d 708, the supreme court of Florida made the following statement with reference to §97.081, F. S.:

"The Legislature has long recognized the necessity for up-to-date registration records by the enactment of many laws requiring or authorizing re-registration of voters in the various political subdivisions of the State. It is common knowledge that old, out-moded registration records are impediments to orderly elections, and the trend of legislation is toward constantly up-to-date registration records . . . In the adoption of §6 of Art. IX the people determined that at least one more than half of the qualified electors who were freeholders at the time of the election should participate therein to make it a valid election. To hold that reregistrations could not be required from time to time would be to frustrate the very intent of the plain language of the amendment."

In the case of *Forrey v. Board of Commissioners of Madison County*, 126 N. E. 673, the supreme court of Indiana stated as follows:

"The common acceptance of the expression 'county bonds' is broad enough to include all bonds issued by the county officials to be paid for by a levy on a special taxing district, whether coextensive with the county or coextensive simply with the boundaries of a township in a county, or any other special taxing district created by the Legislature. The County is the official agency through which the Legislature is acting, and all bonds issued through that official agency are commonly referred to as county bonds. They are the bonds of the county paid for by a levy upon a special taxing district."

In view of the foregoing it is my opinion that under §97.081, F. S., a county school board may request and the board of county commissioners may call for a re-registration of freeholders prior to a school district bond election. It is suggested, however, that if the school board has retained bond counsel in connection with the bond issue, the approval of such counsel with respect to this question should be obtained.

056-205—July 17, 1956

LEGISLATURE

LEGISLATIVE INTERIM COMMITTEE—EXPENSES OF
EMPLOYEES—HR 1628, 1955, §§11.12 AND 282.01,
ITEM 33, F. S.*To: Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

May experts in the field of game and fresh water fish, employed by the interim legislative committee established pursuant to house resolution 1628, of the 1955 regular session of the legislature, be paid from funds appropriated by §11.12 or item 33, §282.01, F. S.?

House resolution 1628 was adopted by the house of representatives on May 25, 1955 (House Journal, pp. 1240, 1296 and 2082) but was not laid before, concurred in or consented to by the senate in any official action of that body so far as the senate journals reflect. This resolution provided for an interim legislative committee for the house to investigate and make a study of matters relating to game and fresh water fish in Florida, and report its findings and conclusions to the legislature at its 1957 regular session. The adoption of the said resolution by only one house presents a problem of validity. The authorities hold, in the absence of some constitutional provision providing otherwise, that interim legislative committees may be set up only with the consent and joint action of both houses of the legislature (81 C. J. S. 959, §42; 59 C. J. 95, §75; 49 Am. Jur. 258-9, §41; and Annotation in 28 A. L. R. 1155-57). These authorities raise a serious question as to the sufficiency of house resolution 1628. The resolution involved in our opinion of Dec. 2, 1955 (055-317) was adopted by both houses of the state legislature, and not by only one house as was the one here involved.

Said house resolution 1628 directed the interim committee therein provided for to "make a careful and comprehensive study of all matters relating to game and fresh water fish in Florida, including, but not limited to, management, restoration and regulation of the game and fresh water fish of the state, and the control and management of hatcheries, sanctuaries, refuges, reservations and all other property . . ." and report its findings and conclusions to the 1957 regular session of the legislature. The said resolution further directs that the said committee "assemble such data by whatever means is deemed necessary, such as holding public hearings, employing experts and other persons authorized to carry on its duties . . ." The resolution provides that "all expenses incident to hearings held and investigations made by the committee . . . shall be paid as provided in §11.11, F. S., other than mileage and per diem of members which shall be paid as provided in §112.061, F. S." In the light of the authorities mentioned in the last above paragraph hereof we feel that §11.11, F. S., clearly contemplates interim committees duly constituted by the joint action of both houses of the legislature. These observations are likewise applicable to the appropriations made by §11.12, and item 33, §282.01, F. S.

In the light of the above authorities and observations, we do not feel that warrants in payment of the compensation of the experts mentioned in the above question should be issued unless and until the validity of house resolution 1628 has been determined by an order or decree of a court of competent jurisdiction or by an advisory opinion to the governor.

056-206—July 17, 1956

COUNTY ORGANIZATION AND FINANCE

PURCHASE OF OFFICE EQUIPMENT BY COUNTY OFFICER FROM FEE ACCOUNT—CH. 145, F. S.

To: *Ray E. Green, Comptroller, Tallahassee*

QUESTION:

May a county fee officer, without the consent of the board of county commissioners, purchase adding machines, typewriters, electric clocks, statutes, law books, and similar items of capital equipment, from the fee account of the office?

It appears from the request for opinion, and the copy of a state audit report, made by the state auditing department, handed us with the said request, that a county fee officer, during at least two audit report periods, has been purchasing, without the consent of the board of county commissioners, electric adding machines, electric clocks, typewriters, statutes, law books and other permanent equipment for the said office, from the fee account of his office. In some instances the purchase price of such equipment has been paid in installments, probably running into more than one calendar year.

Under chapter 145, F. S., county fee officers are entitled to all the *net income* of the office not to exceed \$7,500 per annum (§145.01, F. S.) the said *net income* of the office being "the residue of the income from such office after deducting all reasonable expenditures for the salaries of clerks and assistants and the necessary expenditures for the proper operation of said office." (§145.02, F. S.). The said net income, after payment of the compensation allowed the incumbent officer, is required to be paid "into a special fund" to be expended by the board of county commissioners "for the purpose of equipping, maintaining and supplying said office, from which said money is derived, with the necessary books, furniture, and all other things now supplied or furnished by the board of county commissioners and paid for by them from the general revenue of the county . . ." (§145.05, F. S.)

Attorneys general considering the question are in agreement that capital equipment, sometimes referred to as substantial items of equipment, should be paid for by the county, either from the general fund or from the fund provided by §145.05, F. S., and that current office expenses should be paid by the officer from the income of the office; however, there has been some difference of opinion as to classification (1951-2 Biennial Report 252-4). This difference of opinion seems to have involved items such as type-

writer ribbons. Typewriters, adding machines, and similar items have consistently been held to be capital or substantial items of equipment. The fact that a county officer may deem certain items of capital or substantial equipment necessary does not authorize him to make the purchase without the consent of the board of county commissioners.

In the light of the above statutes, authorities and observations the above question should be answered in the negative.

056-207—July 19, 1956

ELECTORS AND ELECTIONS

CERTIFICATE OF NOMINATION TO PARTY CANDIDATE SELECTED BY COUNTY COMMITTEE—§§98.321, 99.111, 99.131, 100.111 AND 102.151, F. S.

To: *Ernest C. Johnston, Supervisor of Registration, Citrus County, Inverness*

QUESTION:

Where a vacancy in nomination for a county office is filled by a party county executive committee as authorized by §100.111, F. S., is the county supervisor of registration authorized or required to furnish such candidate a certificate of nomination?

While it does not appear from the request for opinion, we are informed that the vacancy in nomination here involved resulted from the resignation of the Democratic nominee in the 1956 primaries in Citrus county for the office of superintendent of public instruction; and in pursuance of the provisions of §100.111, F. S., the party county executive committee filled such vacancy in nomination by nominating a candidate for such office and certifying that fact to the board of county commissioners. We are further informed that such candidate has called upon the supervisor of registration for a certificate of nomination.

Section 98.321, F. S., provides that the "supervisor shall give to any person nominated or elected to a county office a certificate of his nomination or election and give to any person desiring it a certified copy thereof . . ." upon payment of certain fees.

Section 99.111, F. S., provides that the "clerk of the circuit court shall notify the supervisor of the names of all persons who qualified for a county office and is without opposition in the primary election."

Section 102.151, F. S., relates to certificates in triplicate to be executed by the county canvassing board in relation to an election, one of such certificates "which relate to offices for which the candidates or nominees have been voted for in more than one county" to be transmitted to the secretary of state, another to the clerk of the circuit court and the 3rd copy filed in the supervisor's office; and the duty is placed upon the supervisor immediately to transmit to the secretary of state, a list containing names and addresses "of all county offices nominated or elected."

Section 99.131, F. S., relating to names of candidates to be printed on the general election ballots by the board of county commissioners, includes along with candidates certified as nominated in the general or special primaries, those certified candidates selected in pursuance of "chapter 100";—which reference can be only to §100.111. With respect to certification of candidates, it is provided: "This certificate shall contain the names of persons nominated, and shall be signed and sworn to by a majority of the members of the appropriate canvassing board of primary elections, or in case of nomination by an executive committee, by the chairman or secretary thereof. All committee nominations are made as provided by laws governing primary elections; and further, there are printed on the ballots the names of candidates of political parties nominated or selected to fill vacancies in nomination or vacancies in office in the manner and within the time provided by chapter 100."

There appears to be nothing in §100.111 concerning certification of a committee nominee.

The words above, quoted from §99.131, "All committee nominations are made as provided by laws governing primary elections", are ambiguous. It is quite obvious that the procedures for accomplishing nomination in the primary and nomination by a committee are distinctly different. It is to be noted that as to unopposed candidates in the primary, the clerk notifies the supervisor (§99.111); and as to candidates with opposition in the primary, one of the triplicate certificates of the canvassing board is required to be delivered to the supervisor (§102.151). Since an unopposed candidate obtains nomination not by votes but default in opposition, reasonably it would appear that the signed and sworn certificate of the chairman or secretary (or both) to the board of county commissioners concerning this committee nomination more nearly represents the signed and sworn returns of a canvassing board. If the above quoted words are to be given any effect, they might be construed as indicating legislative intent that such a signed and sworn certificate of the chairman or secretary (or both) of the county committee be also prepared and filed with the supervisor. Section 98.321, requiring the supervisor to give to a person nominated a certificate of nomination, is not conditioned or qualified. Hence, reasonably it would appear that as a matter of caution there shall be filed with the supervisor a signed and sworn certificate of nomination similar to that filed with the clerk for said board; and thereupon the supervisor will be authorized to issue a certificate of nomination to the candidate nominated by said county committee for such office.

Yesterday, the undersigned assistant discussed with a deputy clerk of the circuit court in Inverness the nature of the certificate to be furnished concerning this committee nomination. We then stated that the certificate should be addressed to the board of county commissioners of Citrus county and that it would be in order to include the clerk of the circuit court as secretary to said board. The question now considered was not then thought of or discussed. Hence, a copy of this opinion is being furnished such clerk.

056-208—July 19, 1956

TAXATION

OCCUPATIONAL LICENSES — REAL ESTATE SALESMEN —
REQUIREMENTS UNDER CH. 205, F. S.—§§205.01,
205.13, 205.49, 205.52, 205.53, AND 475.13, F. S.*To: Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are real estate salesmen, whether employed by or working for or under a real estate broker, required to obtain an occupational license under Chapter 205, F. S.?

No person may engage in or manage any business, profession or occupation, for which an occupational license tax is required by Ch. 205, or any other law of the state, unless he shall have obtained such a license and paid the required tax (§205.01, F. S.). Chapter 205, F. S., provides licenses and license taxes for many specified professions, businesses and professions, including miscellaneous businesses (§205.49, F. S.), professions (§205.52, F. S.) and the business of rendering public service (§205.53, F. S.). "Fees or licenses paid to any board, commission or officer for permits, registration, examination, inspection or other regulatory purposes shall be in addition to and not in lieu of any occupational license tax required by this chapter (Ch. 205, F. S.) or other law unless otherwise expressly provided by law" (§205.13, F. S.).

Brokers dealing in land and land options were required to pay an occupational license tax under §12, Ch. 6421, 1913, which section became §834, R. G. S., 1920. Real estate brokers and salesmen were likewise required to pay an occupational license tax under §2, Ch. 11336, 1925. Doubtless real estate brokers and salesmen were included as a regulated profession in §15, Ch. 14491, 1929, and in §205.52, F. S. However, §475.13, F. S., provides that "no collector or county judge shall issue any real estate occupational license except upon the presentation of an active registration certificate for that year . . ." Chapter 475, F. S., regulates real estate brokers and salesmen as a profession.

The above question is answered in the affirmative; however, no licenses may be issued to persons as real estate brokers or salesmen unless they hold the regulatory licenses mentioned in said §475.13, F. S.

056-209—July 19, 1956

MOTOR VEHICLES

FINANCIAL RESPONSIBILITY LAW—MINIMUM SENTENCE
UNDER §324.201, F. S., DESIGNATION OF §324.201, F. S.*To: Bryan Willis, State Auditor, Tallahassee*

QUESTION:

1. In a conviction under §324.201, F. S., 1955, may a fine be imposed for less than the minimum amount prescribed by the section in a case where prosecution was

delayed because enforcement personnel was numerically inadequate to handle the load of cases, or under the discretion of the judge in other circumstances?

2. In drawing up the affidavit to make a charge for violation of the section, should the section be cited as §324.201, F. S., or should it be cited as it is shown in §1 of Ch. 29963, 1955 (§324.19)?

In my opinion the above questions are properly answered as follows:

1. It will be noted that §324.201 (§324.19, F. S., as set forth in §1, Ch. 29963, 1955) specifies the following penalties for violation of the provisions of said section: "... and such person upon conviction shall be fined not less than \$2 or sentenced to not less than 1 day in prison or both in the discretion of the court for each day of delay commencing with the date of suspension." These quoted words are to be construed in connection with the provisions of §324.221, F. S. (§324.21, F. S., as set forth in §1, Ch. 29963, 1955) which repeats such minimum penalties but provides that the fine shall not exceed \$500 and that imprisonment shall not exceed 90 days. Mention is made in the question of delay in prosecution. These minimum penalties per day start to run with the date of the order suspending the license or registration of a person within the contemplation of said §324.201, and not from the date of prosecution. However, it is evident that delay in prosecution is not a relevant factor in relation to these penalties. It is not necessary to cite authority to support the proposition that the mentioned statute fixes minimum penalties which should be imposed. It is recognized that under rare circumstances a situation might arise which might abate or delay the beginning of the running of the time as fixed by said §324.201; for example, a situation where a person to which such an order of suspension is directed is unable to comply by reason of illness or physical disability. However, in absence of a particular case with unusual circumstances, generally it is stated that the minimum penalties described in said section are to be observed. If this justice of the peace in times past has construed the provision of §324.201 as permitting him to impose sentences in actual cases less than the minimum penalties prescribed, he is not to be disturbed by such since those cases are settled and represent his construction of his lawful duties under the statute.

2. Since the present 1955 edition of Florida Statutes has not yet been adopted by our legislature, technically §324.201 as set forth in Florida Statutes, 1955, should be referred to or cited as §324.19, F. S., as set forth in §1, Ch. 29963, 1955.

056-210—July 19, 1956

**STATE AND COUNTY OFFICERS AND EMPLOYEES
RETIREMENT SYSTEM — OPTIONS — CONTRIBUTIONS —
WORKMEN'S COMPENSATION BENEFITS—
§§122.02, 122.03, 122.08 AND 122.10, F. S.**

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. May persons eligible for retirement, who have not applied for retirement and who are not now employed by the state or a county, select one of the options provided by §122.08, F. S.?

2. May an officer or employee, after selecting one of the options provided by §122.08, F. S., terminate his employment without applying for retirement without affecting such option?

3. Where a state or county employee is paid workmen's compensation, or workmen's compensation and salary, should such workmen's compensation be included in his compensation in determining contribution and retirement pay?

4. Is there ever a time when an employee may be permitted to make contributions to the retirement fund on the amount paid him as workmen's compensation?

Section 122.08, F. S., makes several options available to state and county officers and employees within the purview of the state and county officers and employees retirement system, including (1) an option to retire at the age of 60 years, (2) an option to retire, on a reduced rate of compensation, at the age of 55, (3) an option to retire, at a reduced rate of compensation, with certain benefits to his or her spouse after death, and (4) the option provided by §122.08(4), F. S. Said §122.08, F. S., is applicable to officers or employees in current state or county service. Section 122.10, F. S., provides in part that "should any officer or employee who has 10 or more years service within the contemplation of this law leave the services of the state or county, such officer or employee *may leave said contributions in the retirement fund and receive the same retirement benefits as provided for current employees in §122.08, of this law; provided, however, that such officer or employee shall have made contributions as required by this law, or such officer or employee may elect to accept a refund of 100% of his contributions to the fund, without interest . . .*" (Emphasis supplied.)

We are, therefore, of the opinion that where the provisions of §122.10, F. S., have been complied with, and the former officer or employee has contributed to the retirement fund for 10 or more years, as provided in said section, he will be entitled to the same retirement benefits as if a current officer or employee under §122.08, F. S. The retirement rights of current officers and employees under §122.08, and of past officers and employees under §122.10, when duly qualified for retirement benefits, are the same.

Section 122.03, F. S., requires that there be deducted "6% from each installment of *salary* of each officer or employee so long as such officer or employee shall hold office or be employed and said amount so deducted shall be deposited in a special fund hereby established in the state treasury . . ." designated as the "state and county officers and employees retirement fund." The term "salary," as used in Ch. 122, F. S., is defined as the "fixed monthly compensation paid officers and employees . . ." (§122.02(3), F. S.). Under federal income taxing statutes the "amounts received under workmen's compensation acts as compensation for personal injuries or sickness" are not deemed to be a part of the income of the person receiving such compensation (Title 26, §104(a)(1), U. S. Code). Under some retirement statutes the retirement compensation is dependent upon workmen's compensation payments and under others there is no such dependency (62 C. J. S. 122, §588). We know of no provision in Florida Statutes, and especially Chs. 122 and 440 thereof, making sums received by state and county officers and employees as workmen's compensation a part of their salary or compensation. We find nothing in the definitions appearing in §122.02, F. S., which would include workmen's compensation payments and make them a part of the salary or compensation paid state and county officers and employees so as to bring the same within the purview of the state and county officers and employees retirement system.

In the light of the above-mentioned statutes, authorities and observations we feel that the above stated questions should be answered as follows:

1. The 1st question is answered in the affirmative.
2. The 2nd question is answered in the affirmative.
3. The 3rd question is answered in the negative; and,
4. The 4th question is answered in the negative.

056-212—July 23, 1956

COURTS

SMALL CLAIMS COURT—POWER OF JUDGE TO ENTERTAIN PROCEEDINGS SUPPLEMENTAL TO EXECUTION— §§55.52-55.61, F. S.

To: *Samuel A. Harper, Judge, Small Claims Court, Brevard County, Merritt Island*

QUESTION:

Where a small claims court is created by virtue of Ch. 42, F. S., is the judge thereof empowered to entertain the proceedings supplemental to execution found in §§55.52-55.61, F. S.?

Said §§55.52-55.61, F. S., provide a means whereby after an execution has been returned unsatisfied by any sheriff the defendant in execution may be required to appear before the court and be examined regarding property which might be subject to such

execution. The powers of the judge in conducting said proceedings are quite broad for he may order property of the judgment debtor subject to execution to be applied towards the judgment debt. The validity of said act was upheld in *So. Florida Trust Co. v. Miami Coliseum Corp.*, 101 Fla. 1351, 133 So. 334 as to the sufficiency of the title to the act, the denial of due process and as being in conflict with §11, Art. V, vesting exclusive original jurisdiction in equity in the circuit courts. This case, in the syllabus by the court, states the purpose of the act to be "... to assist judgment creditors to discover any assets of the defendant that can be appropriated to the satisfying of judgment, thereby furnishing new and additional means of making executions effective ..."

In the later case of *Ryan's Furniture Exchange v. McNair*, 120 Fla. 109, 162 So. 483 the court stated that the purpose of what are now the sections above designated is to give the *circuit court* broad discretionary powers to carry out the full intent and purpose of proceedings supplemental to execution. In *State v. Viney*, 120 Fla. 657, 163 So. 57 the court quoted with approval from the *McNair* case as to the intention of the statutes. Again in *Riley v. Fatt*, Fla., 47 So. 2d 769, 772 the court stated the purpose of the act was to give the circuit courts broad discretionary powers with respect to judgments and then went on to say "... the statutes are intended to afford to a judgment creditor the most complete relief possible in satisfying his judgment. (Citing cases). To accomplish this purpose the proceeding may be employed as a substitute for a creditor's bill in equity."

In fact, in *Richard v. McNair*, 121 Fla. 733, 164 So. 836, 840 the court said "... Such proceedings are considered a substitute for a creditor's bill in chancery, ... not only to discover assets which may be subject to his judgment, but to subject them thereto by a speedy and direct proceedings in the same court in which the judgment was recovered."

It is to be observed that in all the cases cited herein the supplementary proceeding was had in a *circuit court*. We do not find a decision litigating the question of the jurisdiction of any other court to entertain the proceeding.

Section 11, Art. V, State Const., in part provides:

"The Circuit Courts shall have exclusive original jurisdiction in all cases in equity ... and of such other matters as the Legislature may provide." (Emphasis supplied.)

Of course, we recognize the court of record of Escambia county also has equity jurisdiction (§39, Art. V, State Const.), but that need not be dealt with in this instance.

The decisions under the statutes now considered say that the proceedings supplementary to execution are intended to give the circuit courts broad discretionary powers and are to be considered a substitute for a creditor's bill. A creditor's bill is an equitable proceeding.

The power vested in the court to entertain proceedings supplementary to execution might possibly be considered as an addi-

tional grant of jurisdiction to the circuit courts under §11, Art. V, State Const. Inasmuch as orders (rules nisi) issued by the judge may be directed to third parties who are called upon to show cause concerning concealment of the defendants' assets, and in similar situations, I believe it follows that only a circuit court can properly entertain the proceedings.

The question is, accordingly, answered in the negative.

056-213—July 27, 1956

STATUTES

VALIDITY OF ACTS PERFORMED UNDER STATUTE DECLARED UNCONSTITUTIONAL PENDING APPEAL—CH. 25806, 1949, §21, ART. V, STATE CONST.

To: *George A. Harris, Justice, First District, Duval County,
Jacksonville*

QUESTION:

Where, after a justice of the peace is duly elected, qualified and performing his duties, the statute under which his district was created is declared unconstitutional, but an appeal is taken and supersedeas granted, is such justice of the peace a de facto officer whose official acts are to be considered valid as to third person pending determination of said case on appeal?

One of the enclosures is a copy of the final decree entered by Circuit Judge Claude Ogilvie on July 20, 1956 declaring Ch. 25806, 1949, which abolished the then existing justice of the peace districts in Duval county and designating the number at 5, unconstitutional. The decree stated, with reference to the act, "... it contravenes the express language of §21, Art. V of the Florida Constitution." Judge Ogilvie further held that the "9 justice of the peace districts existing in Duval county prior to the adoption of §21, Art. V, are the legally constituted justice of the peace districts of Duval county, today." A supersedeas order was entered on July 23, 1956 staying the cause "... pending disposition by the supreme court of Florida." Even though an officer may not be a de jure officer his acts may be valid as a de facto officer.

A de facto officer is defined in 43 Am. Jur. at p. 225, as follows:

"A person is a de facto officer where the duties of the office are exercised ... (4) under color of an election or an appointment by or pursuant to a public, unconstitutional law, before the same is adjudged to be such. And this has been widely accepted."

The supreme court of Florida, in *Sawyer v. State*, 94 Fla. 60, 113 So. 736, 744, referring to *State ex rel Attorney General v. Gleason*, 12 Fla. 190, said: "... it was held by this court that an officer de facto is one exercising the duties of an office under

color of election or appointment, and his acts are as valid and binding upon the public, or upon third persons, as those of an officer de jure."

The de facto doctrine was introduced into law as a matter of policy and necessity so as to protect the interests of the public and individuals where those interests were dependent upon the official acts of the person exercising the duties of the office without being a lawful officer. (43 Am. Jur., p. 224). Further, 43 Am. Jur., at p. 241, says: "... The practical effect of the rule is that there is no difference between the acts of de facto and de jure officers so far as the public and third persons are concerned. The principle is placed on the high ground of public policy, and for the protection of those having official business to transact, and to prevent a failure of public justice."

In *State v. Wiseheart*, 158 Fla. 267, 28 So. 2d 589, 593 Justice Terrell, speaking for the majority of the court, said:

"... The difference between the authority of a de facto officer and that of a de jure officer is that one rests on right and the other rests on reputation."

Based upon the foregoing authority, it is my opinion that should the supreme court of Florida affirm the decree of the circuit court of Duval county, thereby declaring the 1949 act unconstitutional and divesting you of your office thereunder, as a de facto officer the official acts performed by you in the discharge of the duties required of the office will be considered valid as to third persons.

The question is answered in the affirmative.

While this opinion is directed only to you as justice of the peace of the 1st district, it is equally applicable to the remaining four justices of the peace and all constables in the five districts created by the 1949 act.

056-214—July 30, 1956

COURTS

APPROPRIATION FOR JUVENILE COURT—CH. 39, F. S.

To: Judge Ernest Housholder, Seminole County, Sanford

QUESTION:

What interpretation is to be placed upon the language "... shall appropriate... from the general revenue fund or other fund of the county as the board may choose, reasonable and adequate funds for the expense of operating the juvenile court in that county..." found in §39.18 (1), F. S., as amended, in so far as the same relates to the payment of the annual salary of the juvenile judge and the counselor of said court?

It is the long established practice of this office not to render an opinion which affects the powers and duties of a public official except upon request of the public official concerned. How-

ever, in this instance the performance of the duties cast upon the board of county commissioners by the juvenile court act vitally affects the operation of the juvenile court and so may properly be answered.

The pertinent portion of said §39.18 (1), F. S., as amended by Ch. 29900, 1955, reads:

"The board of county commissioners of each county shall appropriate each fiscal year commencing Oct. 1, 1955, from the general fund or other fund of the county as the board may choose, *reasonable and adequate funds* for the expense of operating the juvenile court in that county." (Emphasis supplied.)

Prior to the 1955 amendment, the appropriation for the juvenile court had a ceiling placed upon it of "... not exceeding a sum equal to 25c for each person in the county." The word "may" had substituted for it the word "shall."

Before amendment in 1955 we held in opinion 051-230, dated July 20, 1951 (AGO 1951-52, p. 70) that the juvenile court act "is mandatory upon all counties other than those specifically excepted in the context of the act." Consequently, it appears the view we expressed has been confirmed by the legislature by striking the word "may" and inserting the word "shall", thereby definitely making the provisions of the act mandatory.

Section 39.18(2) (f), F. S., now reads:

"The counselor shall be paid an annual salary fixed by the juvenile judge and approved by the board of county commissioners and shall be paid in 12 equal monthly installments."

In addition, in said opinion, with reference to the salary of the juvenile judge, we said that the board of county commissioners of each county may fix such annual salary as shall not exceed the amount specified in §39.18, F. S. It was formerly provided by sub §(2) (f) that the counselor be paid an annual salary equal to 2/3 of the annual salary to be paid to the judge. We concluded as follows: "... However, as indicated by the law, these figures are merely maximum salaries which may be paid, and the board of county commissioners has the authority under this statute to fix the salaries at any rate not in excess of these figures."

In opinion 051-350, dated Oct. 5, 1951 (AGO 1951-52, p. 69) we again held that "... it is within the discretion of the County Commissioners to determine what compensation, not to exceed the maximum ceiling provided in §39.18, shall be paid the Juvenile Court Judge and to provide for the payment thereof." As we interpret the act, it vests, after due consideration of all factors which may affect or should determine the salary to be allowed the juvenile judge, the discretion to fix what that amount shall be. In other words, the board of county commissioners should take into account the comparable duties required of a juvenile court judge in a county within the same population bracket, the number of cases handled by the judge, the time consumed in the performance of his duties and other matters that normally determine

what is reasonable and adequate compensation for the duties required of the office. If such be properly done, then I believe that the county commissioners have complied with the legislative mandate of appropriating reasonable and adequate funds and that that discretion may not be upset by judicial process or otherwise.

However, we call your attention to the case of *Singletary v. State*, 69 So. 2d 794, 798 where the court said:

"... The power to exercise discretion which the law must vest in public officials under certain circumstances carries with it a corresponding—and very great—responsibility, a responsibility to see that it is exercised with caution and always with the realization that nothing can attain a greater degree of despotism than an abuse of this necessary power."

It was said in *State ex rel Roberts v. Knox*, 153 Fla. 165, 14 So. 2d 262: "The officer when exercising the discretion is not permitted or allowed to act in an *arbitrary* or *capricious* manner. He is not permitted to exercise the discretion conferred by law for personal, selfish or fraudulent motives or for any reason or reasons not supported by the discretion conferred by law." While legal compulsion will lie to compel an administrative board to act, it will not lie to control the discretion of that board. (*Garvin v. Baker*, Fla., 59 So. 2d 360). See, also, *State v. Turner*, 155 Fla. 270, 19 So. 2d 832 with reference to control of discretion by legal process.

Therefore, in line with these authorities, the discretion vested in the board of county commissioners to appropriate *reasonable* and *adequate* funds for the operation of a juvenile court can only be disturbed to the extent of requiring it to exercise that discretion, but not in any particular manner, and then only where there is a wilful, capricious, unreasonable or arbitrary refusal to appropriate sufficient and adequate funds to properly operate said court.

It follows that if the county commissioners arbitrarily abuse their discretion and fail or refuse to fix reasonable and adequate compensation for such a juvenile court judge, then they may in a proper suit be required to reconvene and fix such compensation. While the courts will not fix any particular compensation, they would undoubtedly entertain an appropriate suit to require the commissioners to fix another salary where the one fixed is manifestly inadequate and unreasonable.

This answers the question as definitely as the same may be answered.

056-215—July 30, 1956

COURTS

JUVENILE COURTS—INVESTIGATIONS BY SHERIFFS WHERE NO COUNSELOR APPOINTED—§30.23, F. S.

To: *John A. Madigan, Jr., Florida Sheriffs' Assn., Tallahassee*
QUESTION:

In the absence of a juvenile counselor duly appoint-

ed and acting for the purpose of making investigations of those alleged to be delinquent or dependent children under Ch. 39, F. S., may the judge of said court designate the sheriff to make investigations of criminal acts alleged to have been committed by a delinquent child?

The pertinent part of said §30.23, F. S., provides a fee for the sheriff for "investigations of crime when made under the direction of the judge of a court having criminal jurisdiction . . ." when such fee is approved by the court. (Emphasis supplied.)

The real question, then, is whether or not the sheriff may properly charge the per diem for said investigations. We are confronted with the principle ". . . that fee statutes are to be strictly construed and none allowed except where clearly provided by law." (Bradford v. Stoutamire, Fla., 38 So. 2d 684, 685).

Also, we have held that the provisions of the juvenile court act are mandatory so that a county must comply with the provisions of the act (Opinion 051-230, dated July 20, 1951, AGO 1951-52, p. 70). We there stated: "It is my opinion that Ch. 26880 provides an exclusive method for handling juvenile cases, and that the act is mandatory upon all counties . . ." save those excepted from the act. We also said: "Since, in addition to the judge, a counselor seems to be required in order to carry out the clear intent and purposes of the act, *it would be incumbent upon the county to provide for and the judge to appoint a counselor in the manner provided therein.*" (Emphasis supplied.) Your request does not indicate why there is no counselor as required by the act. It is clearly contemplated by the law that the counselor make all investigations relating to dependent or delinquent children. (§§39.04, 39.06 (2), F. S.)

The juvenile court has no criminal jurisdiction in the strict sense of the words for a child is never charged with crime in that court.

Where the lack of a counselor is due to no fault of the juvenile judge, but is the result of something entirely beyond his control, it is obvious that there should not be a termination of investigations of juvenile delinquency.

In fact, we recognized in opinion 051-465, dated Dec. 18, 1951 (AGO 1951-52, p. 73) a situation where the county refused to appropriate funds for the juvenile court by holding that the county judge might pay out of the fees of his office attorneys' fees for advice, counsel and litigation, respecting his duties as juvenile judge.

In opinion 051-447, dated Dec. 6, 1951 (AGO 1951-52, p. 241), we construed the provisions of what is now §125.45 (2) (g), F. S., relating to payment of a sheriff's telephone and telegraph bills for "apprehension of criminals." Question 2 deals with what persons fall within the term "criminals." We said, in part: ". . . Under such a broad definition, it seems also reasonable to assume that the phrase would include cases where delinquent children would be involved, who, although not classified as criminals, may have violated criminal statutes and would be sought by the sheriff

for the purpose of taking such a child into custody." We stated the phrase should be construed in its broadest sense.

Of necessity, then, where, under the facts set forth in the question, the juvenile court feels that an investigation is necessary and proper, he may designate the sheriff to make the required investigation. As qualified, the question is answered in the affirmative.

This is not to be construed as permitting the sheriff to make the investigation under the direction of the court where the same may be made by the court or the counselor thereof.

056-216—July 30, 1956

ELECTORS AND ELECTIONS

CITY OF TAMPA—SPECIAL MUNICIPAL ELECTION TO
FILL VACANCY IN OFFICE OF MAYOR—HELD IN CON-
JUNCTION WITH STATE GENERAL ELECTION—
§§99.131, 100.031, 101.151, 101.25 AND 101.36, F. S.

To: *Guy T. Beck, Vice Chairman Board of Elections, Tampa*

QUESTIONS:

1. Can the Tampa board of elections call a special municipal election to be held with the regular state-wide general election for the purpose of filling the vacancy in office created by the death of Mayor Curtis Hixon, the ballots for both elections being placed on the voting machines used in the city of Tampa?

2. When a member of the board of representatives of the city of Tampa submits his resignation to become effective subsequent to a special municipal election called to fill the vacancy in the office of mayor, which resignation is duly accepted by the city board of representatives, can the board of elections require the filling of this prospective vacancy in the membership of the board of representatives at the same special election?

As I understand it, the board issued a call for special first and second elections to be held on these dates, such call being made shortly after Mayor Hixon's death.

To my mind, this raises a serious question of whether the board has exhausted its authority and may now abandon that call and issue another one setting the special election for some subsequent dates. Although you have not specifically raised this question, it can not be ignored as it has an obviously important relation to the question of whether the date of one of the municipal elections can now be coincided with the date of the general election.

Assuming for the present that the city election board can legally change the special elections from the dates in September, there would be no objection to their calling for one of the special elections to be held on the same day as the general election if both elections were kept separate and distinct to the extent that

they would be if held on different days. Such a degree of separation appears to be legally impossible, however, because of the lack of a sufficient number of voting machines to enable the city and the county to each have the number of machines it is required to have. The possibility of the city election being conducted by paper ballots is obviated by the provisions of §101.36, F. S., which require a municipality to use voting machines in all elections when the county in which it is located has a population in excess of 150,000 and has adopted the use of voting machines. (See also Ch. 18406, 1937.)

Sections 99.131, 100.031, 101.151, and 101.25, F. S., as well as other provisions, leave no doubt as to what should appear on a general election ballot. In none of these statutes is there any indication that the election of a municipal official could be accomplished through the use of space on the general election ballot. From this it may be concluded that the election of a mayor for the city of Tampa can not be had by including the names of that office and the candidates for it on the general election ballot. The old legal principle, *expressio unius est exclusio alterius*, is aptly applied here in that the expression in these laws of the things to be included on a general election ballot excludes anything else from being put on the ballot.

Bond or referendum elections have been held by placing the separate ballots used for such purposes on the same machines used in regular primary or general elections. However, in the instances where this has occurred, to my knowledge, there has been at least some vestige of legislative authority for the combination. The county commissioners or the county election board in such instances would control both elections and there would be no division of authority as to the preparation of the voting machines, the appointment of election officials, the actual conduct of the election, or the tabulation and certification of the results. Although the division of authority in the proposed combination of a Tampa municipal election with a state and county election would lead to many such conflicts of authority in the various technical aspects of conducting the election, it must be admitted that these obstacles would not be insurmountable provided the authority was granted by the legislature to deal with such obstacles. Such authority was given to the city of Orlando by Ch. 31073, 1955. To my knowledge, this is the only instance where joint municipal and state elections have been expressly authorized by the legislature.

Despite the broad powers granted to both the city of Tampa and the Hillsborough county election boards, neither of such boards, being creations of the legislature, have any powers other than those expressly granted or necessarily implied. There is no express grant of the power to combine the elections conducted by these boards, and it is doubtful that any such power can be reasonably implied from the express terms of the statutes applicable to them. (See *State ex rel Burr v. Jacksonville Terminal Co.*, 71 Fla. 295, 71 So. 474, and *State v. Atlantic Coast Line Railway Co.*, 56 Fla. 617, 47 So. 969.) Even if such power were necessarily implied, the combination of the two elections would

constitute a drastic departure from the established procedure of conducting them separately which is subject to none of the doubts referred to herein.

In view of the foregoing it is my opinion that regardless of the convenience and economy of combining the two elections, such grave doubt exists concerning the validity of such action as to dictate that the board of elections of the city of Tampa should adhere to the most prudent and cautious course under the circumstances and hold the special municipal elections on the dates for which they have already been called.

The 2nd question which you have presented involves primarily the power of the Tampa board of elections to call a special election to fill a vacancy which has not as yet occurred. A member of the board of representatives of the city of Tampa has submitted his resignation to become effective on Oct. 1, 1956, which is subsequent to the September special elections called to fill the vacancy in the office of mayor. This resignation was duly accepted by the city board of representatives. After the submission of the resignation, the board of elections called special elections to fill the prospective vacancy for the same dates as the previously called special elections.

In considering this issue it is pertinent to bear in mind that all regular elections, as distinguished from special elections, provide elected officials to fill vacancies that will not exist until after the election but which are certain to exist by expiration of term.

It is also noted that the following principle was announced by the Florida supreme court in *Tappy v. State*, 82 So. 2d 161:

"This general rule has been recognized in Florida: When an officer tenders his resignation to take effect at a subsequent date, the office does not 'become vacant' until the date on which the resignation becomes effective, *though before such effective date of the resignation, the Governor may grant a commission to an appointed successor to be effective the date the resignation takes effect.*" (Emphasis supplied.)

(See also *In re Advisory Opinion to the Governor*, 117 Fla. 773, 158 So. 441, 442.)

In this Advisory Opinion to the Governor, (Fla.) 158 So. 441, the Florida supreme court recognized the principle that a public officer who had submitted a prospective resignation could withdraw such resignation before it became effective provided the governor had not issued a commission to a successor. The effect of this rule is that the withdrawal of a resignation must be absolutely precluded either by its becoming effective according to its own terms or by some official action being taken on the basis of the resignation that would preclude the resigning official from thereafter withdrawing his resignation. Although the action in the advisory opinion in the situation involved which could have precluded the withdrawal of the resignation would have been the issuance of a commission to a successor, it is not impossible that some other precluding official action would be given a

similar effect under the same principle.

The official action that has estopped or precluded the withdrawal of the resignation under the present facts is the acceptance of the resignation by the city board of representatives followed by the calling of the special election to fill the prospective vacancy. It may be concluded that the resignation in question can not now be withdrawn and that a vacancy on the board of representatives is an absolute certainty.

If the governor can make an appointment to fill a vacancy which has not yet occurred but which is certain to occur, it seems logical that a special election could be called, where otherwise authorized, to fill a vacancy that is certain to occur at a time subsequent to the election. It is a principle of long standing and of obvious validity that a vacancy or hiatus in office is deplored. All of our laws on this subject are designed to terminate vacancies by filling them as quickly as possible after they occur or by providing a person in advance to fill the vacancy when it does occur.

In Florida a vacancy in office which is certain to occur at a definite time in the future may be prospectively filled by a special election where such is otherwise authorized. Although only the courts can settle the question with finality, under the circumstances the board of elections appears to have acted properly in calling the special elections to fill the prospective vacancy on the board of elections prior to the time that it will actually occur.

The orderly processes of government require that when an official takes positive action to surrender a public office which action has been officially accepted and the election machinery is set in motion for the people to fill the vacancy that is bound to occur, such processes should not be lightly disturbed or set aside because of disagreement with the official action taken or the personalities involved. The rights involved in the process belong to the people to fill the prospective vacancy which should not be denied them on the theory that no vacancy presently exists. It is recognized also that several persons have already qualified as candidates to fill the vacancy in question and that they are entitled to be free of the uncertainty and confusion that would follow should the board of elections now determine to set the elections for different dates than those already announced.

056-217—July 31, 1956

TAXATION

CONSTRUCTION OF §192.351, F. S. BARRING ENFORCEMENT OF TAX CERTIFICATES ACQUIRED UNDER MURPHY ACT—APPLICATION TO CERTIFICATES ASSIGNED TO MUNICIPAL CORPORATION

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Does Ch. 29794, 1955, prevent the enforcement of tax sales certificates assigned to a municipal corporation under the provisions of Ch. 18296, 1937, commonly known as the Murphy act?

Chapter 29794, 1955 (§192.351, F. S.), provides, among other things, as follows:

"The right to apply for a tax deed or to institute other action for recovery on or enforcement of tax sale certificates, and subsequent and omitted taxes in connection therewith, which were sold and assigned under the provisions of Ch. 18296, 1937, commonly known as the Murphy act, and which certificates are held by *private holders*, natural or corporate, partnership, trustee, estate of deceased person, or other person or persons under disability, or otherwise, shall be deemed and held to be barred by this section from and after midnight June 30, 1956." (Emphasis supplied.)

The term "corporation," as used in various statutes and constitutions usually refers to private corporations only and ordinarily does not embrace municipal corporations (18 C. J. S., §1, p. 366). Ordinarily the word "private" means in the interest of the individual as distinguished from an enterprise or business operated by or on behalf of the public, or of any official function performed for public benefit. (See Vol. 33, Words and Phrases, pp. 656-661 and Cumulative Pocket Part.) The supreme court of Florida has defined a "private corporation" as one formed for the benefit of its stockholders exclusively (Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage Dist., 77 Fla. 742, 82 So. 346).

In the light of the foregoing authorities, it is our opinion that "private holders" referred to in Ch. 29794, 1955, was not intended to include municipal corporations and the question, therefore, is answered in the negative.

056-218—July 31, 1956

SHERIFFS

PURCHASE OF AUTOMOBILE FOR USE IN EXECUTION OF OFFICIAL DUTIES—§§145.03 AND 145.05, F. S.

To: *Ferrin C. Campbell, Crestview*

QUESTION:

Where an automobile is purchased by a sheriff for use in connection with his official duties, and the down payment and installments are charged as an expense of the office, upon the sheriff's death what method should be used to determine the respective interest of the sheriff's estate and the county in said automobile?

The purchase of office equipment by a county fee officer was discussed in the recent opinion 056-206, dated July 17, 1956, copy of which is enclosed. It stated "... that capital equipment, sometimes referred to as substantial items of equipment, should be paid for by the county, either from the general fund or from the fund provided by §145.05, F. S., and that current office expenses should be paid by the officer from the income of the office . . ." The items involved in the discussion were adding machines,

typewriters, law books, etc. What is a capital expense and what is a current operating expense may be difficult to determine. See, also, opinion 052-143, dated May 1, 1952 (AGO 1951-52, p. 252). However, we do not feel these opinions control the present situation.

We do not see how there may be divided equities in the automobile so purchased, for the county may not be joint owner with the sheriff. Where the down payment and installments are charged as an expense of the office, the automobile is the property of the county.

We are advised by the state auditing department that this method of handling expenditures of this nature without hardship has been used in several of the sheriff's offices. The sheriff purchases and holds the title individually, but charges actual depreciation thereon as an expense of the office. Inasmuch as the sheriff must, under §145.03, F. S., make an annual report of his official income and expenses, as a practical proposition the depreciation must be estimated as accurately as possible for all automobiles being operated by the office. When a car is traded and the actual depreciation is thereby established an adjustment may then be made for the difference between the estimate and the actual depreciation since time of purchase. Thus, when the sheriff's term of office ends, the automobiles on hand are his property.

The depreciation to that time may be established by obtaining an appraisal of the cars on hand. By following this method both the finance or carrying charges and the cost of operating the cars may be charged to the expense of the office.

Sheriff Enzor purchased the automobile in question on Dec. 31, 1955, making a down payment of \$1,800 and charged it and the monthly installments as an expense of the office until his death on June 22, 1956.

In an effort to reach a conclusion equitable to all concerned, we have conferred with the state auditing department. We are advised that the audit indicates the net income for the year 1955 is in error and, therefore, must be revised.

Should the estate desire to follow the method of depreciation described above, the down payment of \$1,800 should be removed from the expenses of the office for 1955 and the depreciation charged to the year 1956. Thereby, the excess income for 1955 would be increased by \$1,800, but the car would become the property of the estate.

This answers the question as definitely as the same seems possible.

056-219—July 31, 1956

REGULATION OF PROFESSIONS AND VOCATIONS

**PHYSICIANS—REFUND OF APPLICATION FEE PAID OR
DEPOSITED UNDER §458.10, F. S.**

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

**When, if ever, may the fees provided in §458.10,
F. S., be refunded?**

We gather from the file handed us with the said request for opinion that an application to take the medical examination in this state was filed prior to the time the applicant had qualified to take such examination by passing the basic science examination, the basic science examination having been held on June 9, and the medical examination on June 24-26, of the same year. Although the applicant knew that he would not be permitted to take the medical examination until he had taken and passed the basic science examination, he, nevertheless, in order that he might take the medical examination, should he pass the basic science examination, made application to the medical board to take the medical examination, and paid the fee provided for and required by §458.10, F. S. Each applicant for medical license by examination is required to pay a fee of \$50, which fee shall accompany the application. The fee seems to include the issuance of a temporary license when one is issued. These fees, when paid to the board, are required to be deposited in the state treasury. Said §458.10, F. S., provides in part that "no part of any fee is returnable under any circumstances"

We find nothing in the statutes prohibiting the filing of an application to take the medical examination, although the applicant had not at the time of the making of the application taken and passed the basic science examination; however, such applicant could not be permitted to take the medical examination unless and until he had passed the basic science examination. There is nothing in the statutes prohibiting the medical board processing the application and making the required investigations concerning the applicant and determining his qualifications and right to take the medical examination, subject, however, to his taking and passing the basic science examination. Where the medical board accepts such an application to take the medical examination, should the applicant take and pass the basic science examination, and makes the necessary and customary investigation concerning the qualifications of the applicant, the fee is earned although the applicant is not permitted to take the examination, and no part may be refunded.

Should the medical board elect not to make any investigation or take any action on the application until after the applicant has passed the basic science examination, then it might be said that no part of the fee is earned; however, if any action is taken on the application or any investigation concerning the applicant is made, the fee would be earned. The fee is not merely an exami-

nation fee, but is intended to compensate the state for making the necessary investigations as well as giving the examination. The fee is primarily for the purpose of paying the expenses of the board in regulating the practice of medicine in this state, of which the investigations and examination of applicants are a part.

Where any action has been taken by the medical board on an application to take the medical examination, the fee has been earned and may not be refunded. Whether or not any action was taken on the application is a question of fact to be determined from all the facts and circumstances. Where an application has not been acted on, either in whole or in part, it might be withdrawn and the fee refunded under §215.26, F. S., as nothing is due until *some* action has been taken on the application, however small such action be.

The facts before us are not sufficient to pass upon the specific fee sought to be recovered; however, we feel that the above fixes a formula from which the question may be answered when the full facts are ascertained.

056-221—July 31, 1956

REGULATION OF PROFESSIONS AND VOCATIONS
LICENSES—PRACTICE OF BODY CONTOURING AND
SLENDERIZING BY LICENSED BEAUTICIANS
 —§§480.01-480.03, F. S.

To: *Ethel M. Manning, Executive Secretary, State Board of Beauty Culture, Tallahassee*

QUESTION:

Is the holder of a valid beautician's license who practices body contouring and slenderizing by the use of electrical appliances or apparatus in a beauty shop of this state exempt from the application of Ch. 480, F. S., relating to masseurs and masseuses?

Section 480.03(4), F. S., specifically exempts beauticians, duly licensed under the laws of Florida, and other classes of persons, from the application of Ch. 480, F. S.

Probably the misunderstanding over this question arose from the fact that parts of §§480.01, 480.02 and 480.06, F. S., were amended by Ch. 29971, 1955; however, this amendment did not affect §480.03 of the chapter, which remains in force and effect.

Therefore, your question is answered in the affirmative.

056-222—July 31, 1956

COUNTY ORGANIZATION AND REGULATIONS

RECORDS IN OFFICES OF TAX COLLECTORS AND COUNTY JUDGES—DESTRUCTION—§§192.31, 193.391, 199.03, 200.03, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

May any, or all, of the following records in the offices of the county tax collector and county judge be destroyed before they are 20 years old?

The records referred to in the above stated question are the copies or originals of the following in the offices of the county tax collectors and the county judges, to wit: (1) Class "C" intangible tax receipts, (2) regular intangible tax receipts, (3) occupational licenses, (4) beverage licenses, (5) occupational reports, (6) beverage reports, (7) auto tag reports and registration cards, (8) bank statements and checks, (9) check books, (10) real estate receipts, (11) special drainage receipts, (12) receipts for deposit of county funds, (13) receipts for moneys received by various state and county departments, and (14) unissued occupational licenses.

"A 'public record' has been defined as one required by law to be kept or necessary to be kept in the discharge of a duty imposed by law The elements essential to constitute a public record are, namely, that it be a written memorial, that it be made by a public officer, and that the officer be authorized by law to make it; but the authority of the officer need not be derived from express statutory enactment Generally there is no single test which can be applied to determine what are and what are not public records. All records which the law requires public officers to keep, as such officers, are public records Every memorandum made by a public officer is not a public record; papers or memoranda in the possession of public officers, which are not required by law to be kept by them as official records, are not public records . . . correspondence of officials relating to private affairs, although in connection with public business, and memoranda of public officers made for their own convenience, even if made at public expense are not public records unless made so by statute" (76 C. J. S. 112-113, §1).

Under the statutes the comptroller, under the supervision of the state budget commission, prescribes and furnishes forms to be used in the assessment and collection of state and county taxes (§§192.31, 199.03 and 200.03, F. S.). It is indicated by §193.391, F. S., that tax receipts are issued in duplicate, the taxpayer receiving one of them and the tax collector retaining the other as a public record; these duplicate tax receipts evidently furnish a public record of the taxes paid. Occupational licenses are issued in duplicate, or with a stub containing the necessary information; these likewise constitute public records of the payment of such license taxes. Receipts received by the

said county officers for moneys distributed by them to various state and county departments, and for the deposit of county funds, would seem to constitute public records concerning finances. Copies of reports made by such officers to state and county departments and officers would seem to constitute office records of tax collectors and county judges of such reports. Bank statements, check books, etc., would seem to constitute financial records of the office. Unissued licenses and other documents, although not public records, were probably charged to the officer, and their destruction might make it difficult for the state auditing department, and the state agency furnishing the blank licenses, etc., to audit the officer's accounts.

It is, therefore, our conclusion that none of the records specifically mentioned should be destroyed in the absence of a statute authorizing destruction. Section 193.391, F. S., authorizes the destruction of duplicate tax receipts 20 years or more old.

This answers the above question in the negative.

056-224—July 31, 1956

INSURANCE

GROUP CREDIT LIFE INSURANCE—FIRST INVESTORS CORPORATION

To: *Jerry Thomas, Director, Florida Securities Commission, Tallahassee*

QUESTION:

Does the insurance feature of the investment plans with insurance, as described below, violate the insurance laws of this state?

At the outset, it appears that the opinions referred to in the request for this opinion were 051-311, as supplemented by 051-419. Since copies of these opinions are now exhausted in our files, available copies are attached hereto and reproduced along with this opinion. To avoid unnecessary discussion, a copy of opinion 056-169 is also attached. There have been some changes in our laws relating to group credit life insurance since issuance of the 1951 opinions. There are features of the forms of policies attached to the request for opinion which are objectionable under the previous opinions rendered. Furthermore, in the application of a subscriber to one of the plans, there is required to be furnished by him data concerning his insurability; and it is thought proper at this time to come to some conclusion as to whether or not such data so furnished by a person in connection with an application as a subscriber to one of these plans constitutes an application for insurance coverage in Florida. Since there are quite a number of these plans now being offered in this state, and there continues to be inquiries from several sources concerning the regularity of the sale of these plans with insurance in Florida it is considered appropriate to review the conclusions set forth in the previous opinions.

The mentioned 1951 opinions dealt with purchase of shares of the Wellington fund investment trust. First Investors Corp.,

according to the furnished data, now offers plans with insurance for purchase of shares on a periodic basis up to 10 years of Wellington Fund, Inc., and Mutual Investment Fund, Inc. The prospectus of each of these plans among other things provides that "a plan holder of a single payment plan or a periodic payment plan without insurance may, at any time, terminate his plan by surrendering it to the custodian and may request delivery of the shares accumulated, registered in his name, or the liquidation and remittance to him of the proceeds of such liquidation. A plan holder of a periodic payment plan with insurance in force may exercise such privilege only during his lifetime. (Fee \$1 for withdrawal)."

Attached to the application to be executed and signed by a subscriber to one of these plans is a statement, perforated so that it may be detached, with the heading, "This insurance is not effective until approved by the insurance company and until you have accepted delivery of your plan certificate, duly executed by the company and the custodian. If, however, your application for insurance is rejected, you will be promptly notified." There follows: "In connection with the insurance of the unpaid balance of the payments due under my plan, I submit the following information:" followed by blanks to be filled in to elicit information concerning applicant's name, address, age, etc.; whether applicant has ever been limited, postponed, rejected, etc., for life insurance; medical and surgical history for past 5 years; and data concerning the periodic payment plan to which applicant has subscribed.

Since this data concerning insurability is a part of the subscriber's application for one of these investment plans, and since it is delivered to a salesman for First Investors and transmitted by the former to the latter (not to the insurance company by the salesman) it is determined that such data so furnished by a subscriber does not constitute an application for insurance in this state.

The companies furnishing coverage in connection with these plans are Continental Assurance Co., The U. S. Life Insurance Co., and Connecticut General Life Insurance Co. Each of these policies, under the heading, "Entire Contract", makes "applications of the individual purchasers", if any, a part of the contract. This is contrary to the provisions of former opinions 051-311 and 051-419.

On June 21, 1956, we wrote a letter concerning the Dreyfus investment program. We approved that coverage, assuming that the investment plan involved (with insurance) complied with the findings and conclusions set forth in former opinions 051-311 and 051-419. Such conclusions were set forth at length in said letter, and appear below in this answer. Previously, on Feb. 3, 1956, we refused to approve such policy forms for the reason set forth in the preceding paragraph.

Since issuance of the 1951 opinions, the conclusions set forth therein have determined whether we would approve or disapprove an investment plan with insurance sought to be sold in Florida.

Policies considered in this opinion have cautionary wording that the company may decline to insure any individual purchasers in any state where legal restrictions and state requirements make

such declination necessary. It is suggested for the consideration of the insurance commissioner, to whom a copy of this opinion is being transmitted, that in the light of the clear wording of our opinions 051-311 and 051-419, from which we have not receded, that these insurance companies furnishing coverage for these investment trusts and which companies are admitted in Florida assume some responsibility with respect to the type of coverage they are willing to have used in Florida in connection with one of these plans. In other words, we do not consider that these insurance companies should absolve themselves of responsibility by the cautionary wording mentioned in this paragraph. As set forth in opinion 056-169, the group coverage here is not permitted by Florida laws. In view of the foregoing in my opinion the above question is answered as follows:

1. If the above corporation desires to continue to sell to subscribers in Florida the investment plans described above, then the insurance policies used in connection with said plans should be conformed as to their provisions to comply with the clear requirements of former opinions 051-311 and 051-419.

2. The furnishing by a subscriber to one of these plans of the above mentioned data in connection with his insurability does not constitute an application by such subscriber to any of the insurers involved in these plans of insurance coverage in Florida.

3. In our letter of June 21, 1956, to the director of Florida securities commission, concerning the Dreyfus investment program, we set forth that we had assumed the position in these former opinions that as to Florida persons purchasing or subscribing to such an investment plan with insurance, such group insurance will not be subject to or controlled by our group life laws if the following conditions exist: (a) The master policy is issued in or controlled by the laws of another state. (b) The master policy insures the entity or group composed of all persons wherever located who may subscribe to the plan, and the insurance coverage is afforded to such a prospective plan holder without the necessity of application by him to the insurer as a condition that the coverage will be extended to him. (c) That the named policy holder in the master policy is the investment concern, and that as between the insurer and a plan holder, no obligation under the contract provisions rests upon the plan holder to transmit premiums to the insured. (d) That such certificates as may be issued to plan holders evidencing coverage under the master policy are not in conflict with the terms of the latter, do not set forth terms or conditions additional to those set forth in the master policy, and by the terms in the master policy are not made a part of the insurance contract. (e) Applications of subscribers to the plan with insurance are not made a part of the insurance contract. (f) That a Florida subscriber to the plan with insurance agrees to purchase or subscribe to the plan only; that no separate applications for insurance are involved.

4. That the insurance commissioner send copies of this opinion to all insurance companies issuing coverage in connection with one of these plans being offered to subscribers in Florida, and which companies are admitted in this state, requesting such companies to include such Florida subscribers in its group cover-

age only if the plan and insurance in connection therewith is being offered in this state in pursuance of this opinion. If these companies desire to otherwise engage in business in this state, they should assume some responsibility concerning these investment plans in Florida and the coverage they furnish.

056-225—August 1, 1956

TAXATION

CLASS "C" INTANGIBLE TAX AS A SINGLE TAX—§199.11(3),
F. S., AND §1, ART. IX, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

If the Class "C" intangible personal property tax (FSA §199.11(3)) is paid with respect to the debt recited in the mortgage at the time of recording the mortgage securing the borrower's obligation to the U. S., will the promissory note evidencing such debt be thereafter immune from all subsequent annual Florida intangible personal property taxes whether held by residents or non-residents?

It is noted that §1, Art. IX, State Const., provides in part as follows:

"... the Legislature may prescribe an intangible tax of not more than two (2) mills on the dollar, which shall be payable at the time such mortgage, deed of trust, or other lien is presented for recordation, said tax to be in lieu of all other intangible assessments on such obligations"

And §199.11, F. S., as a part of sub §(3) of said section, which section imposes Class "C" intangible tax, provides that

"The tax imposed by this subsection shall be the only intangible tax levied on such notes, bonds and other obligations under this chapter."

The supreme court of Florida, in *State v. Gay*, 46 So. 2d 165, text 168, states that

"It is a matter of common knowledge, of which this court can take judicial notice, that the Class "C" tax is exacted by our tax gatherers only at the time the mortgage, or other security, is presented for recordation, or for enforcement in our courts; and that, once this tax has been collected on a particular secured obligation, no further annual tax is collected by the tax collectors of this state on such obligation. This has been the long-prevailing construction of §199.11(3), supra, by the Comptroller of the State of Florida, of which this court may also take judicial notice. *Bloxham v. Consumers' Electric Light & Street R. Co.*, 36 Fla. 519, 18 So. 444, 29 L.R.A. 507, 51 Am. St. Rep. 44."

From the above constitutional provision, statute and court decision, it is clear that Class "C" intangible personal property taxes are paid upon the recording of the mortgage securing the obligation, and that once this tax is paid on a particular obligation no further annual tax is collectible by the tax collectors on the obligation. The payment of the tax at the time of recording is the only tax due; however, should there be a failure to record the mortgage, the obligation secured will be subject to an annual tax under a different classification.

This answers the above question in the affirmative. However, there is presented the problem of identification and evidence of the payment of the tax under said Class "C" in case the obligation and the mortgage are separated. Unless there be some means devised for showing the payment of the tax on the obligation, as well as endorsing it upon the mortgage, it may be difficult to prove payment under Class "C" should there be an attempt to levy a tax under another classification. This is merely a suggestion.

056-226—August 1, 1956

INSURANCE

PROPRIETY OF PUBLIC OFFICIAL PROCURING BURGLARY, ROBBERY AND THEFT INSUR- ANCE ON PUBLIC MONIES COLLECTED —CHAPTER 145, F. S.

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*
QUESTION:

Is it lawful for the state, its various boards, bureaus, districts, authorities, and other legislative creations, including county governments and boards of public instruction to expend monies for the purchase of burglary, robbery and theft insurance on public monies collected?

It was the general rule at common law that no personal liability of a public official existed with respect to monies received by him in his official capacity except for his misfeasance or neglect with respect thereto, and that such officer was not responsible for the misconduct of his subordinate. However this rule is not generally followed now, on the theory that public policy dictates the rule of strict liability in order to prevent fraud (*Byrd v. McGoldrick*, 116 A. L. R. 1059). That apparently is the rule in this state, as evidenced by remarks of our court in *Martin v. Karel*, Sheriff Fla., 143 So. 317; *Orange County v. Robinson*, Fla. 149 So. 19.

The question as stated is quite broad. It is recognized that there are numerous public officials and employees in this state officially receiving public monies under varied circumstances. Except as to a certain class of public officials, in the absence of a question making specific reference to certain officers or employees, several factors preclude any attempt to generally answer

the question. The mentioned exception includes those county officials falling within the purview of Ch. 145, F. S.

Section 145.01, F. S., fixes a limit on "net income" of each county official whose compensation is paid wholly or in part by fees or commissions. Section 145.02, F. S., defines "net income" as residue of the income from such an office after deducting all reasonable expenditures for salaries of clerks and assistants and necessary expenditures for the proper operation of such office. Section 145.05, F. S., provides for payment annually by such an office to the board of county commissioners of excess fees into a special fund the proceeds of which shall be expended "for the purpose of equipping, maintaining, and supplying said office, from which such money is derived, with the necessary books, furniture, fixtures and all other things now supplied or furnished by the board of county commissioners and paid for by them from the general revenue of the county"; with further provision for use of such funds, as conditioned.

Since adoption of Ch. 145 (derived from Ch. 7334, 1917, with subsequent amendments) quite a number of opinions have been issued by the office of the attorney general construing the law and particularly what expenditures constitute current operating expenses (deductible in establishing net income) and what constitute expenditures for capital equipment (not so deductible). Some of these more recent opinions are mentioned: 046-22 (1945-46 A.G.R. 255); 046-452 (1945-46 A.G.R. 257); 049-246 (1949-50 A.G.R. 40); 052-143 (1951-52 A.G.R. 252); and 056-153.

Attention is directed to the fact that the state, county or district, depending upon particular officers involved, pays the premium on bonds required of such officials by law, with exception of excess premium, if same is imposed (§113.07, F. S.). A receiver, assignee, committee, guardian, executor or administrator required by law to give bond as such, may include as part of his lawful expense such reasonable sum paid a surety company for such suretyship not exceeding 1% per annum on the amount of such a bond, "as the head of department, board, court, judge or officer by whom, or the court or body in which he was appointed allows" (§648.05, F. S.). While it can not be said that the practice evidences a definite policy of the state, at times the legislature has enacted bills for relief of public officers who have been burglarized of public funds (e.g. Chs. 28560 and 28561, 1953). The average prudent man in private business required to be possessed from time to time of substantial sums of money carries insurance against loss thereof by burglary, robbery and theft.

In view of the foregoing, in my opinion the question, as limited herein, is answered as follows:

There is no authority for the county commissioners to pay the premium required for burglary, robbery or theft insurance covering public monies properly in the possession of such a county officer. Reasonably the premium required for such insurance constitutes an item for current operating expense of the office or, as expressed in §145.02, F. S., an item falling within "the necessary expenditures for the proper operation of said office;" and the amount of such premium will not under any circumstances con-

stitute a part of the excess fees of such office, within the meaning of Ch. 145.

056-228—July 30, 1956

MOTOR VEHICLES

CAR POOLS—LICENSES—VEHICLES FOR HIRE— §320.01(16), F. S.

To: *Mrs. Ina S. Thompson, Motor Vehicle Commissioner,
Tallahassee*

QUESTION:

Are motor vehicles with a capacity of under 8 passengers which provide transportation regularly and continuously to and from places of work and other places for a substantially large segment of the population of a municipality, and whose expenses of operation are paid from a pooled fund, within the legal classification of "for hire" vehicles and as such required to comply with the license requirements imposed on such vehicles?

In my opinion the answer to your question should be in the affirmative.

Section 320.01(16), F. S., relating to the definition of "for hire" vehicles provides, in part:

"(16) 'For hire' vehicles include all motor vehicles, or trailers drawn by motor vehicles, when used for transporting persons, commodities or materials for compensation; let or rented to another for a consideration; offered for rent or hire as a means of transportation for compensation; advertised in a newspaper or generally held out as being for rent or hire; used in connection with a travel bureau or when offered or used to provide transportation for persons solicited through personal contact or advertised on a 'share-expense' basis . . ." (Emphasis supplied.)

A vehicle is classified as "for hire" if it meets all the qualifications of one class enumerated in the above quoted statute (*Kilgore v. Motor Leasing Corp. of Fla.*, 39 So. 2d 69). As yet no general rule has been formulated to answer the question of what vehicles are within the classification of "for hire." It is necessary to determine each case upon the nature of the vehicle and the manner in which it is operated (37 Am. Jur., Mot. Tr. §75, p. 564). Certainly any determination that a vehicle is within the "for hire" class must have a just and reasonable relation to the object of the above quoted statute. However, it is also necessary that the true character of the enterprise be ascertained in order to determine whether or not it is merely a scheme designed for the purpose of evasion. In the determination of statutes similar to the above quoted statute, legal authorities have concluded that one of the purposes of motor vehicle licensing laws is to tax a user of the public highways in proportion to the use made thereof (60 C. J. S., Motor Vehicles, §140, p. 456).

Motor vehicle license laws may also have as their object the fostering of a fair distribution of traffic to the end that all necessary transportation facilities shall be maintained and that the public be free from the inconvenience caused by the inordinate use of the public highways. This purpose has been held to be proper and nondiscriminatory (*Sproles v. Binford*, 286 U. S. 374, 76 L. Ed. 1167, 52 S. Ct. 581).

The classification prescribed by the legislature, in the above quoted section, appears to be based upon the peculiar nature of the enterprise conducted upon and over the public highways rather than on the type vehicle used or necessarily the element of compensation. This type of classification has been held to be proper and nondiscriminatory (37 Am. Jur., Mot. Tr. §53, p. 552).

I can find no authority which contains a discussion of the question you present. However, there is at least one decision relating to the subject of "car pools" which may shed some light on the question. In a 1955 decision the court of appeals of Kentucky reversed a decision of a lower court and held that the operation of "car pools" was not subject to the provisions of the Kentucky motor vehicle laws relating to common carriers (*Chauncey v. Kinnaid*, 279 S.W. 2d 27). In its discussion of the reason for not treating "car pools" as subject to the requirement of the motor carrier laws, the court stated, at p. 29:

"... Particularly should this treatment be accorded to instances where the journey is *incidental* to the main business or purpose of the operator of the vehicle." (Emphasis supplied).

Therein lies the distinction between "car pools" and the arrangement indicated in your request. "Car pools" reached considerable popularity during World War II and the period that followed, and the legislature has not as yet indicated a desire to prohibit or restrict such arrangements. In the operation of a "car pool" the carrying of passengers is "incidental" to the main purpose, whereas in the arrangement in the question under consideration the main purpose of the operator is the carrying of passengers. In addition, it might also be said that the former tends to decrease the traffic on the highway, while the latter tends to increase traffic on the highway.

In my opinion, the automobiles engaged in the enterprise described in your request are within the classification of "for hire" vehicles and are, therefore, subject to the appropriate provision of §320.08, F. S., which requires a "for hire" vehicle with a capacity of under 8 passengers to obtain an "E" Series license tag.

Your question is answered accordingly.

056-230—August 6, 1956

PUBLIC HEALTH

MENTAL HEALTH—APPROPRIATION—TRANSFER
BETWEEN ITEMS—§8, CH. 29880,
1955, §402.08, F. S.

To: *Harry G. Smith, Director, State Budget Commission,
Tallahassee*

QUESTION:

May the amounts specified in the schedule of §8, Ch. 29880, Acts of 1955, for specific purposes be used for other specified purposes so as to increase the amounts mentioned for some purposes and decrease others?

For example, under the heading of "Psychiatric Social Work" provision is made for one psychiatric social work supervisor, seven scholarships for 1st year students, and six stipends for 2nd year students; similar provision is made for training in other fields of mental health. The question is may the appropriation for scholarships be used for stipends, etc., and vice versa?

Section 8 of Ch. 29880, 1955, appropriates the sum of \$250,000 from the general revenue fund, "to be expended according to the following schedule:" Here follows the items for which the appropriation was made, showing the amount to be used annually, and the amount to be used for the biennium, as to each item. We find nothing in said Ch. 29880 either authorizing transfers between items or prohibiting such transfers.

Section 216.24, F. S., the same being a part of the legislature's 1953 spending philosophy law, provides that "any sum or sums appropriated in the general appropriations act or as otherwise provided by law shall be expended only for the purpose for which appropriated," (emphasis supplied) with certain specified exceptions not here material. This section is substantially identical with §8 of the 1955 general appropriations act. We feel that the purposes for which the appropriation was made by §8, Ch. 29880, 1955, are those set out in the schedule.

This opinion is limited to the question submitted relating to transfers between items of appropriations under the general appropriations act. It does not relate to transfers of surplus funds authorized by §215.18, F. S.

This requires a negative answer to the above question.

056-231—August 7, 1956

TAXATION

DOCUMENTARY STAMP TAXES—PROMISSORY NOTES TO
PAY MONEY TO THE U.S.A. OR ITS AGENCY—
§§201.01-201.08, F. S.*To: Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are Florida documentary stamp taxes payable on promissory notes and other written obligations to pay money to the U. S. through the farmers home administration?

Sections 1000, et seq., Title 7, U. S. Code, make provision for federal government loans to farmers. Loan funds are provided by the congress. Promissory notes evidencing such loans are usually payable "to the order of the United States of America, acting through the Administrator of the Farm Home Administration," at the office of the said administration in the U. S. department of agriculture in Washington, D. C. The farmers home administration is a direct governmental agency of the U. S. in the department of agriculture.

Section 201.01, F. S., levies an excise or stamp tax upon certain documents and written obligations to pay money, which are "written or printed by any person who makes, signs, executes, issues, sells removes, consigns, assigns or ships the same, or for whose benefit or use the same are made, signed, executed, issued, sold, removed, consigned, assigned or shipped in the state." This tax is imposed upon conveyances, powers of attorney, stock certificates and agreements to sell same, bonds, debentures, certificates of indebtedness, proxies, promissory notes and other obligations to pay, etc. (§§201.02-201.08, F. S.). We are here concerned with §§201.01 and 201.08, F. S.; and then only where promissory notes or written obligations to pay money have been made and issued to the U. S. acting through the administrator of the farmers home administration in the U. S. department of agriculture.

"Much of the Florida statute appears to have been from a similar federal act on the same subject (§800 of the Revenue Acts of 1924 and 1928, and would therefore take the same construction in the Florida Courts as its prototype has been given in the federal courts" (State v. Cook, 108 Fla. 157, 146 So. 223, text 224; see also Gay v. Inter-County Tel. and Tel. Co., Fla., 60 So. 2d 22, text 23). The federal act has been construed as a tax on documents and not a transaction tax (Merchants' Warehouse Co. v. McClain, 112 Fed. 787, affirmed in 53 C. C. A. 155, 115 Fed. 295; Hamilton National Bank v. U. S., C. C. A. Tenn. 99 Fed. 2d 570, certiorari denied 306 U. S. 653, 59 S. Ct. 643, 83 L. Ed. 1052). The Florida statute is substantially identical with the South Carolina statute considered by a three-judge federal district court in Graniteville Mfg. Co. v. Query, 44 Fed. 2d 64, whose decision was affirmed by the U. S. supreme court (283 U. S. 376, 51 S. Ct. 515, 75 L. Ed. 1126). The said district court held the South Carolina statute to be "a tax on the creation within the state of South

Carolina of evidence of a debt. . . . The tax is laid upon the documents themselves, and required to be paid by the person who makes, signs, or issues them. . . ." This construction appears to have been concurred in by the South Carolina supreme court in *South Carolina Elec. and Gas Co. v. Pickney*, 217 S. C. 407, 60 S. E. 2d 851).

Section 113.2 of the federal tax regulations relating to documentary stamp taxes, provides that "the tax is payable by any of the parties to the taxable transaction. The parties to the transaction may agree among themselves as to which shall pay the tax, but such agreement does not relieve the others from their liability in the event it is not carried out . . . the U. S. or any agency or instrumentality thereof shall not be liable for the tax with respect to an instrument to which it is a party. . . ." Before an instrument is a written obligation to pay money within the contemplation of §201.08, F. S., it must be "signed by the maker or other obligor" (*Lee v. Quincy State Bank*, 127 Fla. 765, 173 So. 909, text 910). Said section has been said to be "an excise tax on the promise to pay" (*Plymouth Citrus Growers Assn. v. Lee*, 157 Fla. 893, 27 So. 2d 415, text 416). The tax arises by reason of the making of the promissory note or the promise to pay. Generally "the person executing a document, or the person for whose use or benefit the instrument is issued, is the one to affix the stamp" (47 C. J. 784, §545, citing federal decisions). We are of the opinion that the tax is payable by any party to the taxable transaction, except in those cases where one of the parties is not subject to taxation, with the primary obligation to pay the tax being on the maker of the instrument or the person for whom made. Although the U. S. or one of its agents may be a party to such transaction, the U. S. or its agent would not be liable for the tax; however, this does not dispose of the liability of such parties to the transaction who are not entitled to tax exemption. The question of a documentary stamp tax on a promissory note for \$750,000 made by the Plymouth Citrus Growers Assn. to the Columbia bank for cooperatives was involved in *Plymouth Citrus Growers Assn. v. Lee*, 157 Fla. 893, 27 So. 2d 415, and although the Columbia bank was entitled to tax exemption as an agency of the U. S., the maker of the note was held subject to the documentary stamp upon the amount of the note. *Pittman v. Home Owners' Loan Corp.*, 308 U. S. 21, 60 S. Ct. 15, 84 L. Ed. 11, involved a recording tax on the person offering the instrument for record and not a stamp tax on the maker of the instrument, and is therefore not controlling here.

Although the making of the loan to a farmer by the federal agency may constitute a transaction with the federal government, the Florida tax is not a transaction tax (*Merchants' Warehouse Co. v. McClain*, *supra*; *Hamilton National Bank v. U. S.*) but a tax on the execution of the documents or the documents themselves. When the documents are executed, the liability for the tax arises. The liability for the tax arises either before delivery to the U. S. or upon such delivery. This tax has many of the features of the gasoline tax involved in *U. S. v. Lee*, 153 Fla. 94, 13 So. 2d 919, in which case the court held the tax to be payable by the seller, although the U. S. was the purchaser. (See also *Alabama v. King and Boozer*, 314 U. S. 1, 62 S. Ct. 43, 86 L. Ed. 3; *Curry v. U. S.*,

314 U. S. 14, 62 S. Ct. 48, 86 L. Ed. 9.) Although the promissory notes in question may become an instrumentality of the U. S., it does not become such until after delivery. The tax has attached by or before such delivery. We find nothing in the federal statutes making the instrument an instrumentality of the U. S. from or prior to the signing thereof by the maker so as to prevent the attaching of the tax liability concurrent with or prior to delivery to the U. S.

We, therefore, feel that the above question should be answered in the affirmative; however, the tax liability is that of the maker and not of the U. S. as payee or holder. There is no liability upon the U. S. to pay the tax in order to have the instruments or any mortgage securing them recorded. The liability is that of the maker and must be enforced against him, or the person for whose benefit the instrument was made, if not the maker, and not the U. S. or its agency.

056-232—August 7, 1956

INSURANCE

BUSINESS DOMICILE OF INSURANCE SOLICITOR— CONSTRUCTION OF §627.80(4) AND (5), F. S.

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*

QUESTION:

In view of the provisions of §627.80(4) and (5), F. S., and under the circumstances and facts set forth below, should the described insurance solicitor's license be renewed?

The above question arises from the fact that a woman, whose personal residence and domicile is in Hawthorne, for many years has been licensed and acting as an insurance solicitor for an agent whose office is located in Gainesville. We have examined your file handed us with the above request for opinion from which, together with the request for opinion, we gather that all books and records, concerning the sales of insurance through the said solicitor, are kept in the agent's office in Gainesville. It seems that the said solicitor considers the agent's office in Gainesville as headquarters for her insurance operations, and that she makes no insurance quotations without conferring with, or referring the matter to, the agent in Gainesville for confirmation. Upon her request assistance is given her in connection with insurance prospects obtained by her; and she is in the practice of visiting the agent's office to obtain assistance in handling details connected with her prospects and projects. There are indications from the file that she visits the agency office for assistance and advice as often as necessary in connection with the small volume of business produced by her. There is no evidence that she uses her home, or any address other than that of the agency, in any advertisement, letterhead or telephone listing, as her insurance business address. So far as the file is concerned, and what appears from the question posed by you, there is no evidence that she transacts any business from her home in Hawthorne, or from any address other than that

of the agency office in Gainesville. Although there is some doubt in our minds as to the ability of the solicitor in question to transact her insurance business entirely from the office of the agency in Gainesville, there is nothing in the record before us, or from the question posed, that such is not the case. Although we may feel that it is impossible for the solicitor in question to transact her business without having a business office in Hawthorne, it is made to appear from the file before us that no business office other than that of the agency is being used by her, and we have nothing before us contradicting this as a fact.

Section 627.80(4) and (5), F. S., are as follows:

"(4) That the applicant will be employed by only one agent, which agent will supervise the work of the applicant, and his conduct in the insurance business, and the applicant will spend all of his business time in the employment of the agent and will be domiciled in the office of the appointing agent."

"(5) 'Domiciled in the office of the appointing agent' as used in the above paragraph shall be construed to mean that the solicitor shall be housed wholly and completely within the actual confines of the office of the agent whom he represents, together with any such furniture, books, records, equipment and paraphernalia necessary for the conduct of such insurance business. The solicitor shall not maintain any such office or furniture, books, records, equipment or paraphernalia at any other address or location, nor shall he maintain or make use of any other quarters, or space, or address, for the purpose of the conduct of such business. No advertising or letterhead or telephone listing shall indicate any business address other than that of the agent by whom he is employed. No solicitor may be employed from any location except where an agent licensed to write such lines spends his full time in charge of such location."

These statutory provisions are a part of Ch. 627, F. S., which is designed to regulate the sale of insurance in this state through solicitors and agents. Statutes such as these are designed and reasonably adopted to protect the public from fraud, misrepresentation, incompetence and sharp practice which falls short of minimum standards of decency in the selling of insurance by personal solicitation and salesmanship. That such dangers may exist, may even be widely prevalent in the absence of such controls, is a matter of common knowledge and experience. And no argument is needed to show that these evils are most apt to arise in connection with the activities of the less reliable and responsive insurers, as well as insurance brokers and salesmen, and vitally affect the public interest (*Robertson v. Calif.*, 328 U. S. 440, 66 S. Ct. 1160, 90 L. Ed. 1366, text 1373). The general object of statutes providing for state regulation of insurance is to make certain that the citizens will secure the indemnity for which they contract, and that the rates and charges for insurance which may be required of them will be reasonable and nondiscriminatory (44 C. J. S. 531, §60). There is no vested right to engage in the practice of any business, profession or calling, free from police

regulation, in cases where regulation is permitted or required under the police powers (16 C. J. S. 1186, et seq., §225) and regulation seems to be indicated for the insurance business.

There is nothing in the record before us, and we must confine ourselves to the record before us and the request for opinion, showing that the solicitor in question maintains any business office other than the agency office in Gainesville; and especially there is no direct showing that her home in Hawthorne is maintained or used as her business office. There is no statutory requirement that a solicitor spend any allotted period or periods of time in the business office, the requirement being that only a sufficient time for the proper administration of his or her insurance business be spent in such office. By the very nature of the business of an insurance solicitor, his or her business is largely out of the insurance office. Usually the solicitor must hunt up prospects; prospects do not usually hunt up the solicitor. Although we may wonder how she maintains her insurance business without an office in Hawthorne, there is no showing in the record that such is the actual fact. So far as the record is concerned, her business office is the agency office in Gainesville.

Upon the record before us we find nothing factual justifying a denial of the renewal of the license in question. This answers the question upon the record before us. Had other and further facts in this connection been revealed, then our conclusion might have been different; however, we must base our opinion upon the record placed before us.

056-233—August 7, 1956

TAXATION

LICENSE FOR BOATS RENTED FOR HUNTING AND FISHING—TOURIST COURTS AND MOTELS—§372.63, F. S.

To: *A. D. Aldrich, Director, Game & Fresh Water Fish Commission, Tallahassee*

QUESTION:

Do the provisions of §372.63, F. S., authorize the game and fresh water fish commission to collect an annual license fee on boats owned by tourist courts and motels and RENTED by the owners to the public for hunting and fishing purposes?

Section 372.63, F. S., provides that:

"Any person who engages in the business of renting boats for hunting in the waters of the state, or fishing in the fresh waters of the state, shall pay an annual license fee on each boat operated, as follows: . . .

"Application for such license shall be made to the game and fresh water fish commission. . . . Any subterfuge to circumvent or evade the requirements of this section shall be deemed a violation hereof and shall be punishable as a violation hereof."

The question seems to hinge upon what constitutes "engaged

in the business of renting boats for hunting and fishing," within the purview of §372.63, F. S., or whether such boats are merely for the convenience of the guests of the courts and motels and furnished as a part of the *modus operandi* to attract guests.

A. G. O. 050-313 (p. 404), copy attached, relates to the question of whether a county judge is authorized to issue a warrant against an individual for failure to obtain a license for renting of boats for fishing, who makes a charge for parking cars on his land, but makes no charge for the use of the boats for fishing to his parking patrons upon the owner's contention that he is not in the business of renting boats. The opinion holds that it is a matter for the county judge to determine whether there is probable cause to believe the party involved is attempting to circumvent or evade the requirements of §372.63, F. S., and that a "highly material point" is whether boats are free to persons not parking automobiles.

"To engage in" a business has a well-defined meaning at law. It means that employment which occupies the time, attention and labor of the person so engaged in business; it denotes regular and legal employment, not one that is occasional, irregular, or illegal (Words and Phrases, Engage, p. 599). "To engage in" is defined as to "embark in a business; to take part; to employ or involve oneself" (Webster's New Int. Dict.).

If the boats are rented to guests of motor courts or motels for hunting or fishing, it appears that this would constitute "engaging in the business" and therefore subject the owner to payment of a license fee for each boat. However, if the boats are operated and maintained as a convenience solely for guests of the court or motel as an adjunct to attracting guests, *and no fee is charged in addition to the usual lodging rate*, it does not seem to come within the purview of §372.63, F. S., which applies to persons engaging in the business of renting boats. Further, if such boats are rented by court or motel owners *strictly for pleasure riding* and not for the purpose of "hunting in the waters of the state, or fishing in the fresh waters of the state", it appears that such boats would not be subject to the license fee imposed by §372.63, F. S.

Therefore, it is my opinion that operators of motels or motor courts, who also engage in the business of renting boats for hunting in the waters of the state or fishing in the fresh waters of the state, are subject to payment of an annual license fee on each boat operated in the amount provided by law. Tourist court and motel operators whose facilities are situated along Florida fresh waters and who maintain boats-for-hire for hunting and fishing purposes are engaging in the business of renting boats for hunting and fishing, even though these particular facilities do not constitute their entire operation or business. However, if the maintenance of such boats is solely a part of the service offered the guests of such courts and motels and no extra fee is charged over and above the usual room rates, then such facilities may be construed as an added attraction or amusement, such as free tennis courts, swimming pools, etc.

Any subterfuge to circumvent or evade purchasing the boat license provided in §372.63, F. S., is a violation of law.

056-234—August 8, 1956

TAXATION

REFUND OF TAXES PAID THROUGH MISTAKE—
§193.40, F. S.*To: Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where a person pays taxes upon lands, assessed in his or her name but not owned by him or her but by another, may such person paying taxes obtain a refund pursuant to §193.40, F. S.?

Section 193.40, F. S., provides for the refund of moneys paid as taxes where such payment (1) was an overpayment of taxes, (2) a payment when no taxes were due, or (3) was made in connection with a bona fide controversy as to the correctness or validity of the tax assessed. Section 215.26, F. S., relates to refunds of moneys paid into the state treasury; the taxes here involved were real estate taxes assessed and payable to the county and not into the state treasury. It is not contended that the taxes paid were an oversight of taxes or taxes paid where there was a bona fide controversy as to the correctness or validity of the tax assessed. Was the tax a payment when no tax was due?

It appears from the file that one Rosa Waldman, who was the owner of a portion of government Lot 3, Sec. 11, Twp. 52, S., R. 42 E., paid taxes on another portion of said government lot owned by another but actually assessed in the name of Mrs. Waldman, for the tax years beginning with 1947 and ending with 1953, such payments totaling the sum of \$165.20. It is the contention of Mrs. Waldman that she would have not paid the taxes had they been correctly assessed in the name of their owner. She claims to have been misled by reason of the assessment being in her name instead of the name of the actual owner. There is nothing in the file indicating payment under protest or compulsion. The payment was one made under a mistake of fact, that is ownership of the property assessed. We are not advised whether the taxes on the lands actually owned by Mrs. Waldman were paid or not for the said years.

We are not advised of any use of the lands in question entitling them to tax exemption under the laws of this state (see §192.06, F. S.; §1, Art. IX, and §16, Art. XVI, State Const.). There appears from the file the contention that the lands assessed, and upon which the taxes were paid by Mrs. Waldman, are tax exempt under Ch. 15751, 1931; however, upon examination of this chapter it is found to relate only to the right-of-way, or parts thereof, of the Florida east coast canal and was intended as a cancellation of taxes and tax liens existing against said right-of-way at the time of the enactment of the said act. This act provided no tax exemption of lands along the canal but not within the right-of-way thereof. The lands taxed, and upon which the taxes were paid by Mrs. Waldman, do not lie within the right-of-way of the said canal. We find no evidence of the right of the lands in question to tax exemption.

The lands taxed as aforesaid were subject to the tax assessment (§§192.01 and 192.04, F. S.). Real estate taxes are enforced contributions for the support of the government of the state, its agencies and subdivisions (*Orlando v. State*, Fla., 67 So. 2d 673) and are charges against the property assessed and not a debt of the landowner (*Fla. Industrial Com. v. State*, 114 Fla. 1, 152 So. 717; *St. Lucie Estates v. Ashley*, 105 Fla. 534, 141 So. 738). The assessment of real estate is against the land itself and not the landowner, although the name of the owner be stated. Although an assessment in a name other than that of the owner was held at one time to invalidate the tax assessment, this rule was changed by Ch. 10040, 1925, and subsequent acts, now appearing as §192.21, F. S. Here the assessment appears to have been valid.

It is a general rule that taxes may not be refunded when the payment was voluntary (*North Miami v. Seaway Corp.*, 151 Fla. 301, 9 So. 2d 705; *Certain lands v. Monticello*, 159 Fla. 134, 31 So. 2d 905). Under some circumstances a mistake of fact may prevent the payment of taxes being a voluntary one; the facts here do not bring the person paying the taxes within the said rule (84 C.J.S. 1258, §637, notes 48 and 49). But if within the rule, the payment was neither an overpayment or a payment when no taxes were due, nor was it in connection with a controversy, so as to be within §193.40, F. S.

The above question is answered in the negative.

056-235—August 8, 1956

ELECTORS AND ELECTIONS

SPECIAL ELECTION—RATIFICATION OF RACING PERMIT—COST—§§550.02(6) and 550.06, F. S.

To: *Mack N. Cleveland, Representative, Seminole County, Sanford*

QUESTION:

Can a special referendum election for the purpose of approving or ratifying a racing permit under §550.06, F. S., be held in conjunction with the regular general election and the cost of such election be assessed against the racing permit holder?

Section 550.02(6), F. S., authorizes the state racing commission to require of each applicant for a racing permit "a deposit of a sufficient sum, in currency or by check certified by a bank licensed to do business in the state with the county commissioners of the county in which the election is to be held, in an amount necessary to pay all expenditures in connection with the holding of the election mentioned in §550.06, F. S."

Section 550.06, F. S., provides in pertinent part as follows: ". . . The board of county commissioners of the county designated, upon the presentation to said board at a regular or special meeting of a written application, accompanied by a certified copy of the permit granted by the

state racing commission, and asking for an election in the county in which said application was made, shall order an election in said county to decide whether such permits shall be approved and licenses issued and race meetings permitted in such county. . . ."

* * * *

"All elections ordered under this chapter shall be held within 90 days and not less than 21 days from the time of presenting such application to said county commissioners, and the inspectors of election shall be appointed and qualified as in cases of general elections and they shall count the votes cast and make due returns of same to the county commissioners without delay. . . ."

* * * *

". . . electors for such special election shall have the same qualifications for and prerequisites to voting in elections as under the general election laws. . . ."

* * * *

". . . The county commissioners shall immediately certify the results of the election to the secretary of the state racing commission; provided, that the expense of holding the said election shall be paid for by the permit holder as provided for in sub §(6) of §550.02. . . ."

The foregoing statutory provisions clearly give the board of county commissioners the authority to call the special election for any date they may choose within the prescribed limits. If it should occur that the general election day would fall within the period during which the board could call the special election, the two elections could be held on the same day.

This office has concluded on a number of occasions that special elections could be held in conjunction with regular county primary and general elections where there is discretion granted by law as to the date that the special election is to be held and where there is no express prohibition against holding it on the same day as a regular election. In all of such cases, it has been the opinion of this office that the elections should be kept separate and distinct from each other. In this regard, see the enclosed copy of opinion 054-53, which concerns a bond election held in conjunction with a regular primary election but which is also applicable to the situation at hand in so far as the necessity for keeping the elections separate is concerned.

As to the cost of a special election held for the ratification of a racing permit, the foregoing statutes indicate that all expenditures in connection with the holding of the special election should be paid by the holder of the permit. This does not mean that all of the expenses of the general election can be assessed against the permit holder, but there would be a considerable savings to the county if the two elections were held simultaneously particularly in regard to the remuneration of the election officials. The cost of printing the general election ballots, as distinguished from the special election ballots, would be borne by

the county as would any other expenses that would not normally be incurred if the special election were held on a different date.

As conditioned above, it is my opinion that your question should be answered in the affirmative.

056-236—August 8, 1956

CORRECTIONAL SYSTEM

FLORIDA PAROLE COMMISSION—EMPLOYMENT OF PERSONNEL NOT MEETING STATE RESIDENCE REQUIREMENTS—§947.08, F. S.

To: *Joseph Y. Cheney, Chairman, State Parole Commission, Tallahassee*

QUESTION:

In the event that the Florida parole commission is unable, after exercising due diligence, to procure enough employees possessing the requisite qualifications and having 2 years residence in the state to carry out the expansion program for which funds were recently authorized by the legislature, may said commission employ persons having the required qualifications but who have not been residents of the state for 2 years?

Section 947.08, F. S., dealing with the authority of the parole commission to employ supervisors, assistants and other employees, provides in part as follows:

"... Only citizens of Florida who have resided in and been bona fide residents of the state for 2 years or more next prior to the date thereof shall be eligible for employment by the commission, except only where after due diligence no person can be found in the state possessing the required qualifications necessary to the particular employment."

A similar residence requirement is laid down by §§112.02-112.04, F. S., relating to all state and county employees.

Under these statutes, the parole commission may employ a qualified person who has not resided in and been a bona fide resident of Florida for 2 years or more next prior to the date of employment if, and only if, after due diligence, no person can be found in Florida who meets said residence requirement and who also possesses the required qualifications necessary to the particular employment.

056-237—August 9, 1956

PORTS AND HARBORS

HARBOR MASTER FEES—LIABILITY FOR PAYMENT BY STEAMSHIP COMPANY OPERATING FROM ITS PRIVATE DOCKS AT STOCK ISLAND, KEY WEST— §§313.04, 313.05, 314.03 AND 314.05, F. S.

To: *Wm. Fred Edwards, Harbor Master, Key West*

QUESTIONS:

1. Does use of private docks at Stock Island,

Key West, by a steamship company relieve it from payment of harbor master fees, within the purview of §313.05, F. S.?

2. What are the limits of the Port of Key West?

We are advised that the West India Fruit and Steamship Co., Inc. operates a ferry, the "City of Havana," from its privately constructed docks at Toppino Terminals, Stock Island, Key West; that the steamship company contends that its private docks are not within the limits of the port of Key West, and therefore, the company is not liable for payment of harbor master fees, as provided by §313.05, F. S.

Section 313.04, F. S., provides that "every master of any vessel arriving at the ports in this state shall report to the harbor master for a station, or for a berth at the wharves, and the harbor master shall regulate and station or assign berths at the wharves to said vessel." Section 313.05, F. S., provides that harbor masters shall receive from the master, owner, or consignee of vessels coming into the port for which he is appointed, for the services rendered by himself or his deputy under the provisions of this section, not exceeding the sum of \$20 for each vessel, according to the amount and value of the services rendered.

Attorney General's Opinion 051-258 answered essentially the same question, holding that the harbor master of the port of Jacksonville was acting within the scope of his authority in collecting a fee on each vessel entering the port, even though no special service is rendered to the vessel by the harbor master other than his general duties of policing the harbor and otherwise discharging his statutory duties. However, on that question there was no issue as to port limits.

It does not appear to be legislative intent to except from the provisions of Chs. 313 and 314, F. S., private wharves and docks situated at ports in Florida. Therefore, masters, owners or consignees of vessels are not relieved from payment of harbor master fees because they use private docks within the limits of the port. Thus, the 1st question is answered in the negative.

Treasury decision 53994 effective Jan. 5, 1956, extended the limits of the customs port of entry of Key West in customs collection Dist. 18 (Florida) to include the territory of Stock Island (5 U.S.C. 22; 19 U.S.C. 1, 2). Also, Key West is a designated port of entry in Dist. 6, class A, for all aliens, under the immigration and nationality act of Dec. 18, 1952, 17 F.R. 11469, as amended (2 U.S. Cong. News 1953, part 231.6).

The port limits of Key West are not specifically defined by Florida statutes or decisions, or by U. S. statutes, for legal and commercial purposes. The U. S. coastal geodetic survey coast chart 582 of Oct. 29, 1955, for Key West harbor and approaches does not define the port limits of Key West. This map shows the northern end of Stock Island to be approximately 4 miles from the southern end of Key West.

The steamship company's vessels are subject to quarantine regulations and inspection by the state board of health (Ch. 381, F. S.), and the harbor master is required to cooperate with

state health authorities by boarding vessels coming into port, after release is given by health authorities; to secure the release from the master and deliver same to the secretary of the state board of health (§314.05, F. S.).

An analogous case relating to port limits, *Devato v. 823 Barrels of Plumbago*, 20 F. 510, dealt with the question of whether delivery of cargo at Brooklyn, N. Y., constituted fulfillment of a contract to deliver goods at the "port of New York." The court said that legal limits of a port are such as are fixed or recognized by the statutes of the state or of the U. S., and held that Brooklyn, for commercial purposes, was within the limits of the port of New York, for the reason that where the commerce of a port increases rapidly, the limits of the port must necessarily be gradually enlarged to avoid inconvenient crowding, and to promote economy and dispatch in delivering cargo. The effect of this decision was to extend the limits of the port of New York to include Brooklyn.

All of the statutes pertinent to regulation of commerce, protection of public health, welfare and property must be read together to determine the question. Therefore, though not specifically designated by statute, Stock Island is an adjunct to the port of Key West. The docks at the lower end of the city serving maritime traffic have become overcrowded. In view of the recent growth and expansion of harbor accommodations, it is reasonable to assume that the limits of the port, the word being used in the legal and commercial sense, include contiguous navigable waters and wharves and docks facilities on Stock Island, which for all practical intents and purposes insofar as maritime shipping is concerned, is part of the port of Key West. To exclude privately constructed docks of this steamship company carrying passengers to and from the U. S. from the limits of the port would be in derogation of the statutory authority of the state board of health and its powers of quarantine as well as the powers of the board of pilot commissioners, since the harbor master is required by law to cooperate with the state board of health, and is also required to carry out the rules and regulations of the board of pilot commissioners, of which the harbor master is an ex officio member §314.03, F. S.

Therefore, basing our opinion on the above stated facts, Stock Island is within the limits of the port of Key West within the purview of Chs. 313 and 314, F. S.

056-238—August 13, 1956

COUNTY OFFICERS AND EMPLOYEES

RETIREMENT BENEFITS OF COUNTY OFFICERS—SHORT-AGE IN ACCOUNTS—INSANITY—CHAPTER 122, AND PRIOR CHAPTER 134, F. S.

To: *Ray E. Green, Comptroller, Tallahassee*

QUESTIONS:

1. Where a county officer was retired on March 1, 1953, pursuant to Ch. 134, F. S., but was, during May

of 1955, adjudged incompetent and admitted to the state hospital, is he entitled to retirement compensation from the date of adjudication of incompetency until restoration of competency pursuant to statute?

2. Where a person was retired under Ch. 134, F. S., does §122.08(8), F. S., have any application to him in case of a shortage in his accounts as therein mentioned?

Section 134.05, F. S., provided for the retirement of county officers and employees who had attained a specified age and had accumulated service with the county aggregating 10 years or more, or had served the county for 30 years or more, all as specified in said section. When the county officer in question was retired on March 1, 1953, there was no provision in the retirement statute prohibiting the retirement or payment of benefits to any county officer or employee having a shortage in his accounts, so long as the said shortage existed. However, §3, Ch. 28175, 1953 (effective on July 1, 1953), amended §134.05, F. S., by adding a subsection thereto providing that

"No county employee or official who has a shortage in his accounts may retire or receive any benefits under this chapter so long as such shortage exists."

Chapter 29801, 1955, consolidated and revised Chs. 121 and 134, F. S., into Ch. 122, F. S., §122.08(8) of which provides that

"No state or county official or employee who has a shortage in his accounts, as certified by the state auditing department, may retire or *receive any benefits* under this chapter so long as such shortage exists." (Emphasis supplied.)

Where an officer or employee within the state and county officers and employees retirement system has met all requirements for retirement, including the payment of all contributions required of him, he is entitled to draw his retirement pay and has a vested right in this connection (62 C. J. S. 1482-3, §727; Advisory Opinion, Fla., 82 So. 2d 494) and should draw his retirement pay in accordance with Ch. 122, F. S., notwithstanding his subsequent incompetency; however, during incompetency retirement pay must be paid through a legal guardian. This seems to answer the 1st question in the affirmative, subject, however, to our answer to the 2nd question.

The retired official in question, having retired prior to the adoption of §134.05(8), F. S., now appearing in the consolidated statutes as §122.08(8), F. S., the prohibition against retiring so long as there is a shortage in the retiring officer's accounts, has no application. However, said sub §(8) of §122.08, as did sub §(8) of §134.05, F. S., after July 1, 1953, provides that "no . . . county official . . . who has a shortage in his accounts . . . may . . . *receive any benefits* under this chapter so long as such shortage exists." A person receiving retirement compensation under either Ch. 122 or 134, F. S., is receiving benefits under said chapters. The above statutory provision, if constitutional, prohibits the payment of retirement benefits to any retired state or county official or employee having a shortage in his accounts so long as such shortage

exists. As this office does not pass upon the constitutionality of statutes, we presume the constitutionality of said §§134.05 and 122.08, F. S., and thereupon answer the 2nd question in the affirmative. No payments of retirement compensation should be made to the retired official in question so long as the said shortage shall exist.

056-239—August 14, 1956

TAXATION

LICENSE PLATES FOR MOTOR VEHICLES—SALE AND DISTRIBUTION—APPOINTMENT OF AGENTS—RESPONSIBILITY OF TAX COLLECTOR—§320.03, F. S.

To: *Mrs. Ina S. Thompson, Motor Vehicle Commissioner, Tallahassee*

QUESTIONS:

1. Are the tax collectors of the several counties of the state authorized to delegate the official duties imposed upon them by §320.03, F. S., to private individuals or organizations not officially connected with said tax collectors, to act as agents for them in performance of their statutory duties, in delivering license plates to applicants and collecting and remitting monies collected as required by the statute?

2. May the motor vehicle commissioner, under the rule-making power accorded by §320.03, F. S., authorize the appointment by the several tax collectors of private individuals or organizations not officially connected with the tax collector, to perform the official duties of issuing license plates and collecting and remitting monies collected for such plates to the tax collectors or to the commissioner?

3. Under the statute, may a tax collector or any person lawfully deputized by him, issue license plates and collect and remit to the commissioner lawful fees fixed therefor, exact any service charge for such service in addition to the charge authorized by law?

AS TO QUESTION 1:

The tax collectors of the several counties of the state, are charged with the responsibility of issuing motor vehicle license plates to applicants in accordance with rules and regulations to be prescribed with reference thereto by the state motor vehicle commissioner and each tax collector is required to give a good and sufficient surety bond conditioned that he will faithfully and truly perform the duties imposed upon him in accordance with the requirements of law and rules and regulations of the state motor vehicle commissioner (§320.03, F. S.).

Unless prohibited by statute, a tax collector is authorized to appoint assistants and deputies who are authorized to act in ministerial matters, and the collector will be responsible for the

acts and omissions of such assistants (84 C. J. S., §650, p. 1331). However, such deputies or assistants must be subject to the supervision of the tax collector.

We find no general law which authorizes the tax collectors of the several counties of the state to enter into contracts with private individuals or organizations not officially connected with their offices to sell and distribute motor vehicle licenses. Therefore, it is our opinion that question 1 should be answered in the negative. This conclusion is not intended to prohibit the sale and distribution of motor vehicle licenses by private persons or organizations when officially authorized by statute (See Ch. 31057, 1955—Okeechobee county).

AS TO QUESTION 2:

As pointed out in our answer to question 1, the responsibility of issuing motor vehicle license plates is vested in the tax collectors of the several counties of the state. The statutes do not give the motor vehicle commissioner any authority to authorize the appointment by the several tax collectors of private individuals or organizations, not officially connected with the tax collector, to issue license plates and remit the monies collected for such plates. The commissioner's rule-making power cannot supersede the statute which places this responsibility in the tax collectors. Therefore, question 2 is answered in the negative.

AS TO QUESTION 3:

The fee authorized to be collected for the sale and distribution of motor vehicle licenses is set forth in §320.04(1), F. S. A tax collector, or any person lawfully deputized by him, may not issue license plates, collect and remit to the commissioner lawful fees fixed therefor, and exact any service charge for such service in addition to the fee authorized by law. Therefore, question 3 should be answered in the negative.

056-240—August 15, 1956

WELFARE

COUNCIL FOR THE BLIND—EXPENDITURE OF MONEYS DONATED TO THE COUNCIL—§409.26(10), F. S.

To: *Harry E. Simmons, Executive Director, Council for the Blind,
Tampa*

QUESTION:

Do funds donated to the council for the blind have to be used solely as case service monies to blind clients?

Section 409.26, F. S., provides the duties, purposes and authority of the council for the blind. It specifies a number of services for the blind which the council is required to render, including medical, vocational rehabilitation and training, aid in finding employment, special services of various kinds and many others.

Section 409.26 (10), F. S., provides:

"Receive moneys or properties by gift or bequest from any person, firm, corporation or organization for any of the purposes herein set out, but without authority to bind the state to any expenditure or policy except such as may be specifically authorized by law all such moneys or properties so received by gift or bequest as herein authorized, may be disbursed and expended by the council upon its own warrant for any of the purposes herein set forth, and such moneys or properties shall not constitute or be considered a part of any legislative appropriation made by the state for the purpose of carrying out the provisions of the law." (Emphasis supplied.)

The italicized portion of this act clearly answers your question. Donations to the council may be used at the discretion of the council for any of the purposes provided in §409.26. Your question is therefore answered in the negative.

056-241—August 16, 1956

STATE OFFICERS AND EMPLOYEES

RETIREMENT—EFFECT OF ACCEPTING STATE EMPLOYMENT AFTER RETIREMENT UNDER §112.05, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

May a state officer or employee who has retired under §112.05, F. S., accept state employment after his retirement without affecting his retirement compensation?

Although §112.05, F. S., makes provision for the retirement of state officers and employees on a pension after having been in state service the designated time and having attained the specified age, or having served for 30 years or more, nowhere in this statute is there any express prohibition against a person so retired accepting other and further state employment. It has been held in several states where like and similar statutes did not forbid subsequent employment by the state or its agency retiring such person that subsequent reemployment would not prevent the payment of the pension (62 C. J. S. 1216, §588; Annotation in 162 A. L. R. 1470), unless the public policy of the state prohibited such reemployment and payment of the pension at the same time.

This brings us to the question of the public policy of this state in this connection. It is noted that under the former state and county officers and employees retirement systems (§§121.14 and 134.14, F. S., 1953), the present state and county officers and employees retirement system (§122.16, F. S.), and the retirement system for school teachers (§238.181, F. S.), clearly show an intention on the part of the legislature to either prohibit public employment of persons retiring under said laws or to limit such employment. These statutes clearly show an intention on the part of the legislature that no person draw retirement pay and be paid a regular salary as a public employee. No re-

tired justice of the supreme court of Florida may engage in the practice of law (§25.125, F. S.). The same rule applies to retired circuit judges (§123.09, F. S.).

When the state and county officers and employees retirement systems were first established, it was provided that any retired officer or employee who might be reemployed or accept other state service for a salary would, by the acceptance of such reemployment service for a salary, forfeit his right to retirement pay (§§14, Chs. 22831 and 22938, 1945). This rule was subsequently changed so as to permit reemployment upon waiver of retirement pay during such reemployment (§§121.14 and 134.14, F. S., 1953, and §122.16, F. S., 1955). This seems to fix a state public policy in this connection.

In the light of the above-mentioned statutes, we feel that it is the public policy of this state that persons drawing retirement pay or pensions for past public service should not be permitted to become reemployed by the state and draw both retirement pay or pension and a salary from such state employment at the same time. This indicates a negative answer to the above stated question, unless retirement pay be suspended during reemployment; however, the rule against reemployment above mentioned would not seem to prohibit a person retired under said §112.05, F. S., from contracting with the state on the basis of an independent contractor, so long as there is no employment on a salary.

056-242—August 17, 1956

BEVERAGE LAW

EFFECT OF §562.14, F. S. AS AMENDED BY CH. 29964, 1955, ON EMPLOYEES OF LICENSED BEVERAGE VENDOR HIRED PRIOR TO ENACT- MENT OF SAID AMENDMENT

To: J. D. Williamson, State Beverage Director, Tallahassee

QUESTION:

Does §562.14, F. S., as amended by Ch. 29964, 1955, relative to employing persons in a licensed beverage place of business who have been convicted of operating a gambling house or conducting a lottery apply to a person who was convicted and sentenced for such offenses in 1947 and who was employed by a licensed beverage operator for 3 years prior to the effective date of the 1955 amendment?

Section 562.14, F. S., prohibits the employment of minors and certain other persons by licensed vendors of alcoholic beverages and provides insofar as material here as follows:

"... It shall also be unlawful for any such vendor to knowingly employ any person in the place of business of such vendor who shall have been previously convicted within the last past 5 years of any offense against any of the beverage laws of this state, or who shall have

been convicted, within the last past 10 years of bookmaking, operating a gambling house or operating or conducting a lottery or shall have been convicted within the last past 15 years of any offense involving moral turpitude in this state or any other state or in the courts of the United States."

You advise that the employee involved has been convicted of keeping a gambling house and violating the lottery laws within the last past 10 years.

The supreme court of Florida in the case of *State ex rel Hoffman v. Vocelle*, 159 Fla. 88, 31 So. 2d 52, held that the state, under the police power, may by statutory enactment prescribe rules, terms and conditions under which intoxicating liquor may be sold to the public, and if application is made to the state for a license, the statutory conditions become binding obligations between the state and licensee upon acceptance of a license and under which the licensee engages in the sale of liquor. Our court said in that case:

"It is established law that a sovereign state, when functioning under its police power, may enact such measures as are reasonably calculated to be essential or necessary in behalf of the general welfare for the control and regulation not only of the sale but the possession of intoxicating liquors. The form or method of regulation and control is one of public policy for the decision of each state, and frequently the prevailing view is reflected by appropriate legislative enactments . . ."

The opportunity to engage in the sale of alcoholic beverages in the state is not a right but a privilege and is a business under which the state may exercise greater control and exercise its police power in a more arbitrary manner because of the noxious qualities of the enterprise as distinguished from those enterprises not affected with a public interest and those enterprises under which the exercise of the police is not so essential for the public welfare. (See *Rodriguez v. Jones*, 64 So. 2d 278.)

It may be contended that this statute is harsh, but so is the statute requiring a driver's license to be revoked when the holder thereof is convicted of driving an automobile while in an intoxicated condition, yet the supreme court has held in *Bartels v. State*, 156 Fla. 535, 24 So. 2d 40, that the court was compelled to revoke a driver's license in such circumstances even though the revocation was harsh under the circumstances of the case. See *Simmons v. Hanton*, 65 So. 2d 42, where a rule of the state racing commission requiring persons who actively participate in racing and jai alai activities to furnish the state racing commission with fingerprints and photographs was upheld by the supreme court of Florida. In that case the court said:

"Certainly some form of identification is essential if the commission is required to carry out such mandates of the legislature as the provision for denying or 'revoking' a license to any person who shall have been refused a license by any other state racing . . . authority."

It has been said that a retrospective law in the legal sense

is one which takes away or impairs vested rights acquired under existing law, or creates a new obligation or imposes a new duty, or attaches a new disability, in respect of transactions or considerations already passed, however, a statute is not regarded as operating retrospectively because of the mere fact that it relates to antecedent events, or draws upon antecedent facts for its operation (50 Am. Jur. on Statutes, §476).

In 50 Am. Jur. on Statutes, §478, we find the following:

"A retrospective operation is given to a statute or amendment where the intent that it should so operate clearly appears from a consideration of the act as a whole, or from the terms thereof which unqualifiedly give the statute a retrospective operation, or imperatively require such a construction, or negative the idea that it is to apply only to future cases."

The act in question is not a criminal act, but is a regulation of alcoholic beverages, a commodity which our court has many times held must be strictly regulated and controlled, and the statute merely exercises the police power of the state in a manner to protect the general welfare and public morals. Increased regulation of liquor business has been held by our court not to constitute a violation of any vested right of liquor licensees.

It was held in *State v. Fuller*, 134 Fla. 212, 183 So. 726, that intoxicating liquor license holders were subject to city ordinances forbidding the sale within a certain distance from churches, notwithstanding they had been engaged in the liquor business prior to the passage of said ordinance, since establishment of a liquor business did not create a vested right which the legislature was powerless to regulate or prohibit.

A sovereign state, when functioning under its police power, may enact such measures as are reasonably calculated to be essential or necessary in behalf of general welfare for control and regulation of the intoxicating liquor business (See *State v. Vocelle*, 159 Fla. 88, 31 So. 2d 52), and the form or method of regulation and control of the sale and possession of intoxicating liquors is one of public policy for decision by the legislature.

In *Corpus Juris Secundum*, p. 1284, on constitutional law, we find the following:

"The constitutional prohibition against impairing the obligation of contracts is not an absolute one and is not to be read with literal exactness like a mathematical formula. Such provisions are restricted to contracts which respect property, or some object of value, and confer rights which may be asserted in a court of justice, and have no application to statutes relating to public subjects within the domain of the general legislative power of the state, and involving the public rights and public welfare of the entire community affected by it. They do not prevent a proper exercise by the state of its police power by enacting regulations reasonably necessary to secure the health, safety, morals, comfort, or general welfare of the community, even though contracts may thereby be affected,

since such matters cannot be placed by contract beyond the power of the state to regulate and control them.

In *Miami Bridge Co. v. Railroad Commission*, 155 Fla. 366, 20 So. 2d 356, our supreme court held that the legislature, after granting a franchise to operate a toll bridge under a special law, had authority under the "police power" to enact an act transferring the authority to fix rates to be paid by public for use of the bridge from the holder of the franchise to the state railroad commission. Said the court:

"It is established law that the inhibitions of the Constitution of the U. S. upon the impairment of the obligations of contracts, or the deprivation of property without due process, or the equal protection of the law by the States are not violated by the legitimate exercise of legislative power in securing the health, safety, morals and general welfare. The governmental powers cannot be contracted away, nor can the exercise of rights granted, nor the use of the property, be withdrawn from the implied liability to governmental regulations. The right to exercise the police power is a continuing one."

Your question is therefore answered in the affirmative.

056-243—August 20, 1956

REGULATION OF TRADE, COMMERCE AND INVESTMENTS

DOG RACING AND HORSE RACING—CHARITABLE AND SCHOLARSHIP FUNDS—§§550.03 AND 550.08, F. S.

To: *Florida Racing Commission, Miami*

QUESTIONS:

1. When calculating the sums payable to the charitable and scholarship funds, provided in §§550.03 and 550.08, F. S., should the "taxes" be included or excluded as a part of the income of the track in determining the PROFITS derived from the extra day of racing?

2. When calculating the sums payable to the charitable and scholarship funds, as aforesaid, what costs and expenses may be deducted when determining the "profits" from the extra day of racing?

The above questions involve a construction of §§550.03 and 550.08, F. S., in so far as they relate to extra days of racing for charitable and scholarship purposes. Section 550.03, F. S., provides for an extra day of racing, and that,

"All profits derived from the operation of such racing on such day including all taxes which would otherwise be received by the state racing commission for such day's operation shall be and become a part of charity fund for which such racing on such day is conducted."

And §550.08, F. S., permits an additional day of racing, and that,

"All profits, less actual operating costs from such

specific day's operations of such track *including all taxes* payable to state or any agency thereof for such day's operation shall be paid into the state treasury for a scholarship fund"

The above provision in §550.03, F. S., originated in Ch. 20843, 1941; the above provision in §550.08, F. S., originated in Ch. 25258, 1949. The said provisions have remained substantially the same since enactment. The supreme court of this state, in *State v. Florida Racing Commission*, Fla., 70 So. 2d 375, seems to have considered these provisions in §§550.03 and 550.08, F. S., as being the same in substance. We, therefore, feel that the "profits" under each of said sections should be determined in the same manner. In the above cited case the court remarked that

"The exercise (excise tax) ordinarily paid by the race tracks to the state *goes into the profits* and the quoted statutes exempt the race tracks, which voluntarily run the extra day, from payment of taxes and instead direct the proceeds to charitable and educational purposes in the manner provided"

Both §§550.03 and 550.08, F. S., provide for the creation of charitable and scholarship funds in the state treasury from the *profits* derived from the day's operation of the race track, *including all taxes payable to the state*. This statute includes the taxes as a part of the profits not as a part of the income or receipts of the race track for the day's operation. The said statutes waive the state's taxes for the extra days of racing and permit the extra day's racing, if there is added to the day's racing profit the taxes mentioned.

The supreme court of Florida, in *Orlando Orange Groves Co. v. Hale*, 107 Fla. 304, 144 So. 674, text 677, and 119 Fla. 159, 161 So. 284, text 292, quoted with approval from *Dealers' Granite Corp. v. Faubion*, Tex. Civ. App., 18 S. W. 2d 737, as follows:

"In the absence of a definite agreement, we hold with the Texas Court of Civil Appeals that *net profits*, generally speaking, implies what remains in the conduct of a business after deducting from its total receipts the expenses incurred in carrying on the business, and that to such expenses may be charged taxes, upkeep, depreciation, and interest on the corporation's debts, but not interest on its capital"

In *Mobile and Ohio Railroad Co. v. Tenn.*, 153 U. S. 486, 14 S. Ct. 968, 38 L. ed. 793, text 797, the Court stated that,

"Net earnings are properly the gross receipts less the expenses of operating the road to earn such receipts. Interest on debts is paid out of what thus remains—that is, out of net earnings. Many other liabilities are paid out of net earnings. When all liabilities are paid, either out of gross receipts or out of net earnings, the remainder is the profit"

The salary or compensation awarded to a director or officer of a corporation in return for his services as such must be reason-

able in amount and should not be excessive in relation to the services rendered. Sometimes a court of equity may inquire into the reasonableness of such salaries or compensation, considering the nature and extent of the services, and if found excessive may reduce the same (13 Am. Jur. 983-984, §1039). The same rule would seem to be applicable to other salaries and compensation paid by the corporation. Although the above rule seems to arise in proceedings by stockholders or other interested parties, we see no reason why the state racing commission may not take the same rule into account in determining the "profits" mentioned in §§550.03 and 550.08, F. S. In determining the "profits" under said sections, the determination and calculations of the race track are not conclusive and binding on the state racing commission, and the said commission may make a redetermination of the same. Under said sections we feel that the state racing commission may, in auditing the books and records of the extra days of racing, determine "actual operating costs" in running the extra days of racing under said sections. However, when determining whether certain charges are excessive in determining "profits" the commission should proceed with caution and not interfere with an honest and fair corporate policy (see *Seitz v. Union Brass and Metal Mfg. Co.*, 152 Minn. 460, 189 N. W. 586, 27 A. L. R. 293).

From the above and foregoing statutes, authorities and observations, we conclude:

1. When calculating the sums payable to the charitable and scholarship funds, provided in §§550.03 and 550.08, F. S., the "taxes" should not be taken into account when determining the "profits" of the extra days of racing, but constitute a statutory fund to be added to the "profits" after they have been determined. This being true, the sums payable to the said funds should never be less than what the taxes would have been had the race been a regular day of racing.

2. When calculating the sums payable to the charitable and scholarship funds, provided in said §§550.03 and 550.08, F. S., only the usual and reasonable expenses of the race track for the day of racing should be subtracted from the net proceeds of the day of racing. No salaries of officers and employees or other expenses for more than the day of the race should be deducted in determining the "profits" from the day of racing.

056-244—August 20, 1956

PUBLIC HEALTH

MOSQUITO CONTROL DISTRICTS—TIME FOR ADOPTING
DISTRICT BUDGET—§§390.162, 390.18, 193.25, 193.29
AND CH. 129, F. S.

To: *Naples Mosquito Control District, Naples*

QUESTIONS:

1. May mosquito control districts organized and existing under Ch. 390, F. S., hold their budget hearings in July and adopt their budgets in September under §390.162, F. S.?

2. Are mosquito control district assessments "assessments for benefits" within the purview of §7, Art. X, of the state constitution?

Section 390.162, F. S., as adopted by Ch. 29657, 1955, authorizes mosquito control districts to adopt fiscal years beginning on either July 1 or October 1 of each year. The budgets mentioned in sub §(1) of this section seem to be work budgets, similar to those county budgets mentioned in Ch. 129, F. S., and not the budgets which form the predicate for fixing the millages to be used for tax assessment purposes. The budgets mentioned in §390.162(3) are the budgets from which the tax millages are determined and are similar in nature to those from which county millages are fixed under Ch. 193, F. S. The budget prepared under said §390.162(3), F. S., is used by the board of county commissioners in making the tax levy for the tax year next following.

Under §193.29, F. S., the county tax rolls are required to be made up by the county tax assessors on or before July 1 of the tax year on which day they are submitted to the board of county commissioners, sitting as a tax equalization board, for the purpose of equalization. Where any valuations are changed at the equalization hearing, further notice is given of a hearing on the changes on the 1st Monday in August or September (§193.25, F. S.). After the final equalization of the tax roll valuations, which in many instances is completed during the first of August and by statute is required to be completed on or about the 1st Monday in September, the tax assessor, using the millages determined and fixed by the board of county commissioners extends the tax roll finally fixing the taxes assessed against each parcel of property subject to taxation. This work is required to be completed by the 1st Monday in October of the tax year. When we read §390.162(3), F. S., with the above-mentioned provisions in Ch. 193, F. S., we gather that the legislature intended that the mosquito district millages be fixed and in the hands of the board of county commissioners before September 1. We find nothing in §390.162, F. S., as adopted in 1955, indicating an intention to change the requirements of §390.18, F. S., governing the date by which the mosquito control district millages is to be determined and certified to the board of county commissioners.

The above observations answer the 1st above question in the negative; as a matter of fact §390.18, F. S., requires such budgets to be adopted by July 1 of the tax year.

The 2nd question was answered in the negative in our opinion of Jan. 23, 1949 (049-88; 1949-50 Biennial Report, 418), a copy of which is handed you herewith.

056-245—August 21, 1956

TAXATION

TAX SALE CERTIFICATES ISSUED FOR DELINQUENT EVERGLADES FIRE CONTROL ASSESSMENTS—CANCELLATION—CH. 10116, 1925, §196.12, F. S.

To: *T. Coburn Moore, Clerk of the Circuit Court, Hendry County*
QUESTION:

May tax sale certificates issued for delinquent Everglades fire control assessments pursuant to §3, Ch. 10116, 1925, be cancelled of record without the payment of such assessment?

Section 3, Ch. 10116, 1925, provided for the levy of an assessment of taxes for the use of a fire control board, established by the said act, for controlling fires within the Everglades drainage district. Under the said act said assessments or taxes were "certified to the tax assessors . . . and collected in the same manner as other taxes within the Everglades Drainage District."

We have carefully examined said Ch. 10116, and we cannot escape the conclusion that the tax levied by §3 of the said act was a special ad valorem state tax for use in the prevention and control of fires in the Everglades drainage district. The tax was levied and assessed by the statute and was not assessed or levied by the Everglades drainage district. Neither was any agency created by the act and given any authority to assess or levy the tax provided for in §3 of Ch. 10116.

Section 196.12, F. S., provides:

"A period of 20 years is declared to be the life of any tax certificate issued against any lands in the state, whether issued for state and county taxes or issued by a municipality for municipal taxes, and held by any private holder, natural or corporate, partnership, trustee, estate of deceased person or other person or persons under disability, or otherwise, such period of 20 years to be reckoned from the date of the issuance of such tax certificate; and when such certificate becomes 20 years old, reckoned from the date of its issuance, the same shall be deemed and held to be barred by this statute of limitation, and no action on such certificate shall be maintained by any such private holder in any court of this state, and no tax deed shall issue thereof. This section shall not be construed so as to make it unlawful for the state or any municipality to sell, to third persons or private purchasers, tax certificates which become 20 years old after the effective date of Ch. 19515, acts of 1939, but as to all such tax certificates which are so sold and which become 20 years old after said act became a law, and as to all tax certificates, now held by the state or any municipality, which are already 20 years old, and which may be sold, the purchaser or purchasers shall be limited to 5 years from the date of purchase of such certificate or certificates in which

to apply for a tax deed or institute other action for recovery on or enforcement of such certificate or certificates.

"The provisions and the limitations herein prescribed for tax certificates shall not apply to tax certificates which were sold under the provisions of Ch. 18296, acts 1937, commonly known as the Murphy act."

We are of the view that the tax imposed by §3, of Ch. 10116, 1925, was a state tax and that any outstanding tax certificates issued under and by virtue of said §3, of Ch. 10116, which are more than 20 years old, are subject to cancellation if the certificates are held by any private holder as defined in said §196.12. We do not pass upon the question of whether the certificates, if held by a public body, may be cancelled.

Your question, subject to the foregoing observations, is answered in the affirmative.

056-246—August 22, 1956

CORRECTIONAL SYSTEM

ESCAPES—PENALTY—APPLICATION OF §954.30, F. S., TO PRISONER CONVICTED FOR VIOLATION OF CITY ORDINANCE

To: Paul B. Johnson, County Solicitor, Tampa

QUESTION:

Does §954.30, F. S., as amended by Ch. 29949, 1955, apply to a prisoner who is confined in a municipal stockade or jail by virtue of a conviction of violating a municipal ordinance, where such violation would also constitute a misdemeanor under the state laws?

Section 954.30, F. S., as amended by Ch. 29949, 1955, reads as follows:

"954.30 *Escapes; penalty.*—Any prisoner confined in any prison, jail, road camp or other penal institution, state, county or municipal, or in working upon the public roads or being transported to or from a place of confinement, who escapes or attempts to escape from such confinement, *if the charge or conviction under which said prisoner is incarcerated constitutes a felony, he shall be guilty of a felony* and upon conviction thereof shall be punished by imprisonment of not more than 10 years; or *if the charge or conviction under which said prisoner is incarcerated constitutes a misdemeanor, he shall be guilty of a misdemeanor* and upon conviction thereof shall be punished by imprisonment of not more than 90 days. The punishment of imprisonment imposed under this section as amended shall be in addition to any former sentence imposed upon any prisoner convicted hereunder." (Emphasis supplied.)

It is apparent that said statute applies to only two classes of prisoners, viz., (1) those who are incarcerated under a charge

or conviction of felony, and (2) those who are incarcerated under a charge or conviction of misdemeanor. Is a municipal prisoner who is confined by reason of his conviction of violating a municipal ordinance incarcerated under a conviction of either felony or misdemeanor? I think not.

A felony is a criminal offense punishable with death or imprisonment in the state prison (§25, Art. XVI, Fla. Const.; §775.08, F. S.). A violation of a municipal ordinance is not punishable in either manner and is therefore not a felony.

Every offense except a felony is a misdemeanor (§775.08, F. S.). A misdemeanor is a crime (§775.05, F. S.), and a crime is a wrong directly or indirectly affecting the public, to which the state has annexed certain punishments and penalties, and which it prosecutes in its own name in what is called a criminal proceeding (22 C. J. S. 49, Criminal Law, §1-b.). The violation of a municipal ordinance does not come within this definition because the state annexes no punishment or penalty for such a violation, it being the province of the municipality to do that, and because a prosecution for a violation of a municipal ordinance is not maintained in the name of the state but in the name of the municipality.

Therefore, since the violation of a municipal ordinance is neither a felony nor a misdemeanor, §954.30, as amended in 1955, has no application to a municipal prisoner who is confined by reason of his conviction of violating a municipal ordinance, with the result that your question is properly answered in the negative.

The foregoing answer to your question is not affected by the fact that the act which constitutes the violation of the municipal ordinance may also amount to a misdemeanor under the laws of Florida, the reason being that the prisoner in question is not being held under a charge or conviction of misdemeanor; rather, he is incarcerated for something entirely different, viz., the violation of a municipal ordinance.

The only time that §954.30, F. S., as amended in 1955, could apply to a prisoner confined in a municipal jail or other municipal penal institution would be when such person is charged with or convicted of a felony or a misdemeanor, both offenses against the state laws, and, for reasons of necessity or convenience, is confined in such municipal jail or other municipal penal institution.

056-247—August 22, 1956

TAXATION

DOCUMENTARY STAMP TAXES—PROMISSORY NOTES TO STATE AND FEDERAL CREDIT UNIONS

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. Are promissory notes made and delivered by individuals to federal credit unions subject to state documentary stamp taxes?

2. Are promissory notes made and delivered by individuals to state credit unions subject to state documentary stamp taxes?

The 1st above question is similar in many phases to the question propounded and considered in opinion 056-231, of Aug. 7, 1956, a copy of which is furnished you herewith. It is stated in the said opinion of Aug. 7, 1956, that the Florida documentary stamp tax is not a transaction tax but a tax on the execution of the document or documents themselves. When the documents are executed, the liability for the tax arises; it arises either before delivery or simultaneously with delivery. The promissory note, if in fact an instrumentality of the U. S., does not become such (unless otherwise declared by congress) until delivery to the U. S. or its agency. It is doubted that the doctrine of implied immunity of the federal government, its agencies and instrumentalities will of itself extend to the execution of promissory notes, liens and mortgages to the federal credit unions (Plymouth Citrus Growers Assn. v. Lee, 157 Fla. 893, 27 So. 2d 415). We find no statute, either state or federal, expressly making promissory notes, liens and mortgages to the state or federal credit unions governmental instrumentalities prior to delivery. The tax liability arises by reason of the making, signing, executing, issuing, etc., of the instrument. When the instrument is received and accepted by the government or governmental agency the tax has attached and is due and payable by the maker.

Each of the above stated questions is answered in the affirmative.

056-248—August 24, 1956

TAXATION

**TAX EXEMPTION—FLORIDA EDUCATIONAL BUILDING—
§192.06(3), F. S., §1, ART. IX AND §16, ART. XVI,
STATE CONST.**

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Is the Florida educational association building here in Tallahassee entitled to exemption from ad valorem taxes?

We gather from your file, furnished with the request for opinion, that the Florida educational association is an association or nonprofit corporation whose membership is composed of classroom teachers, retired teachers, principals, supervisors, superintendents, department of education personnel, college professors and teachers, students of education and some associate members who are interested in education in this state. The income of the association is derived in the main from membership dues supplemented by advertisements in the association's magazine or journal (which equals about $\frac{1}{4}$ of the printing costs of the journal), rental from a portion of the association building and other minor income. The building is being financed from dues paid by members.

We further gather from your said file that the principal concern, aim and work of the association is the improvement of educational opportunities for the children of this state. The association works toward this purpose by providing in-service training opportunities for teachers, thus leading to better and improved teaching in our schools; also by working for better and improved working conditions for the teachers, so that they may render better and improved service to the schools. The association is instrumental in bringing educational experts in various fields of education and instruction to this state in connection with teachers' meetings, conferences, etc., where their views may reach the teachers of this state. It has been stated by the executive secretary of the association that during its annual convention it spends "several thousand dollars bringing to the state outstanding leaders in educational thinking and in the subject matter fields to meet with teachers and assist them in the professional responsibility of improving themselves in their ability to serve the state." The association conducts meetings in all areas of the state; this year contacting some 99% of the active teachers, supervisors, superintendents, etc. Assistance is often rendered to individual teachers in solving some of their individual problems.

The association is said to be presently engaged in the development of a program for raising funds for scholarships for needy students interested in becoming teachers in the public schools of this state. Some work is being done looking toward obtaining favorable group or other insurance for the teachers of the state.

Section 1, Art. IX, State Const., authorizes legislation providing tax exemption for the property of institutions, associations, etc., held and used for educational, literary, scientific, religious or charitable purposes. Section 192.06, F. S., was designed to make effective the exemptions authorized by said constitutional provision. Section 16, Art. XVI, State Const., provides a similar exemption for property of corporations held and used for the above purposes. The above factual situations reflected by the file, if found to be true by the tax assessor, would seem to clearly indicate that the association is engaged in one or more of the purposes mentioned in §1, Art. IX, and §16, Art. XVI, State Const., and §192.06, F. S.

If it should be found that the association's educational, literary, scientific and charitable purposes and work compose substantially all of its endeavor and that its rental of space in its building is within the purview of §192.06(3), F. S., then we feel that the tax assessor would be justified in granting it tax exemption.

The above observations furnish the formula for determining the answer to the above stated question.

056-249—July 24, 1956

CORPORATIONS AND BUSINESS TRUSTS

CAPITAL STOCK TAX—APPLICATION OF §608.33, F. S.— §§608.04, 608.32 AND 608.33, F. S.

To: *R. A. Gray, Secretary of State, Tallahassee*

QUESTION:

Where a corporation for profit has been organized in

pursuance of law in this state, must it observe the provisions of §608.33, F. S., relating to the annual capital stock tax, prior to the time such a corporation begins to transact business or actually issues its capital stock, or otherwise exercises its corporate franchise?

The request for opinion states that each year the office of the secretary of state receives inquiries from corporations regarding capital stock tax liability, "stating that the corporations have not transacted any business, or issued any capital stock, or exercised their corporate franchise in any way"; that "most such corporations have been in existence less than a year, but some have been in existence over a year, or even several years," and that, "the usual attitude is that no tax is due". The request for opinion further points out the provisions of §608.04, F. S., which provide in part and in effect that when the articles of incorporation have been filed in the office of the secretary of state and approved by him and all filing fees and taxes have been paid, the subscribers thereof, their successors and assigns, shall constitute a corporation; and the comment is made to the effect that there appears to be no other section of the law which would relieve a corporation for profit of its capital stock tax liability. The actual question as set forth in the request for opinion is as follows: "Shall capital stock tax liability be waived for the corporations referred to in my first paragraph, or should the minimum tax be required?"

The section was originally enacted as a part of Ch. 14677, 1931; was formerly carried as §610.08, F. S.; and since the adoption of Ch. 28170, 1953 (Ch. 608, F. S.) it has appeared in its revised form as §608.33.

Inquiry evidences that prior hereto it has been the custom for the secretary of state not to require the tax where an affidavit has been filed by the corporation to the effect that for the immediately preceding tax year a corporation has not engaged in business or has been dormant.

Section 608.32, F. S., requires corporations annually to file with the secretary of state a sworn statement or report setting forth certain information as detailed, a part of which is the following: "(f) Whether the corporation has been actively engaged in business during the previous 12 months or if its charter powers have been dormant and unused during that period." Section 608.32 (2) has special provisions for particular corporations as described. Section 608.32(3) requires such reports for the calendar year to be filed by July 1, and that "the tax payable under §608.33 shall be paid at that time."

Section 608.33(1) provides that "Every corporation" (except certain described ones which are excluded from the conclusions herein) "doing business in this state shall pay to the state for the use of the state a capital stock tax according" to a schedule set forth. The subsection concludes with these words: "The capital above mentioned refers to the invested capital represented by shares of stock outstanding." Section 608.33(2) provides for a pro rating of such tax as to domestic corporations organized and foreign corporations receiving permits during the 12 months preceding date the tax is paid. Section 608.33(4) sets forth the manner

of valuing no par value stock for the purposes of computing the tax.

Reasonably it appears that the provisions of paragraph (f) of §608.32(1), the words "doing business in this state" and the concluding sentence of §608.33(1), all quoted above, are relevant to this question.

The words "actively engaged in business" and "charter powers . . . dormant and unused", in said paragraph (f), and "doing business in this state", as used in §608.33(1), in relation to this tax appear to mean the same thing. Inquiry into the meaning of "engaged in business" or "doing business" by corporations evidences that such phrases have been construed mostly concerning statutes relating to foreign corporations; however, certain of such constructions are here applicable.

"A foreign corporation is doing, transacting, carrying on or engaging in business' within a state when it transacts some substantial part of its ordinary business therein" (20 C.J.S. 46, §1829). "If a corporation is doing that for which it is organized, for the purpose of earning profit, very slight activity is sufficient to constitute the 'doing of business' within the meaning of the national industrial recovery act and revenue act of 1934, imposing capital stock tax . . . Page v. M. Rich & Bros. Co., C.C.A. Ga. 99 F. 2d 607" (13 Words & Phrases 160). In a statute imposing franchise taxes, "doing business" has been construed as "any transaction or transactions" by a foreign corporation "qualified to do, or doing, intra-state business in this state" (Union Oil Asso. v. Johnson, Cal., 43 P. 2d 291). And it would seem that the term "doing business", while covering transactions of ordinary business in pursuance of charter powers, reasonably does not include activities confined solely to organization and management matters (First Central Trust Co. v. H. I. Gelvin, Inc., 272 Ill. App. 241).

Attention is now directed to the concluding sentence in §608.33(1): "The capital stock above refers to the invested capital represented by shares of stock outstanding." These quoted words are not to be construed as referring to invested "capital" of the corporation but to stockholders' investments in shares of stock of the corporation. Further, in relation to the question, attention is directed to the words "shares of stock outstanding."

In view of the foregoing, in my opinion the question is answered as follows:

A domestic corporation for profit "doing business" is required annually to pay the capital stock tax imposed by §608.33, F. S. Such a corporation, regardless of recitals in its articles of incorporation concerning subscriptions to capital stock, which has no outstanding capital stock, is not required to pay such tax. The corporation is "doing business" or "actively engaged in business" if during such 12-month period it engages in business activities or transactions in pursuance of its charter powers, or is possessed of property in Florida acquired by it in pursuance of its charter powers, subject to the exception set forth in the succeeding sentence. The corporation is not "doing business" and not "actively engaged in business" and is "dormant" only if during such 12-month period it does not engage in business activities or transactions in pursuance of its charter powers, or is possessed of no

property in Florida acquired by it in pursuance of its charter powers other than money, represented by bank deposit or otherwise, not invested or drawing interest.

056-250—August 24, 1956

INSURANCE

GROUP COVERAGE—SICKNESS AND ACCIDENT PLAN PROPOSED BY FLORIDA MEDICAL ASSOCIATION— §§642.04 AND 635.24, F. S.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTION:

Is the following described plan for sickness and accident insurance for Florida medical association permitted under relevant laws pertaining to group coverage?

Two plans of such group coverage are offered, a "Basic Plan" and an "Extended Plan." Each of these plans is broken down into units, the former into units A, B, C and D, the latter into units A-1, B-1, C-1 and D-1. The amounts payable under the plans and various units start with weekly benefits of \$100 and then in uniform diminishing amounts to \$25.

This proposed group coverage must find its authority in the relevant provisions of our laws permitting it. Reference is made to §642.04, F. S., and particularly the subsections thereof quoted below.

Section 642.04(2) (c) provides: "Under a policy issued to an association, including a labor union, which association shall have a constitution and bylaws and not less than 25 members and which has been organized and has been maintained in good faith for a period of two years for purposes other than that of obtaining insurance, or to the trustees of a fund established by such an association, which association or trustees shall be deemed the policyholder, insuring at least 15 members of the association for the benefit of persons other than the officers of the association, the association or trustees."

Section 642.04(2) (f) provides: "No such policy of insurance as defined in subsection (2) (c) above may be issued to any such association, unless all members of such association or all of any class or classes thereof, are declared eligible and acceptable to the company at the time of issuance of the policy, and unless 60% of the eligible members are so insured."

Certain features of the plan are mentioned:

"If 60% of our members enroll in either the Basic or Extended Income Plans, the Company will issue coverage to each applicant, regardless of past medical history, *reserving only the right to limit impaired risks to the B, C, or D Units of the Plan for which application is made.*"

"All members *under age 70* may apply for Unit C, C-1, D or D-1. Only male members *under age 60* may apply for Unit A, A-1, B, B-1 . . ."

The company reserves the right to reduce or decline applications from members who are insured in other plans, *if the combined liability exceeds the company's established limit of weekly indemnity on any one member.*

Reasonably it appears from the above that the plans attempt at least the following classifications: (1) Those impaired as distinguished from those not impaired. (2) Those under age 70 and those under age 60 as to certain coverages. (3) Those who are males as to certain coverages, thus excluding females. (4) Those presently possessed of certain coverage which, combined with the coverage offered, would exceed the limits fixed by the insurer.

We consider these classifications in relation to the words "or all of any class or classes thereof," appearing in above-quoted §642.04(2) (f).

The provision concerning the right of the company to pre-mise group coverage of this nature upon physical condition does not appear to be justified. The following is quoted from Appleman, *Ins. Law & Practice*, Vol. 1, §44: "Seldom is a medical examination ever required in group insurance." Then there is the following from Osler, *Accident and Sickness Insurance*, pp. 114-115: "A group must either cover all employees, or all employees of a certain classification or classifications. For example, it might cover salaried employees but not hourly workers, or vice versa * * * The only individual underwriting in a group plan comes when employees eligible for participation in a contributory plan at the time it was installed delay coming in until after the enrollment deadline." It is recognized, of course, that these statements from the mentioned authorities are subject to the provisions of our statutes. The legislature saw fit to permit an insurer issuing group life coverage to inquire into the insurability of prospective participants. (See §635.24, F. S., and its various subdivisions.) No such provision is made with respect to insurance of the nature here found. Hence, it reasonably appears that this reservation by the company to limit "impaired risks" to the coverage provided by certain "units" is not justified. This in effect would constitute an approach to individual underwriting as distinguished from group underwriting.

Grave doubt exists that the other attempted classifications relating to age limits, sex and other insurance carried are valid. Attention is directed to §642.04(2) (d) relating to group credit insurance and the words: "or all of any class or classes thereof, determined by conditions pertaining to the indebtedness or to the credit transaction giving rise to the indebtedness," also to the provisions of §642.04(2) (e) relating to group employee insurance and the words: "or all of any class or classes thereof, determined by conditions relating to their employment, but not determined to exclude those in more hazardous employments solely because of the hazardous employments." Attention is also directed to the various types of group life coverages authorized by the provisions of §635.24, F. S., and mention of class or classes: §635.24(1) (a), group life coverage for employees, "or all of any class or classes determined by conditions pertaining to their employment"; §635.24 (2) (a), group credit life, "or all of any class or classes thereof determined by conditions pertaining to the indebtedness or the

purchase giving rise to the indebtedness"; §635.24(3)(a), relating to group life coverage for members of labor unions, "or any class or classes thereof determined by conditions relating to their employment, or to membership in the union, or either." We cannot agree that the attempted classifications mentioned in the first sentence of this paragraph are authorized under §642.04(2)(f).

There is an additional questionable feature. We have under the guise of proposed group coverage for the members of an association different benefits and we assume different premium rates, as though each unit was the subject matter of a distinct policy. When we have these different plans, each broken down into units with their particular benefits, upon what basis do we proceed to determine if "60% of the eligible members are so insured"?

For the reasons stated above, such doubt exists in my mind concerning the propriety of this proposed coverage with respect to the features mentioned, I regret I am unable to approve such coverage in the light of our applicable statutes.

056-251—August 24, 1956

JUDICIARY DEPARTMENT

GRAND JURY—RIGHT TO DEFENSE PROVIDED BY STATE OR COUNTY IN SUITS BROUGHT AGAINST THEM

To: *LeRoy Collins, Governor of Florida, Tallahassee*

QUESTION:

Where members of a grand jury are sued in an action of libel resulting from comments and criticisms appearing in their official report, do I, as governor, have the authority to assign a state attorney to defend the jurors in this civil action?

The grand jury system is of ancient common law origin, (*Cotton v. State*, 85 Fla. 197, 95 So. 668) but has been enlarged by statute. At the time of the settlement of this country the grand jury no longer retained its early function of trying offenders as well as accusing them. Qualification for grand jury duty is strict and service upon a grand jury is undoubtedly one of the most important public services that the lay citizen is called upon to render his country. A grand jury by its very nature is an informing, inquiring, inquisitorial and accusing body. It always proceeds *ex parte*. It is not a trial body and is not the ultimate fact finder, however, its functions are of a judicial nature and a proceeding before it constitutes a judicial inquiry. The oath administered to grand jurors is quite enlightening:

"You, as grand jurors for the body of this county of _____ do solemnly swear (or affirm, as the case may be) that you will diligently inquire and true presentment make, of all such matters and things as shall be given you in charge; the counsel of the State of Florida, your fellows and your own, you shall keep secret, unless required to disclose the same by some competent court;

you shall present no man for envy, hatred, or malice, neither shall you leave any men unrepresented for love, fear, favor, affection, reward, or hope thereof, but you shall present things truly as they come to your knowledge, according to the best of your understanding. So help you God.'"

After the oath is administered the court is required to charge them concerning their duties. The supreme court of Florida In Re Report of Grand Jury, 11 So. 2d 316, said:

"In a democracy, it is not possible for the people individually to know when such trusts (speaking of public trusts) are being abused so one of the agencies provided to represent and report when abuses are committed is the grand jury. It is a means whereby the people participate directly in the administration of their business and aids to a knowledge why the grand jury has become such an important agency among free peoples."

In the case of *O'Regan v. Schermerhorn*, N. J., 50 A. 2d 10 (1949), a suit was brought against 23 members of the grand jury of Houston county, for libel, the facts of which case were quite similar to the facts in this case. Referring to the civil liability of the grand jury, the court said:

"The grand jury, at common law, is an arm of the court and acts for the court under which it is organized, and its proceedings are regarded as proceedings in the court. In *re Schwartz*, 133 NJL, 79, 84, 85, 42 A. 2d 564 (see cases cited). Its members are officers of the court and exercise functions of a judicial nature and its proceedings are judicial within the meaning and operation of the law or privilege (citing cases). It naturally follows that they are entitled to the same legal privileges and immunities with respect to their judicial acts as the judge of the court of which they are a part (citing cases).

"It is settled by the great weight of authority, on consideration of public policy, that all officers exercising judicial functions are absolutely privileged in what they speak, write or do in the performance of their judicial acts, at least where such statements are relevant and pertinent to the matter before them. Such acts are judicial acts and cannot form the basis for money damages, if the officer had jurisdiction of the parties and jurisdiction or color of jurisdiction of the subject-matter, even though in exercising such jurisdiction he acts erroneously, illegally, irregularly or in excess of jurisdiction, and such acts are alleged to have been done maliciously and corruptly."

In *Hayslip v. Wellford*, Tenn., 263, S.W. 2d 136, a suit for libel against members of the grand jury which had investigated certain high schools and made a presentment and report but not an indictment, citing from a former opinion, the court said:

" "The proceedings connected with the judicature of the country are so important to the public good, the law holds

that nothing which may be therein said with probable cause, whether with or without malice, can be slander, and, in like manner that nothing written with probable cause under the sanction of such an occasion can be a libel.”

“It is the act, the judicial character thereof and not the individual that makes it a public necessity that public agents or officials in the performance of their public duties should not suffer for performing their judicial acts even though they err therein.”

Section 22, Art. 3, Fla. Const., provides:

“Provision may be made by general law for presenting suit against the state as to all liabilities now existing or hereafter originating.”

This same provision has not been changed since our constitutions of 1868 and 1885.

In the case of *Rabin v. Lake Worth Drainage Dist., Fla.*, 82 So. 2d 353, an action was brought by a landowner for loss sustained by the landowner due to crop retardation caused by chemical herbicide which the drainage district sprayed on the drainage canal in order to destroy the hyacinths in the canal. The circuit court of Palm Beach county entered judgment for the drainage district dismissing the action and the landowner appealed. The supreme court held that even if the action of the drainage district was negligent and constituted tort, it was tort for which the drainage district was not under the law liable because the district was acting in a governmental capacity as a public corporation and the action would be a suit against the state. (See also *Arundel Corporation v. Griffin*, 89 Fla. 128, 103 So. 422.)

If as governor, after considering all of the facts and circumstances in this case and from a study of the entire subject matter, you believe that this is in fact a suit against the state, then it would appear that the grand jury could be represented by the state attorney. The fact that the state attorney is the “counsel for the state of Florida” before the grand jury lends strength to this reasoning.

Section 27.02, F. S., relating to the duties of the state attorney, provides:

“The state attorney shall appear in the circuit court within his judicial circuit, and prosecute or defend on behalf of the state all suits, applications or motions, civil or criminal, in which *the state is a party.*” (Emphasis supplied.)

If the governor in his sound discretion from a review of the entire subject matter feels that the resident state attorney is disqualified to represent the state or its arm, the grand jury in this case, then under §27.14, F. S., he may assign a state attorney from another circuit to discharge the duties of the state attorney in the circuit wherein the action is pending.

While the question has not been asked, there is an alternate method of dealing with the problem at hand and that is the em-

ployment of private counsel by the county or state to represent in this libel action the agency of this state, the grand jury in this case, whose duties and functions perform county and state purposes. Suit money for such purposes could be provided by public agencies from the general fund of the county or from available state funds, if deemed advisable by the county commissioners, or by you as governor and the appropriate state agency having in charge the expenditure of such state funds.

This office has held on prior occasions that payment of attorney's fees for representation of officers and agencies, including jurors, was a proper state or county purpose. In opinion 049-290, 1949-50 Biennial Report, p. 245, this office held that the county attorney should represent a tax assessor where suit is brought against the said assessor for the purpose of canceling or contesting a tax, and in opinion 051-8, 1951-52 Biennial Report, p. 224, this office held that the board of county commissioners had the authority to pay attorney's fees for services in defending the tax assessor in a suit where the revenue of the county was directly affected by the suit and the county attorney was in that instance disqualified to represent the tax assessor.

In opinion 052-320, dated Nov. 26, 1952, we held that the state road department was authorized to employ counsel and pay for same out of its regular funds to act as defense counsel for a convict guard captain who was being prosecuted in federal court and charged with depriving certain prisoners of their constitutional rights. We said in that opinion:

"It is universally held that a sovereign state government may appear in private litigation whether on behalf of the prosecution or the defense where such government has a real interest in the outcome of the litigation. On several occasions, U. S. attorneys have appeared and represented, as defense counsel, officers or employees of the U. S. who have been charged with the violation of the criminal laws of a state. See: *Cunningham v. Neagle*, 135 U. S. 1, 10 S. Ct. 658, 34 L. ed. 55; *Illinois v. Fletcher, et al.*, 22 Fed. Rep. 776; and U. S. attorneys have appeared as defense counsel on behalf of federal judges who were being sued on a civil charge arising out of acts performed by them in their official capacity (*Booth v. Fletcher*, 101 Fed. Rep. 2d 676)."

In opinion 054-206, dated Aug. 23, 1954, addressed to Hon. Park Campbell, county attorney for Dade county, we held that duties and functions performed by members of a grand jury serve a county purpose, as well as a state purpose and that where members of a grand jury are sued in an action for libel resulting from comments and criticisms appearing in their official report, the board of county commissioners may pay reasonable attorney's fees incurred by such jurors in the defense of the action. That particular opinion, however, was limited to a proposition where it had been determined in a libel action that the members of the grand jury were not civilly liable, however, in the light of the authorities cited it is my opinion that the principle of law is the same, whether the defense funds are provided before or after the trial of the issue.

In each case where the grand jury members or other judicial official or public officer is sued the question whether public funds shall be provided for their defense, or state or county counsel shall be assigned to defend them, depends upon the particular circumstances in each case obtaining. Thus each situation calls for the exercise of administrative discretion by the duly authorized public officials. It follows that if you as governor or if other authorized public officials, state or county, in good faith and in the exercise of a sound discretion believe from the particular facts involved that defense funds or public counsel should be provided for the defense of the grand jury, then your affirmative action would be legally justified. Moreover, we have seen from the cited cases that insofar as grand juries and judges are concerned the immunity that protects them from suit is very far reaching indeed and would in practically all situations justify public defense assistance for them.

I am therefore of the opinion that if you believe from a review of the particular facts and in the light of the applicable law and of the public interest that public defense assistance is justified in this case, then you may assign a state attorney to defend the members of the grand jury as an arm of the state in the pending libel action on the assumption that the state is actually the real party defendant, or as an alternative you could recommend that applicable state or county funds be made available to provide the services of defense counsel which could be voted by duly authorized state or county officials if they in good faith likewise believe it to be their duty to provide such defense assistance.

056-252—August 24, 1956

PUBLIC BUSINESS

AWARDING OF PRINTING CONTRACTS—LAWS GOVERNING—§§283.10, 287.10(2), 321.02 AND 16.44(9), F. S.

To: Col. H. N. Kirkman, Director, Dept. Public Safety, Tallahassee

QUESTION:

What law governs the awarding of public printing?

Section 283.10, F. S., relating to class B printing provides:

"283.10 Bids required on class B printing.— No general contract shall be let to cover the printing designated as class B, but each job coming under this classification shall be let separately, by the department to which it belongs, to the lowest responsible bidder who shall manufacture the same within the state. Such contract shall apply only to the job under consideration, and each department of the state government shall call for bids from two or more printing houses within the state upon each separate job of printing. No certified check may be required to accompany such bid for class B printing, except in such cases as the various state departments may deem the same to be for the best interest of the state, and then not in excess of \$2000."

Chapter 28056, 1953 (Ch. 287, F. S.) creates the state purchasing council for the regulation of purchases by the various state agencies and officers of the state. Section 287.10(2), F. S., reads:

"This chapter shall neither repeal nor modify any part of chapter 283, F. S."

In opinion 053-315, dated Nov. 20, 1953 (AGO 1953-54, p. 374), I stated that the provisions of Ch. 283, F. S., were not in anywise repealed or amended by reason of the enactment of said Ch. 287, F. S.

You point out, however, that certain provisions of the statutes require various departments and agencies to advertise for bids for all purchases of supplies and equipment in excess of specified amounts. For example, the department of public safety law (§321.02, F. S., as amended by Ch. 29756, 1955) contains the following:

"Provided, however, that all supplies and equipment consisting of single items or in lots, of a value of more than \$1,000, shall be purchased by advertising for sealed bids at least once a week for not less than two consecutive weeks."

Similarly, §81, of the Florida highway code of 1955, (Ch. 29965, 1955) provides as follows:

"No purchase of road material, machinery, tools, equipment or supplies in excess of \$3000 shall be made by the board unless made upon competitive bids received, after advertising therefor in a newspaper of general circulation, at least once a week for not less than two consecutive weeks, prior to the date on which bids are to be received. The board may at its discretion, award a contract to the lowest responsible bidder or it may reject all bids and proceed to readvertise."

Your primary question has to do with whether or not the purchase of class B state printing is governed by the provisions of Ch. 283, F. S., or by the individual purchasing laws applicable only to specific agencies, examples of which are given above.

An examination of the history of Ch. 283, F. S., indicates that the legislature has always considered public printing as a special item. Moreover, it has long been the departmental policy of various agencies of the state to handle printing purchases solely under the provisions of Ch. 283, F. S., by calling for competitive bids from two or more printing houses in the state. The departmental construction where not contrary to law is entitled to great weight (*Gay v. Canada Dry Bottling Co.*, Fla., 59 So. 2d 788, and other cases).

It appears that the purchase of printing has consistently been deemed to be in a special category having its own governing laws, and not considered in the same classification as other state purchases. Therefore, it well may be contended that by the enactment of Ch. 283 and its predecessor laws dating back as far as 1887, the legislature intended to prescribe specialized rules for

the purchase of public printing by all state agencies, complete unto themselves, as now contained in Ch. 283; and that the general limitations placed in certain departments purchasing powers relative to supplies and equipment in general were not intended to modify or affect the purchasing of "class B" printing.

This long-time treatment by the legislature of printing contracts, as distinct from other types of purchases, may be based on a logical determination that printing is not to be classified in the same category as other "supplies and equipment." It may well be claimed that printing, as contrasted to other articles or commodities purchased by the state, is an item which involves important elements of personal service and specialized craftsmanship along with the tangible product itself.

Further substantiation is given to this conclusion by the fact that the legislature, in the enactment of Ch. 287, F. S., saw fit to specifically except printing from its scope, leaving Ch. 283 as the sole specialized method governing purchases.

It seems consistent with the intent of the legislature and with the long established administrative construction of the statutes to determine that public printing contracts are governed exclusively by Ch. 283, F. S., equally applicable to all agencies of the state unless clearly in conflict with other laws evidencing a specific contrary intent.

In my opinion, the general provisions of §321.02, as amended, relative to purchases of "supplies and equipment" by the department of public safety, and those of §8 of the new highway code, relative to "equipment and supplies" purchased by the state road department, do not, in the light of the above observations, clearly evidence any intent to apply to printing contracts, nor to modify the uniform provisions of Ch. 283.

It is pointed out that my opinion 055-45, of Feb. 28, 1955, dealing with a similar problem concerning the turnpike authority, had under consideration statutory language substantially different than that considered here. In the turnpike act, the limitation applies to "*all contracts and agreements*," other than "compensation for personal services", which is an all-inclusive term, while in the statutes here considered, the limitation applies specifically only to "purchases" of "supplies and equipment." Further, the attorney general is, by §16.44(9) (b), F. S., required to *advertise* for bids for printing and binding the Florida Statutes. There may be other departments or officers where the applicable statutes spell out specifically what is required in the way of competitive bidding. These, of course, are mandatory.

In some cases, a question may arise as to whether or not certain items are "supplies and equipment" or "printing". In this connection, reference is made to my opinion 053-315, cited above, wherein I distinguished between printing and those items of stationery usually carried as merchandise by stationers, such as blank books, paper, and envelopes. Under the instant opinion, while purchases of printing would be governed solely by the provisions of Ch. 283, F. S., those other items of merchandise described above would be ordinarily considered as "supplies and equipment" and

therefore subject to the specific agency purchasing requirements as well as regulations of the state purchasing council.

In the light of the above observations, and subject to the noted exceptions, it is my opinion that unless a statute governing an office or agency specifically requires its printing contracts to be let only after advertising for bids such purchases need only be made by compliance with the provisions of §283.10.

This interpretation of the law, however, is not to be deemed to prohibit or discourage the advertising for bids on certain printing jobs, where deemed desirable or appropriate by the agency concerned. In many cases, following such an administrative practice, even though not required by law, may be wise and business-like, particularly where a substantial sum is involved, and may serve to avoid any criticism of favoritism or extravagance. As stated in 43 Am. Jur. Sub. 24, p. 765:

“... Experience has shown, however, that the interests of the public are best conserved by offering contracts for public work to the competition of all persons able and willing to perform it, . . .”

Each state official and agency will of necessity have to determine individual requirements and policies in the light of the appropriate statute and this opinion. This seems to answer your question as definitely as possible.

056-253—August 27, 1956

MOTOR VEHICLES

FLORIDA HIGHWAY PATROL—AUTHORITY TO ENFORCE LAWS COMMITTED ON PUBLIC HIGHWAYS—§§321.05, 339.25, 339.29, 339.31, 381.411, 821.36 AND 861.10-861.11, F. S.

To: *Wilbur E. Jones, State Road Department, Tallahassee*

QUESTION:

Do officers of the state highway patrol have authority to enforce all violations of criminal laws committed on the rights-of-way of public highways, including obstructions thereon, injuries to physical structures and growth thereon, violations of sanitary regulations, creating traffic hazards thereon, and the like?

Section 321.05, F. S., relating to the duties, functions and powers of patrol officers provides, in part:

“(1) . . . to maintain the public peace by preventing violence on highways; to apprehend fugitives from justice; to enforce all laws now in effect regulating and governing traffic, travel and public safety upon the public highways and providing for the protection of the public highways and public property thereon; to make arrest without warrant for the violation of any state criminal law committed upon the right-of-way

of any public road, such arrest may be made only when the offense is committed in the presence of such director or patrol officer, . . ."

It should be noted that the enforcement powers of patrol officers extend to the entire right-of-way of public roads.

In your letter the following factual matters are set forth which prompt the question presented:

"Throughout our State Road System, but most especially along the Florida Keys, members of the traveling public drive their vehicles off the hard surface of the highway and camp along the highway on the shoulder of the road. A great number of these people have trailers and some pitch canvas tents and others simply sleep along the highway in sleeping bags or in some other manner. The Department has had numerous complaints from citizens living along the highways of this condition and has been requested to prohibit the continuance of this practice by these people. In some instances these people set up a camp for several weeks at a time and create sanitary and other problems as there are no facilities for their use."

Since highway patrol officers have general authority to enforce all state laws relating to crimes committed on public highways, a brief examination of statutes relating to highway safety, protection of highways, including plants and shrubbery, sanitation regulations and various other acts intended to protect the health, safety and welfare of the public indicates ample authority to prevent the kinds of situations described in your letter as quoted above.

The following statutes are cited as examples of specific violations which might well be encountered under the factual situation stated: §§339.29 and 861.10 provide a maximum penalty of \$100 or imprisonment for 30 days for dumping refuse or rubbish on the right-of-way of public highways (see also §821.36 F. S. to similar effect); §§861.11 and 339.25 provide a penalty for conviction of marring trees or shrubbery either natural or planted on the rights-of-way of roads; §339.31 provides a penalty of fine or imprisonment for causing any obstruction in or to any part of a public road; §381.411 provides penalties of up to \$1000 or imprisonment up to 6 months for violation of any of the provisions of Ch. 381, F. S., relating to the powers and duties of the state board of health for violation of rules or regulations promulgated by the board. This chapter gives the board of health broad powers to safeguard the health and sanitation of public facilities in Florida, to prevent and control public health nuisances, to control disposal of excreta, sewage or other waste in all public places and to control "any other condition, place or establishment necessary for the control of communicable diseases or the protection and safety . . . of the public."

Emphasis is particularly placed upon said §339.31, F. S., which reads as follows:

"Obstructing highway.—Whoever obstructs any public

road or established highway by fencing across or into the same, or by willfully causing any other obstruction in or to such road or highway, or any part thereof, shall be punished by fine not exceeding \$100, or by imprisonment for a term not exceeding 60 days, and the judgment of the court shall also be that the obstruction be removed."

In 25 Am. Jur. 510, §211, the text reads:

"It is well settled that a traveler on a highway or street has a right to stop his vehicle temporarily, provided in doing so he exercises reasonable care under the circumstances to avoid injury or damage to other travelers. Such right is, however, subject to valid parking regulations. But such right must be exercised reasonably, otherwise the standing vehicle may constitute an unlawful obstruction. The question whether the length of time or extent of stoppage is reasonable is one to be determined by the circumstances of each case. . . ."

And in 25 Am. Jur. 459, §164, we find:

". . . Moreover, the right of passage of the public must be exercised reasonably and in such a way as not unnecessarily or unreasonably to impede the exercise of the same right by others, and acts in their nature justifiable may, owing to their amounting to an unreasonable or excessive use of the highway, amount to public nuisances. . . ."

I believe that anything more than temporary parking of a motor vehicle or trailer on a highway for a few hours, such as, for example, using the same as a place for overnight lodging quarters when no emergency exists such as breakdown of the vehicle or some other difficulty, would in all probability constitute criminal obstruction of the highway. Particularly would this be the case if the obstruction continued for several days. Conceivably this would amount to an unreasonable use of the highway disadvantageous to its customary use by all travellers and might be said to create safety and sanitary hazards. Of course, in all such cases the officers would use reason and common sense principles in enforcing these statutes. The officer should always be conscious that highways are intended to serve the public and that if the interests or privileges of an individual are in conflict with public welfare, then the privileges of the individual must give way to the interests and welfare of the general public. Perhaps warnings rather than arrests would suffice except in the more flagrant cases.

These (particularly §339.31, F. S.) and other laws, in my opinion, authorize highway patrolmen to safeguard the health and safety of the public by enforcing existing laws and regulations which might be violated under the circumstances described in your letter. Your question is therefore answered in the affirmative.

056-254—August 27, 1956

STATE OFFICERS AND EMPLOYEES

RETIREMENT—FEDERAL EMPLOYEE UNDER STATE RETIREMENT SYSTEM—FORMER CHAPTERS 121 AND 134, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. May the time served by a resigned state employee with the federal bureau of entomology, in connection with a joint state and federal effort, be counted as state employment for retirement purposes?

2. Where a person served with the federal bureau of entomology and was retained as a state inspector on a monthly salary during such employment, may the period of time served by him in such dual capacity be counted as state employment for retirement purposes?

The person who is the subject matter of this opinion was a state employee when Ch. 22831, 1945, was enacted, and we are informed, elected, pursuant to said chapter, to accept the provisions thereof and join the retirement system thereby established for state officers and employees. It appears from the minutes of the state plant board of Oct. 10, 1921, that "the Bureau of Entomology, U. S. Department of Agriculture, in cooperation with the State Plant Board, proposes to attempt the eradication of the sweet potato weevil from several isolated areas in the southern part of the state." It further appears that it was the desire of both the state and federal agencies that bureau of entomology agents "hold appointments also as agents of the State Plant Board." It was, thereupon, provided by the said state plant board "that . . . W. H. Merrill . . . of the Bureau of Entomology, be appointed as special agents of the State Plant Board at a salary of \$5 per month each, effective as of Oct. 1, 1921." We find nothing in the file showing how long this arrangement continued; however, it is indicated in Mr. Merrill's letter of July 16, 1952, that this arrangement was continued until Oct. 31, 1925.

The above matters and things occurred prior to the enactment of said Ch. 22831, 1945, and do not involve the question of what officers and employees of the state are or were within the purview of the state and county officers and employees retirement systems (Chs. 121, 122 and 134, F. S.) but relate primarily to service credits of former state employment or retirement system. We find references in the statutes to service with the state, who has been in the service of the state, etc., some of which relate to service with the state prior to July 1, 1945, the effective date of Ch. 22831, 1945, (Ch. 121, F. S.). The definitions of "state officers and employees," "average final compensation," "salary," etc., contained in Ch. 121, F. S., and similar terms in Chs. 122 and 134, F. S., seem, in the light of *Gay v. Blocker*, Fla., 73 So. 2d 855, text 858, to have been used "for the purpose of determining those persons who were covered by the retirement system," and not the question of average compensation and past or prior service.

The appointment of agents of the U. S. as inspectors or agents of the state appears to have been quite common when the livestock board and the federal bureau of animal industry work together in similar work (see §585.11, F. S., authorizing the appointment of inspectors of the bureau of animal industry as assistant state veterinarians or livestock inspectors). Such a provision existed as early as 1917 (see §12, Ch. 7345, 1917). In 1921, the plant board was duly authorized to employ, prescribe the duties of, and fix the compensation of such inspectors and other employees as it may require (§4, Ch. 6885, 1915; §2422, R. G. S., 1920). We find nothing in the state statutes which would have prevented the same person acting as an inspector for the state plant board and the bureau of entomology in 1921 to 1925, or even today, although we find no provision as the provisions in said §585.11, F. S.

We, therefore, feel that W. H. Merrill above mentioned, may well have been an employee of both the state plant board and the bureau of entomology. The work was such that his inspection may well have been for the joint benefit of both the state plant board and the bureau of entomology. Both the state plant board and the bureau of entomology were engaged in a common purpose—that of eradicating the sweet potato root weevil from sections of Florida. The eradication of the said weevil was a joint project and a joint effort of both the state plant board and the bureau of entomology. Mr. Merrill was a full time employee of both, although paid primarily by the federal government.

The 1st question is, therefore, answered in the negative, the 2nd question in the affirmative, under the facts and circumstances involved. Although the principles of law here discussed are general in their application, the answers to the two questions, being based upon both questions of fact and of law, are specific and should not be applied to other facts and circumstances.

056-255—August 27, 1956

STATE FINANCIAL MATTERS

CANCELLATION OF WARRANTS—UNEMPLOYMENT COMPENSATION FUND—FINE FUND STATUTE—§§17.26 AND 215.30, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where a state warrant drawn on the unemployment compensation fund is cancelled pursuant to §17.26, F. S., what method should the state comptroller follow in handling his accounts in connection with such cancellation?

Said §17.26, F. S., in so far as here material, provides that "if any state warrant issued . . . against any fund in the state treasury, is not presented for payment within one year after issuance thereof, the comptroller may cancel the same and credit the amount of such warrant to the fund upon which it was drawn . . .; provided, that if the warrant so cancelled was issued against a fund which is no longer operative, then the amount of

such warrant shall be credited to the general revenue fund When the payee or person entitled to any warrant so cancelled by the comptroller requests payment thereof, the comptroller may, upon investigation, issue a new warrant therefor to be paid out of the proper fund in the state treasury." This statute is identical, except for the period of limitation, to the one considered by this office in its opinion of May 5, 1952, which is here controlling unless a different rule is required under the state and federal unemployment compensation statutes. It is clear from the above-mentioned statute that the legislature by said statute requires the reissued warrant to be payable from the same fund as the original; except, where the amount of the warrant was credited to the general revenue fund as aforesaid, in which case the new warrant is payable from the said general revenue fund.

When we consider the five funds statute (§§215.30, et seq., F. S.,) with said §17.26, F. S., we arrive at the conclusion that the amount of the cancelled warrant under said §17.26 is not available for the payment of other warrants but is earmarked for the payment of the new or reissued warrant so long as the account on which it was drawn exists, and should such account be abandoned or abolished, the amount of the cancelled warrant must be transferred to the general revenue fund for the payment of any new or reissued warrant. The cancellation of any warrant, under said §17.26, should never have the effect of increasing or decreasing the appropriation for any year or other period of time. Warrants for the payment of money may never be issued on the state treasury of Florida unless and until the necessary funds for their payment is available in such treasury. The purpose and intent of §17.26, in so far as it provides for crediting of the amount of the warrant to the fund on which drawn, or, in certain cases, to the general revenue fund, is to be sure funds are available for the payment of the new or reissued warrant when demanded by the person entitled thereto, at least until the right to such new or reissued warrant has been barred by limitations, if any.

Unemployment compensation taxes, imposed by Ch. 443, F. S., are paid into a clearing account of which the state treasurer is ex-officio treasurer. From time to time the funds accumulating in this account are "deposited with the Secretary of the Treasury of the U. S. to the credit of the state unemployment trust fund, established and maintained pursuant to" §1104, Title 42, of the U. S. Code, to be maintained and investigated by the Secretary of the U. S. Treasury. "The Secretary of the Treasury is authorized and directed to pay out of the fund to any state agency such amounts as it may duly requisition, not exceeding the amount standing to the account of the state agency at the time of such payment" (sub §(f) of §1104, Title 42, U. S. Code). The said unemployment trust fund in the hands of the secretary of the treasury is clearly a trust fund; likewise, the funds in the state treasury, derived from the said unemployment trust fund, as aforesaid, is a trust fund within the purview of §§215.30, et seq., F. S. Section 215.30, F. S., divides the funds in the state treasury into five separate general funds, one of these funds being designated the state "trust fund." Each of these funds is divided into many accounts, and accounts into subaccounts, etc.

The state unemployment trust fund is an account in the said state "trust fund", along with many other accounts making up such fund. When a state warrant, drawn upon the said state unemployment trust fund, is cancelled, the amount of the warrant is restored to that fund, earmarked, however, for the payment of any new or reissued warrant, at least so long as the right to demand the reissuance of the warrant is not barred by limitations. In order to preserve the funds so restored to the state treasury pursuant to §17.26, F. S., it would seem necessary that the state comptroller maintain a subaccount within the said account, or a separate account within the trust fund for preserving such amount and similar amounts for the payment of reissued warrants under said §17.26, F. S. If the said fund be maintained in the said state unemployment trust fund as a subaccount, there must at all times be maintained a sum in said subaccount sufficient to pay all such reissued warrants when and if reissued and such amount may never be used for the payment of other sums or amounts or other warrants.

Therefore, where a state warrant drawn on the unemployment compensation fund is cancelled pursuant to §17.26, F. S., the comptroller must either set up a subaccount in the said unemployment compensation fund account and preserve the said subaccount for the payment of warrants reissued pursuant to said §17.26, or handle the same as suggested in our opinion of May 5, 1952 (052-146).

056-256—August 28, 1956

STATE AND COUNTY OFFICERS AND EMPLOYEES

RETIREMENT—CREDIT FOR MILITARY SERVICE—NOMINATION FOR OFFICE—§122.02(4) AND CH. 115, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

May a present member of the state and county retirement system be given credit for military service with the armed services of the U. S., served "between 1939 and 1946," who, although nominated for public office at the 1942 primaries, resigned his nomination and did not become a state or county officer or employee until 1948 and has been a member since such date?

Section 122.02(4), F. S., provides in part that "in determining the aggregate number of years of service of any officer or employee, the time of military service between 1939 and 1946 by the employee *on leave of absence* shall be added to the years of state or county service. Credit for any other military service *on leave of absence* shall not exceed four years" The condition upon which a member of the state or county officers and employees retirement system receives credit for military service is that such service shall have been on leave of absence from state or county service. This leave of absence doubtless has reference to the leaves of absence for military service authorized under Ch. 115, F. S. The special mention of one thing in a statute implies the exclusion of other things (Re Ratliff's Estate, 137 Fla. 229, 188 So. 2d 128,

text 133). This statute does not give general credit to all members of the state and county officers and employees retirement system for prior military service, but only when such service was predicated upon a *leave of absence* from state or county service.

Although a person may be a nominee for public office at the May primaries, he does not and cannot become a public officer until elected at the general election, or some authorized special election. The member mentioned in the above question was not a state or county officer or employee to whom a leave of absence could have been granted, under Ch. 115, F. S., or any other similar statute or law, when he entered military service.

Because of the limitations mentioned in said §122.02(4), F. S., and no leave of absence appearing, the above question must be answered in the negative.

056-257—August 27, 1956

WELFARE

AID TO DEPENDENT CHILDREN—DESIGNATION OF BENEFICIARY—§409.30, F. S.

To: *State Department of Public Welfare, Jacksonville*

QUESTION:

Is the state welfare board required to obtain designations of beneficiaries from aid to dependent children payees?

In my opinion the answer to the above question should be in the negative.

At the outset it should be understood that welfare payments accrue to the benefit of the recipient's estate, since they are made subsequent to, rather than prior to, the determination of need.

Section 409.30, F. S., provides among other things that the payee of public assistance shall designate a person to receive any public assistance payments accruing to said payee's estate at the time of death; and that if no designation is so made, then the county judge shall make the designation. Designations made by such payees are required to be kept by the state welfare board.

In addition to rewarding, in a small measure, a designee for his humanitarian considerations to a welfare recipient in his final days, the legislature, by providing for the disposition of public welfare payments accruing to date of death, intended to overcome in most instances the need for the administration of a deceased welfare recipient's estate.

The requirement of a designee is unquestionably applicable to welfare programs for old age assistance, aid to the blind, and aid to permanently and totally disabled, since the grant under such programs is certified and issued each month in the name of, and for the benefit of, the payee.

In aid to dependent children, however, welfare payments do not accrue to the benefit of the payee's estate upon the death of

the payee, as in other categorical programs, but instead continue for the benefit of the child or children for whom the payee was designated guardian. Upon the death of the payee in such instances a new guardian is appointed.

When a child, who is receiving aid to dependent children, dies, any payments due and unpaid accrue to the benefit of the child's estate. The natural guardian then, by virtue of §744.13(2), F. S., receives any benefits accruing to such estate. If, however, there is not a natural guardian it becomes necessary for the county judge to designate a beneficiary as contemplated in §409.30, F. S., since the child, because of minority, is not capable of designating a beneficiary.

In summary, it is my opinion that §409.30, F. S., does not contemplate that the payee of aid to dependent children shall designate a beneficiary as is required of payees under the other, above mentioned, categorical programs.

Your question is answered accordingly.

056-258—August 28, 1956

LEGISLATURE

LEGISLATION—PAYMENT OF EXPENSES OF MEMBERS OF COMMITTEE APPOINTED PURSUANT TO HOUSE RESOLUTION NO. 96-XX OF 1956

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

May the expenses of the committee provided for by house resolution 96-XX, of the 1956 special session of the state legislature, be paid on the same basis that expenses of committees appointed by house resolutions are paid during the sessions?

House Resolution 96-XX was adopted by the house of representatives during the extraordinary session of the legislature convened by proclamation of the governor made and issued by him on July 20, 1956, under and pursuant to §2, Art. III, and §8, Art. IV, State Const. This extraordinary session was, pursuant to §10, Art. IV, State Const., adjourned, on Aug. 1, 1956, until the beginning of the next regular session of the legislature. Because extraordinary sessions of the legislature convened under and pursuant to §2, Art. III, and §8, Art. IV, State Const., are limited to sessions not exceeding 20 days, the said extraordinary session is now in sine die adjournment. This is true although the legislature itself may be in recess as to its extraordinary session convened by the governor pursuant to §3, Art. VII, State Const.

The house of representatives, during the said extraordinary session convened pursuant to §2, Art. III, and §8, Article IV, of the State Constitution, adopted house resolution 96-XX, authorizing the speaker to appoint a legislative procedure committee, consisting of five members, to attend the legislative service conference in Seattle, Wash., meeting on Aug. 28-Sept. 1, 1956,

and make report to the next regular session of the Florida legislature. As this committee was set up to attend a meeting in another state, beginning on Aug. 28, 1956, it is of necessity an interim committee, because the extraordinary session adopting the said resolution, even under the state constitution, could not have extended beyond 20 days from and after July 23, 1956. This question is not affected by the fact that the legislature may be in technical session under the resolution of the governor calling them into extraordinary session pursuant to §3, Art. VII, State Const., as such sessions "shall consider no business other than such reapportionment." The conference in Seattle, Wash., beginning on Aug. 28, 1956, does not seem to be one relating to state reapportionment. We, therefore, have an interim committee under said house resolution 96-XX.

"While legislative committees, in the absence of special authority, can act only while the legislature is in session, it is within the power of the legislature, in the absence of constitutional restriction, to appoint committees to sit after adjournment, between sessions, or during a recess. Generally, neither branch of the legislature may, by independent action, create an investigating committee with power to sit after adjournment of the legislature, and, in order to continue or appoint a committee whose work of investigation is to proceed after the adjournment of the body which created it, the enactment of a law by bill passed in the manner prescribed by the constitution, is required in some jurisdictions. Accordingly, it has been held that the resolution of a single branch of the legislature is insufficient to confer power in a committee to sit after adjournment of the legislature, and that even a joint or concurrent resolution of both branches of the legislature is insufficient for this purpose; but in jurisdictions where joint resolutions are recognized as equivalent to laws enacted by bill, such resolutions when duly passed may continue or appoint a committee to carry on after adjournment." (81 C. J. S. 959-60, §42; see also 49 Am. Jur. 259, §41, notes 10-14; and Annotations in 28 A. L. R. 1155-1159 and Ann. Cas. 1916 B. 1147-8).

These authorities raise a serious question as to the validity of said house resolution 96-XX.

Section 2 of the said house resolution 96-XX, provides "that expenses as provided by law to be paid members of this committee from the *house* appropriation for legislative expense." There is no *house* appropriation for legislative expense; however, we feel that the reference is to the appropriation for "legislative expense" (see Item 33, §282.01, F. S., as well as §§11.12 and 11.13, F. S.). Should there be any conflict between the provisions of §§11.12 and 11.13, F. S., and the provisions of the general appropriations act of 1955 (Ch. 29966, 1955), the general appropriations act will control as it is the later act in point of time. We deem the continuing appropriation made by §11.12(2), F. S., suspended during the life of the biennial appropriation made by said Item 33, §282.01, F. S. It is provided, both in §11.13, and in Item 33, §282.01, F. S., that "members of interim committees, *authorized by law*, of either

branch of the legislature, and joint interim committees, shall be paid per diem or mileage, or per diem and mileage, while on official business within the state, as provided for state employees, unless otherwise provided by joint or concurrent resolution, and shall be paid per diem and mileage without the state as provided for the governor and members of the state cabinet under general law."

We are here concerned with the phrase, "members of interim committees, *authorized by law*, of either branch of the legislature." We are specifically concerned with the term "authorized by law" as therein used. We have seen from authorities above quoted from and cited that it is the general rule that interim committees may not be established by one house, but must be established by both houses in the manner as statutes and laws are enacted. The legislature may well have had this line of authority in mind when it made reference to "interim committees authorized by law." Although not here exactly in point, reference is made to §4, Art. IX, State Const., where it is provided that "no money shall be drawn from the Treasury except in pursuance of appropriations *made by law*." An appropriation is not "made by law" unless it is made by means of a bill enacted by the legislature "with the formalities prescribed by the constitution for enacting bills into laws as distinguished from resolutions" (Advisory Opinion, 43 Fla. 305, 31 So. 348, text 349). In this case an appropriation was attempted to be made by a resolution passed by both houses of the legislature; concerning which the court said "the resolution under discussion lacks the essential requisites *to make it a law* of an enacting clause" The rule in this advisory opinion has been followed by the court in Advisory Opinion, 156 Fla. 48, 22 So. 2d 398, text 400. The court remarked, in *Winter Haven v. A. M. Klemm & Son*, 132 Fla. 334, 181 So. 153, text 168, that "the enacting clause prescribed by §15, Art. III, is a prime essential to the validity of a law" citing the advisory opinion in 43 Fla. 305, 31 So. 348. Section 15, Art. III, State Const., provides that "the enacting clause of every law shall be as follows: Be it enacted by the Legislature of the State of Florida."

In the light of the above and foregoing authorities, constitutional provisions, and observations, we feel that the provision for the payment of the per diem and travel expenses of "members of interim committees, *authorized by law*, of either branch of the Legislature and joint interim committees" relate to interim committees established or provided for by statutes or resolutions, adopted by both houses, and not by resolutions adopted by one house only. To be paid their per diem and travel expenses, under the appropriations acts or statutes, members of committees must be either appointed pursuant to general statutes or acts of the legislature or by joint action of both houses. Section 2 of the said house resolution 96-XX is not sufficient within itself as an appropriation (Advisory Opinion, 43 Fla. 305, 31 So. 348; Advisory Opinion, 156 Fla. 48, 22 So. 2d 398; Advisory Opinion, Fla., 55 So. 2d 99).

The committee provided in house resolution 96-XX not being an interim committee *authorized by law*, or one set up by joint action of both houses of the legislature, the above stated question

must be answered in the negative. We are not aided by the fact that the legislature may now be in recessed session under the governor's call made under §3, Art. VII, State Const.

056-259—August 28, 1956

CRIMES

WORTHLESS CHECK LAW—ISSUE OF WARRANT BY JUSTICE OF THE PEACE—§832.05, F. S.

To: *J. Tom Watson, Justice of the Peace, Lakeland*

QUESTION:

Is the justice of the peace authorized to issue a warrant under the worthless checks statute, F. S. A. §832.05, where the maker gives the check to the payee to apply on account, or where the check is given to satisfy an obligation and is given several days after the merchandise is delivered and where the check is dishonored by the drawee bank for insufficient funds?

Section 832.05(2), F. S., provides as follows:

"(2) **WORTHLESS CHECKS.**—It shall be unlawful for any person, firm or corporation to draw, make, utter, issue or deliver to another any check, draft, or other written order on any bank or depository for the payment of money or its equivalent, knowing at the time of the drawing, making, uttering, issuing or delivering such check or draft that the maker or drawer thereof has not sufficient funds on deposit in or credit with such bank or depository with which to pay the same on presentation; provided, that this section shall not apply to any check where the payee or holder knows or has been expressly notified prior to the drawing or uttering of same or has reason to believe that the drawer did not have on deposit or to his credit with the drawee sufficient funds to insure payment as aforesaid, nor shall this section apply to any post dated check."

The purpose of the legislature in enacting said statutory provision was not to punish the fraudulent obtaining of money or property by means of worthless checks; rather, the purpose, as stated in §832.05(1), was as follows:

"(1) **PURPOSE.**—The purpose of this section is to remedy the evil of giving checks, drafts, bills of exchange and other orders on a bank without first providing funds in or credit with the depository on which the same are made or drawn to pay and satisfy the same, which tends to create the circulation of worthless checks, drafts, bills of exchange and other orders on banks, bad banking, check kiting and a mischief to trade and commerce."

Section 832.05(2) does not require that anything of value be obtained on the strength of the worthless check. Unless a person comes within the proviso to said statutory provision, he commits

a crime if he issues a bank check with knowledge that he does not have sufficient funds on deposit in or credit with the bank upon which it is drawn to pay it on presentation, even though he obtains nothing of value in exchange for the check.

Therefore, it is my opinion that your question is properly answered in the affirmative.

056-260—August 28, 1956

CORRECTIONAL SYSTEM

JAILS AND JAILERS—TRANSFER AND RETURN OF PRISONERS FROM ONE COUNTY JAIL TO ANOTHER—AUTHORITY—§950.02, F. S.

To: *J. Frank Adams, State Attorney, Blountstown*

QUESTION:

When a prisoner charged with crime is transferred to the jail of another county for safekeeping, pursuant to the authorization of §950.02, F. S., is it necessary to obtain an order from the governor for the return of the prisoner to the county in which the charge is pending for the purpose of arraignment?

Section 950.02(1), F. S., provides that when in the opinion of the governor the interests of the state demand it, the circuit judge shall, upon the governor's request, make an order directing that a person held under a criminal charge shall be confined in the jail of another county.

Subsection (2) of said statute provides that when it shall be made to appear to a circuit judge to be necessary to remove a prisoner to the jail of another county for safekeeping or to prevent injury to the prisoner, and the governor is not easily accessible or it is deemed inadvisable by reason of the circumstances to first communicate with the governor, the circuit judge shall make an order directing that a person held under a criminal charge shall be confined in the jail of another county; and further provides that immediately after the removal the sheriff of the county from which the prisoner was removed shall make full report to the governor of the reasons for the removal and shall attach to such report a copy of the judge's order.

Subsection (3) of said statute provides that no such order of removal shall be made except by the judge of the circuit in which is located the county wherein the offense is alleged to have been committed, that such order shall be in full force throughout the state, and that neither the county to which the prisoner is sent nor any officer thereof shall be required to incur or pay any expense or charge of maintaining such prisoner.

If it were not for sub §(2), a plausible argument could be made that, since an order of removal under sub §(1) is predicated upon the governor's request, it is necessary to obtain the governor's permission before returning the prisoner to the county where the charge is pending, for arraignment.

However, sub §(2) must be taken into consideration. It authorizes an order of removal under the circumstances therein specified without either a request by or permission of the governor and I find nothing therein which expressly or impliedly brings the governor into the picture first or last except that it requires that the sheriff, not the circuit judge, report to the governor the reasons for the removal and attach a copy of the order of removal. This requirement that the sheriff report to the governor does not in any way make the circuit judge accountable to or subject to the directions of the governor. I find nothing in §950.02 F. S., to preclude the circuit judge, after making an order of removal under authority of sub §(2), from thereafter concluding, upon the basis of changed circumstances, that the reason for the removal no longer exists and from thereupon ordering that the prisoner be returned to the county where the charge is pending.

It being my view that the permission of the governor is not necessary before returning a prisoner removed under the authority of sub §(2), I find no justification for holding that such permission is necessary if the removal is made under sub §(1). Such a holding would require reading into sub §(1) something that the legislature did not say. I believe that, in view of the great importance and significance of withdrawing from the circuit judges the right to exercise their own discretion, in the light of changed circumstances, to order the return of prisoners to face court proceedings, the legislature would have spelled out its intent in express terms if it had meant to require the governor's permission before ordering such return.

Therefore, it is my opinion that your question is properly answered in the negative.

056-261—August 30, 1956

MOTOR VEHICLES

REGULATION OF TRAFFIC ON HIGHWAYS—SIGNAL REQUIREMENTS—§317.37, F. S.

To: *Ray E. Ulmer, Justice of the Peace and Small Claims Court, Clearwater*

QUESTION:

Are the signals required of motor vehicle operators by §317.37(1), F. S., prescribed for the purpose of informing following as well as on-coming vehicles of an intention to turn?

In my opinion the answer to your question should be in the affirmative.

Section 317.37(1), F. S., reads as follows:

"No person shall turn a vehicle from a direct course upon a highway unless and until such movement can be made with reasonable safety, and then only after giving an appropriate signal in the manner hereinafter provided, in the event any other vehicle may be affected by such movement."

There is clearly included within the provisions of the above quoted section the requirement that an operator of a motor vehicle comply with the following essential conditions before turning from a direct course on the highway:

“(a) reasonable safety to self and other vehicles, and

“(b) a proper signal giving notice of intention to turn to any other vehicle that may be approaching or following the turning vehicle.”

The reason for the first condition is apparent from the words of the statute which provide that a vehicle shall not be turned on the highway until “such movement can be made with reasonable safety.”

The applicability of hand signals, in the second condition, to situations involving vehicles following the turning vehicle, as well as vehicles approaching the turning vehicle, is apparent from the reasonable safety requirement of the first stated condition and the words of the statute that a signal shall be given “in the event *any other vehicle* may be affected by such movement.” An interpretation of the term “any other vehicle” would necessarily lead to an answer which would be all-inclusive and not restrictive to vehicles approaching from only one direction. This interpretation appears to be the only one possible in view of the language used.

Your question is answered accordingly.

056-262—August 30, 1956

MOTOR VEHICLES

FINANCIAL RESPONSIBILITY—SATISFACTION BY JUDGMENT HOLDER FROM SECURITIES DEPOSITED WITH INSURANCE COMMISSIONER—PROPOSED FORM OF AFFIDAVIT FOR USE IN SALE OF AUTOMOBILES—§§324.021, 324.031, 324.042, 324.051, 324.061, 324.111, 324.141, 324.161, AND 324.211, F. S.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTIONS:

1. What procedure should the commissioner require and observe concerning payment upon judgments of moneys deposited with him or derived from securities or surety bonds deposited with him under provisions of §324.061, F. S.?

2. As contemplated by the statute, a stop order is placed with the motor vehicle department when an automobile registration is suspended. Apparently, an increasing number of vehicles are being sold after suspension of registration with result that new owners are unable to obtain title. The attached copy of affidavit was designed to help control this problem without un-

duly inconveniencing the public while at the same time easing the administrative burden." (Said affidavit is described below.) Will it, when properly executed, be sufficient to invoke the penalty sections of the statute governing sale of vehicles while registrations are under suspension?

3. What is the significance and relationship of the provisions of §324.141, F. S., to a deposit of securities made with the commissioner under §324.061, F. S.?

The questions are answered in their numbered order as follows:

1. When the operator of a motor vehicle is involved in an accident at a time when he has not theretofore met the requirements of the provisions of Ch. 324 relating to evidence of financial responsibility, he may avoid issuance of an order suspending his driver's license and the registration of the automobile operated by him, by depositing with the state treasurer security to conform with §324.061 and by complying with one of the provisions of §324.031 (§324.051(2)(f), F. S.). Section 324.061, F. S., provides that the securities so deposited in pursuance of it shall be with respect to claims to persons or property resulting from such an accident and shall be "in the form and amount determined by the commissioner which, in his judgment, will be sufficient to compensate for all injuries arising out of such accident but in no case shall the amount exceed the limits as specified in §324.021(7)." The amounts of such limits are \$10,000 because of bodily injury to or death of one person in any one accident, \$20,000 because of bodily injury or death to two or more persons, and \$5,000 because of injury to or destruction of property.

The word "security" is used in §324.061, F. S. We are informed that the insurance commissioner has administratively construed such term to include surety bonds. Without commenting upon that construction, we accept it for the purposes of this opinion. Thus, this question contemplates the commissioner being possessed of bonds, money and surety bonds in relation to possible judgments and their satisfaction. The section and chapter are silent concerning the method to be followed by a judgment holder and the commissioner with respect to such a deposit. Mention is made in §324.111, F. S., about sending to the commissioner certified copy of a judgment not satisfied within 60 days; and §324.161, F. S., relating to another deposit, refers to "attachment or execution."

We are advised by the commissioner's office that whenever an accident results in personal or property damage to more than one person, the records of that office will evidence the part of any such deposit required for each person. Since there is only one deposit as to either where the possible claims of one or several are involved, such has a definite relationship to the procedure to be followed in the application of any such deposit to the satisfaction of a judgment obtained by a person for whose benefit all or any part of the deposit is required. And consideration must be given to this allocating or pro rating of such a deposit.

We are here dealing with personal property as distinguished from real property in relation to judgments. "Where a number of

judgments are obtained against a debtor, the judgment placed in the hands of the sheriff for execution first should be satisfied" (headnote, *Blackstone Holding Co. v. Lawrence*, Fla., 192 So. 198); and in that case the court stated: "The lien of Central Hanover Bank & Trust Co. was first secured and placed in the hands of the sheriff. The court therefore was correct in holding that it should first be satisfied. *Love v. Williams*, 4 Fla. 126; *Goodyear Tire & Rubber Co. v. Daniel*, 72 Fla. 498, 73 So. 592; *Pasco v. Harley*, 73 Fla. 819, 75 So. 30."

With respect to one possible claimant for property damage (limit, \$5,000) or one possible claimant for personal damages (limit, \$10,000 for one; \$20,000 for more than one) in the handling of these required deposits no difficulties are presented; but when there are two or more claimants for property damage, which may result in judgments exceeding said limit of \$5,000 or the amount of total deposit required, or two or more claimants for damages for injuries to the person or death resulting in judgments which may exceed the \$20,000 limit or the amount of deposit required, there arises uncertainty. Unfortunately, in such latter cases the provisions of Ch. 324, F. S., relating to such deposits do not state that the commissioner in fixing the amount of the deposit shall pro rate the same among possible claimants. Hence, reasonably in the light of the authorities in the preceding paragraph relating to priority of judgment liens, it cannot be said with certainty that the commissioner can pro rate such a deposit between several possible claimants. Hence this question must be conditionally answered as follows:

a. Where there is only one claimant with respect to either of these deposits for property or personal damages, and there is delivered to the commissioner a duly certified copy of such judgment, together with a certificate of the clerk of the court (or the judge of such court if it has no clerk) in which such judgment was recovered, to the effect that the time for appeal from such judgment has expired and no appeal has been taken, or that otherwise the judgment has become final, and that no order has been entered by the court permitting installment payments as provided by §324.141, F. S., and there shall be presented to the commissioner by the sheriff of Leon county, an execution duly issued on such judgment, the commissioner shall respond thereto as follows: (1) If the deposit is in money, he shall deliver to such sheriff the amount required by said execution, but not in excess of the amount of the deposit required by the commissioner for the judgment creditor. (2) If the security is in bonds, the commissioner shall sell so many thereof as may be sufficient to meet the requirements of the execution, but not in excess of the amount of such deposit required for the judgment creditor, and pay the proceeds to said sheriff. (3) If the security is in the form of a surety bond, the commissioner shall make demand and take such other action as may be necessary to realize from the bond the amount of such execution, but not in excess of the amount of said deposit required for the judgment creditor, and pay the proceeds so realized to said sheriff.

b. Where there is more than one possible claimant to either of these deposits, and demand is perfected upon the commissioner

for application of a part of the securities contemplated by §324.061 upon a judgment of such a claimant, and the amount of such judgment does not exceed the part of such a deposit allotted for the possible claim of such judgment holder, the commissioner shall as set forth follow the procedure designated "(1)" in preceding paragraph. On the other hand if the amount of such judgment exceeds the amount of such deposit allotted to the judgment holder by the commissioner, without delay the commissioner shall file proceedings in the circuit court of Leon county, interpleading such entire deposit, and abide such judgment entered and which may become final in said proceedings.

2. Attached to the request for opinion in connection with this question is a proposed form of affidavit to be executed by the owner of a motor vehicle in connection with its sale and also a statement to be signed by the purchaser. The gist of the proposed affidavit is that the particular vehicle has not been involved in an accident that would subject the owner or the vehicle to the financial responsibility law, that the sale is being made in good faith and not for the purpose of defeating the intent of §324.211, F. S., or circumventing the financial responsibility law; and the statement of the purchaser to the effect that the sale is not being made to circumvent said law.

The effect of §324.211, F. S., is that where an owner's registration has been suspended in pursuance of the chapter, the registration shall not be transferred nor "the motor vehicle in respect of which such registration was issued be registered in any other name" except in pursuance of approval of the commissioner as provided; and the rights of conditional vendors, mortgagees and lessors are recognized in such section. The question in effect is whether the commissioner may by rule or regulation prescribe the use of such form of affidavit in connection with sale of a motor vehicle. The purpose here is to be commended. The financial responsibility division is handling now approximately 90,000 cases annually; thousands of used cars annually are being sold; and too frequently sales are being made where registrations are suspended, without the commissioner's approval. The recitations in this question are referred to.

It is recognized that here exists a considerable administrative problem and the matter of public welfare. There is the provision in §324.042, F. S., that, "the commissioner may make such rules and regulations as may be necessary for its (the chapter's) administration." The provisions of Ch. 319, F. S., set forth the manner in which title to motor vehicles may be transferred in this state. Despite the difficulties in connection with the commissioner's administration of §324.211, F. S., and the public interest involved, in my opinion relief, if any, must be found in legislation and not a rule or regulation of the commissioner.

3. Attention is directed to the provisions of §324.141, F. S., relating to installment payment of a judgment. The answer to the first question would appear to answer this question.

056-263—August 30, 1956

SOCIAL SECURITY

OASI—REFERENDUM CONCERNING OASI FOR STATE AND COUNTY EMPLOYEES—§650.10 AND CHAPTER 410, F. S.

To: *Burnis T. Coleman, Florida Industrial Commission,
Tallahassee*

QUESTION:

Has Florida exercised the election or choice authorized by §218(d)(6) of the social security act, and if so, what was the choice and what was the controlling statute?

Section 218(d)(6) of the social security act (42 U.S.C.A., §418(d)(6)) is quoted:

"If a retirement system covers positions of employees of the State and positions of employees of one or more political subdivisions of the State, or covers positions of employees of two or more political subdivisions of the State, then, for purposes of the preceding paragraphs of this subsection, there shall, if the State so desires, be deemed to be a separate retirement system with respect to any one or more of the political subdivisions concerned and, where the retirement system covers positions of employees of the State, a separate retirement system with respect to the State or with respect to the State and any one or more of the political subdivisions concerned. If a retirement system covers positions of employees of one or more institutions of higher learning, then, for purposes of such preceding paragraphs, there shall, if the State so desires, be deemed to be a separate retirement system for the employees of each such institution of higher learning. For the purposes of this paragraph, the term 'institutions of higher learning' includes junior colleges and teachers' colleges."

The request for this advice refers to our previous opinion 056-130, copy attached. Attention is directed to the question and answer therein set forth. It is noted that copy of that opinion was transmitted by the commission's assistant director of OASI to Mr. James W. Murray, regional representative, OASI, Atlanta, Georgia, along with copies of the several laws mentioned below, with request for advice concerning the following question: "If a referendum is held with respect to, and is limited to eligible employees of Dade county, and a modification and certificate in proper form are duly submitted, will such modification receive the approval of the Secretary of Health, Education, and Welfare?" This letter was responded to by Mr. Carl H. Harper, regional attorney, Atlanta, Georgia, in which he stated in part: "The Florida Attorney General's opinion of May 3, 1956, submitted with your present inquiry acknowledges an ambiguity in the state statutes with respect to this point. It will be necessary for this ambiguity to be resolved by the appropriate legal officials of the State of Florida before we will be in position to consider such a proposed

modification as you suggest submitting." This comment refers to the last paragraph of opinion 056-130.

Attention is briefly directed to those laws, copies of which were transmitted to Mr. Murray, as above mentioned.

Chapter 29801, 1955, consolidated the then existing separate retirement systems for state and county officers and employees into a system designated "state and county officers and employees retirement system." Chapter 29824, 1955, amended various sections of Ch. 650, F. S. (generally referred to as our enabling act), and among other things added present §650.10, F. S. Chapter 29968, 1955, (now carried as Ch. 410, F. S.) on its "effective date", as defined, provides among other things for abolishment of the consolidated system mentioned above and establishment of a new system designated "Florida supplemental retirement system" integrated with OASI upon a favorable referendum. The 1955 house and senate journals will evidence that these three pieces of legislation were considered at approximately the same time by the legislature.

As pointed out in opinion 056-130, rules of statutory construction are to be resorted to only when ambiguity exists.

The provisions of Ch. 410, F. S., *are dormant* and will remain so unless and until the members of the supplemental system mentioned therein vote in a favorable referendum, as contemplated by its terms and the relevant federal law, and thereafter the effective date is fixed by the state cabinet, as provided. Whether, in the light of the conclusions in attached copy of opinion 055-11, there is provided in either Ch. 410 or 650, F. S., the method of activating any such referendum under the former chapter is a question we do not here decide. But in any event *the provisions of Ch. 410 are contingent upon conditions and events which may never transpire.*

On the other hand, *Ch. 650, F. S., as amended, is clear, certain, and unambiguous in its provisions* and, hence, requires no resort to the rules of statutory construction under the authorities mentioned in opinion 056-130 to arrive at the meaning of its several sections. As a matter of law, legislative intent is to be determined from the accomplished results. We must take these laws as we find them.

In view of the foregoing, in my opinion the above question is answered as follows:

The wording of §650.10, F. S., constitutes action by the state *designating* employees of the state *and employees of each of our counties*, under our state and county officers and employees retirement system, *as members of separate retirement systems*, within the purview and for the purposes contemplated by §218(d)(6) (42 U.S.C.A., §418 (d)(6)) and related provisions of the social security act. Quite obviously there is no justification for the holding of a referendum by the members of the state and county officers and employees retirement system in Dade county if the results of a favorable referendum as certified by the governor will not be accepted by the federal social security authorities. Hence, there is enclosed herewith a copy of this opinion which may be

transmitted by the commission's director of OASI to the appropriate federal authorities to ascertain if this opinion meets the requirements of the last paragraph of Mr. Harper's letter, mentioned above.

056-264—August 31, 1956

TAXATION

LICENSES AND LICENSE TAXES—REGISTERED REAL ESTATE SALESMEN—§205.52, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are registered real estate salesmen in the employ of those selling their own property and not registered real estate brokers subject to a state and county occupational license under §205.52, F. S.?

Section 205.52, F. S., requires that "every person engaged in the practice of any profession, whether or not such profession is regulated by law, shall pay a license tax of \$10 for the privilege of practicing, which license shall not relieve the person paying same from the payment of any license tax imposed on any business operated by him. This section shall include real estate brokers but no license shall be required of *their salesmen*." (Emphasis supplied.) "It is an elementary rule of statutory construction that the special mention of one thing implies the exclusion of the other" (Re Ratliff's Estate, 137 Fla. 229, 188 So. 128, text 133). This being true, it seems that the express exemption of real estate salesmen employed by real estate brokers does not exempt real estate salesmen not employed by brokers.

This seems to answer the above question in the affirmative; however, care should be exercised in determining the relation between the owner of the lands and the alleged salesman, which might, under some circumstances, be that of a mere agent and not a real estate salesman.

056-265—August 31, 1956

MOTOR VEHICLES

DRIVERS LICENSES — ISSUANCE — CONTRUCTION OF §322.21, F. S.

To: *H. N. Kirkman, Director, Department Public Safety*

QUESTIONS:

1. Are the county judges of the several counties of the state authorized to delegate the official duties imposed on them by §322.21, F. S., to private individuals or organizations not officially connected with said county judges, to act as agents for them in performance of their statutory duties, in delivering drivers licenses to applicants and collecting and remitting monies to the

county judges collected as required by the statute?

2. May the director of the department of public safety, acting through the executive board of the department of public safety, under the rulemaking power accorded by Ch. 322, F. S., authorize the appointment by the several county judges of private individuals or organizations not officially connected with the county judge, to perform the official duties of issuing drivers licenses and collecting and remitting monies collected for such licenses to the county judge?

3. Under Ch. 322, F. S., may a county judge or any person lawfully deputized by him, issue drivers licenses and collect and remit to the county judge lawful fees fixed therefor, exact any service charge for such service in addition to the charge authorized by law?

It is my opinion that the above questions should be answered in the negative for reasons companion to those enunciated in opinion 056-239, dated Aug. 14, 1956, a copy of which is enclosed.

It should be understood that this negative answer is subject to any law of local application indicating otherwise.

056-266—August 31, 1956

TAX COLLECTOR

SUPPLEMENTAL COMPENSATION IN CONNECTION WITH SALE OF MOTOR VEHICLE LICENSES—§320.04, F. S.

To: *Ina S. Thompson, Motor Vehicle Commissioner, Tallahassee*

QUESTION:

Does the filing of a claim under §320.04, F. S., by a tax collector for supplementary compensation following the expiration of the period specified in such section, bar the payment of such claim by the comptroller?

Section 320.04(1), F. S., authorizes a minimum compensation of \$500 per license year to each tax collecting agency as compensation for handling applications and collecting fees for the issuance of motor vehicle licenses, and provides in part:

"... Each tax collector of the state who is affected by this law shall, as soon as practicable after Nov. 30 of each year, file a written report with the motor vehicle commissioner showing the amount of all fees received by him under the provisions of this section since the last such report was filed; such report shall be filed not later than Jan. 15th of each year. . . ." (Emphasis supplied).

After a careful study of the above-mentioned statute it was evident that such statute did not lend itself to the application of legal principles relating to state claims or forfeitures for a solution to the question presented herein, but instead indicated that the answer hinged on whether the terms of such statute relating to

the filing of the report are to be construed as directory or mandatory.

In the construction of words or provisions in statutes relating to the duties of administrative officers, the Florida supreme court has enunciated the general rule that such words or provisions may be construed as directory, unless something in the body of the act indicates otherwise. *Apgar v. Wilkerson*, 116 So. 78, 95 Fla. 457. The same court has also held that if a particular provision of a statute relates merely to the proper conduct of business, it will be construed as directory (*Reid v. Development Co.*, 42 So. 206, 52 Fla. 595).

Along the same lines, other legal authorities have held that statutory provisions fixing the time for the performance of acts by public officers may be construed as mandatory or directory, and will ordinarily be held directory where there are no negative words restraining the doing of the act after the time specified, and no penalty is imposed for delay (82 C. J. S., Statutes, §379, p. 876; 67 C. J. S., Officers §113, p. 400; *O'Neal v. Spencer*, 47 S.E. 2d 646, 203 Ga. 588).

It has also been generally held that a statute which prescribes the procedure for a public officer to follow and which is designed to promote method, system, uniformity and dispatch is regarded as directory if a disregard of such procedure will not injure the rights of parties, and the statute does not contain words importing a prohibition of any other mode of proceeding (67 C. J. S., Officers §113, p. 400).

Although the word "shall" is used in the above quoted statute and although such word when used in a statute is ordinarily imperative and operates to impose a mandatory duty, it has been construed on many occasions as not to affect the ordinarily directory nature of the law, especially where no public benefit or private right requires it to be given an imperative meaning (See 82 C. J. S., Statutes §380, pp. 877-882).

In light of the foregoing considerations it would appear that the belated filing of the report by the tax collector would not, by that fact alone, prevent the comptroller from properly issuing a warrant for the payment of the supplementary compensation authorized by the statute under consideration. However, since the fund from which such compensation is paid is not a continuing appropriation it would not be possible to pay the supplementary compensation for the years 1953 and 1954.

In answer to the question presented, it is my opinion that the comptroller is authorized to issue a warrant for the payment of the supplementary compensation for the year 1955, but not for the years 1953 and 1954.

056-267—August 31, 1956

WELFARE

STATE BOARD—MAXIMUM ALLOWANCES TO DISABLED AND BLIND—1956 AMENDMENT TO FEDERAL SOCIAL SECURITY ACT, PUBLIC LAW 880, 84th CONGRESS

To: *Department of Public Welfare, Jacksonville*

QUESTION:

May the state welfare board pass on to eligible recipients in the aid to the blind and aid to permanently and totally disabled programs the federal increase in grants provided by the 1956 amendments to the social security act, public law 880, 84th congress, in cases where a grant would exceed the maximum grants established in Ch. 409, F. S.?

The above question does not include additional aid to dependent children since there is an absence of a state maximum in this regard; nor does the question include additional aid for old age assistance since the state and federal maximums in this program are now the same.

The federal matching formula for aid to the blind prior to the 1956 amendments provided as follows:

"Sec. 1003. (a) From the sums appropriated therefor, the Secretary of the Treasury shall pay to each State which has an approved plan for aid to the blind, for each quarter, beginning with the quarter commencing October 1, 1952, (1) in the case of any State other than Puerto Rico and the Virgin Islands, an amount, which shall be used exclusively as aid to the blind, equal to the sum of the following proportions of the total amounts expended during such quarter as aid to the blind under the State plan, not counting so much of said expenditure with respect to any individual for any month as exceeds \$55—

"(A) four-fifths of such expenditures, not counting so much of any expenditure with respect to any month as exceeds the product of \$25 multiplied by the total number of such individuals who received aid to the blind for such month, plus

"(B) one-half of the amount by which such expenditures exceed the maximum which may be counted under clause (A) . . ."

The formulas covering aid to the disabled and old age assistance are identical.

The federal matching formula for aid to the blind, as amended by the 1956 amendments to the social security act, and which becomes effective on Oct. 1, 1956, provides as follows:

"Sec. 343. Section 1003 (a) of the Social Security Act is amended to read as follows:

(a) From the sums appropriated therefor, the Secretary of the Treasury shall pay to each State which has an approved plan for aid to the blind for each quarter, beginning with the quarter commencing Oct. 1, 1956, (1) in the case of any State other than Puerto Rico and the Virgin Islands, an amount equal to the sum of the following proportions of the total amounts expended during such quarter as aid to the blind under the State plan, not counting so much of such expenditure with respect to any individual for any month as exceeds \$60—

“(A) four-fifths of such expenditures, not counting so much of any expenditure with respect to any month as exceeds the product of \$30 multiplied by the total number of such individuals who received aid to the blind for such month; plus

“(B) one-half of the amount by which such expenditures exceed the maximum which may be counted under clause (A) . . .”

Identical amendments were made in the matching formulas for aid to the disabled and old age assistance programs.

From the foregoing it is noted that under the formula which has been in effect and which will continue until Oct. 1, the state contributes \$20 of the maximum grant of \$55 received by recipients under the aid to the blind and aid to permanently and totally disabled programs. Under the new formula which becomes effective Oct. 1, 1956, the same \$20 contributed by the state would entitle a recipient receiving the maximum grant to receive \$58 a month. Such sum would represent an increase of \$3 over the present maximum. Those receiving less than the maximum grant would obtain a proportionate increase.

As previously held in opinions of this office, 046-375 dated Sept. 11, 1946, and 052-253 dated Aug. 14, 1952, an increase in federal grants may be passed on to recipients receiving aid under the applicable categorical welfare programs without violating the provisions of Ch. 409, F. S., relating to maximum monthly grants, if no additional matching funds are required on the part of the state. Copies of such opinions are attached hereto.

Your question is therefore answered in the affirmative.

056-268—August 31, 1956

STATE TREASURER

ACCEPTANCE OF ENDORSEMENT ON STATE WARRANT BY REPRESENTATIVE OF TREASURY DEPARTMENT

To: *J. Edwin Larson, State Treasurer, Tallahassee*

QUESTION:

The district director, internal revenue service, U. S. treasury department, in pursuance of lien perfected for unpaid income taxes due by a state employee and through notice of levy in that connection, has seized

state warrant evidencing salary due such delinquent taxpayer. Will the state treasurer be authorized to honor and pay such warrant if it is presented to him with an endorsement thereon in the following words, or words of similar import?

"This state warrant and its proceeds have been seized by me through notice of levy because of taxes owing by the payee and is deposited to the credit of the treasurer of the U. S. and the proceeds applied to the payee's tax liability.

"
District Director
Internal Revenue Service
U. S. Treasury Department"

The limitation on the right of a claimant to attempt to satisfy a debt due from another by means of garnishment or other appropriate writ against the state or one of its political subdivisions is recognized. However, there appears to be an exception to this rule where there is involved accrued wages and other debts owed by the state to a taxpayer and as to such a federal tax lien may be foreclosed. *U. S. v. Warren C. Graham, et al.*, 96 Fed. Supp. 318, affirmed, *State of Calif. et al., v. U. S.*, 195 Fed. (2d) 530, certiorari denied, 344 U. S. 831; *U. S. v. Newhard, et al.*, 128 F. Supp. 805. Generally, on the matter of protection against double liability, see *U. S. v. Ocean Accident & Guaranty Co.*, 76 Fed. Supp. 277 (involving an insurer, an amount due for workmen's compensation under state law, and such a federal tax lien and levy); and also *U. S. v. Emigrant Industrial Savings Bank*, 122 F. Supp. 547 (involving a bank account and such a lien and levy).

By reason of the foregoing, in my opinion the state treasurer will be authorized to honor and pay such warrant, endorsed as set forth in the question.

056-269—August 31, 1956

TAXATION

DOCUMENTARY STAMP TAXES—APPLICATION TO MORTGAGE AND SUPPLEMENTAL AGREEMENT FOR PAYMENT OF LOAN IN PULPWOOD—§201.08, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where money is advanced by a pulpwood mill to a landowner, which advance is secured by a mortgage encumbering timber and pulpwood, present and future, and made payable by the crediting of a percentage of the price to be paid for pulpwood, and not in cash, what documentary stamp taxes, if any, are due and payable in connection with the said mortgage and its supplemental agreement?

Upon examination of your file, handed us with the said request for opinion, we find that the pulpwood mill advanced to a land-

owner certain sums in money, and agreed to make certain additional advances from time to time, the said advances being secured by a mortgage encumbering the timber and pulpwood now or hereafter growing upon certain described lands of the landowner. Only the timber and pulpwood growing or which may hereafter grow upon the said lands are encumbered; the lands are not so encumbered. The said mortgage makes specific reference to a "separate agreement" and in effect makes it a part of the said mortgage.

The sum advanced or to be advanced by the pulpwood mill to the landowner is to be repaid from pulpwood to be produced and delivered to the said mill by the landowners, or by the said mill itself pursuant to certain provisions in the said mortgage and separate agreement. It is agreed that when the pulpwood is produced and delivered by the landowner to the mill that a certain percentage of the value of the pulpwood so produced and delivered will be credited upon the said advance or advances until the advances have been repaid in such manner. In case of default in such production and delivery of pulpwood, the mill is granted permission to enter upon the lands of the landowner and produce and deliver to the mill such pulpwood, in which case a stumpage, fixed as agreed, is to be credited to the said advance. When these credits equal in amount the sums advanced, the mortgagee agrees to satisfy the said mortgage. We have in effect a sum of money payable by the delivery of pulpwood in accordance with the said agreement; that is, by crediting a fixed percentage of the value of the pulpwood toward the payment of the sum so advanced. We find nothing in the said mortgage or separate agreement for the payment of money to the mortgagee by the mortgagor, unless and until there has been a default in the delivery of pulpwood.

Under §201.08, F. S., "promissory notes, non-negotiable notes, written obligations to pay money . . ." are made subject to documentary stamp taxes in this state. So far as we are advised, there was executed by the mortgagor neither promissory note, non-negotiable note or other instrument mentioned in said §201.08; unless the agreement to repay the sums advanced in the manner aforesaid is to be construed as a "written obligation to pay money." The contract is actually one to furnish a certain amount of pulpwood weekly for which a certain sum will be paid the landowner in cash and a certain sum per unit of pulpwood credited on the sum advanced as aforesaid. We find no other section in Ch. 201, F. S., expressly providing for the taxing of the specific transaction; a mortgage is not a conveyance of an interest in real estate. We, therefore, come to the question of whether or not the mortgage and separate agreement were *written obligations to pay money*, within the purview of said §201.08, F. S.

For an instrument to be negotiable, it must be payable in money; accordingly, a bill or note, if it is to be negotiable cannot be made payable in goods, wares or merchandise, or in property, or in labor or services. Such an instrument is not negotiable if payable in bonds, stock, script, etc. (10 C. J. S. 541, §93). We do not think that the mortgage and separate agreement in question are made payable in money.

There being no written obligation to repay the advances in

money, but in pulpwood, there is no taxable obligation under §201.08, F. S.

This answers the above question, and no documentary stamp taxes are due on the agreements.

056-270—August 31, 1956

SALE OF SECURITIES

EXEMPT TRANSACTIONS—CONSTRUCTION OF §517.06(8), F. S.

To: *Florida Securities Commission, Tallahassee*

QUESTIONS:

1. Do the provisions of §517.06(8), F. S., apply to a single filing by a party; or may there be successive filings by the same party, provided the maximum limitations provided by said subsection are not exceeded in each separate filing?

2. Must there be set forth in a notice of exemption filed pursuant to said sub §(8) a definite amount of securities to be sold under said notice; or may there be an indefinite amount if the notice shows that the total amount of the securities secured by a single mortgage will not exceed \$10,000, and the number of purchasers will not exceed 20?

Section 517.06, F. S., sets out the transactions which are exempt from the Florida Statutes regulating the sale of securities. One of these transactions is the sale of "bonds or notes secured by mortgage upon real estate or tangible personal property situated within the state where the bonds or notes are sold to not more than 20 purchasers and the total face value of all bonds or notes secured by a single mortgage does not exceed \$10,000." This provision was first inserted in the Florida Blue Sky laws by §4, Ch. 17253, 1935. The title to the said 1935 enactment is of little, if any, assistance in determining the above questions.

When we examine other subsections of the said statute, we find exempted judicial sales, sales by pledgees under contract, isolated sales, distribution of stock held by a corporation to its stockholders, exchanges between corporations, corporate organizations, sales to financial institutions and banks, exchanges of securities, securities issued by regulated corporations, and other transactions either isolated in nature, between those dealing in securities, and similar. These sales or transfers of securities are those where-in fraud and deceit would be at a minimum, although possible. These transactions seem to be a type which do not, and would not, constitute a general dealing in securities, either generally or in a specific type.

If said §517.06(8), F. S., is to be construed as permitting one to deal in bonds and notes secured by mortgages, so long as a single mortgage did not secure more than \$10,000 in securities and there are not more than 20 purchasers of an issue of bonds and notes

secured by a single mortgage, such a construction would permit one to deal generally in such bonds and notes without any effective regulation under the statutes. We do not think that the legislature intended any such a construction.

In the light of the above and foregoing, we feel that said §517.06(8), F. S., permits only a single filing, and that there may not be successive filings. We further feel that it is not necessary that an exemption filed under said subsection state a definite amount of securities to be sold, so long as the said exemption shows that there will not be an excess of \$10,000 in securities, which must be secured by a single mortgage, and there will not be more than 20 purchasers of such securities. These observations answer the above question.

056-271—August 31, 1956

TRUSTS

LAND TRUSTS—INTEREST OF BENEFICIARY—NATURE OF THE TRUST

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Is the interest of a beneficiary in a land trust, encumbering lands in this state, real property or intangible personal property?

For examples of land trusts of the nature embraced in the above question, you have furnished us with copies of three existing land trusts wherein the American National Bank and Trust Co. of Chicago is the trustee, and divers persons are beneficiaries, each of these instruments declaring that the interest of the beneficiaries under the said trusts "shall be deemed to be personal property." Each of these trusts encumbers real property in the state of Illinois. We have also been furnished with a land trust agreement used by the North Shore bank of Miami, Florida, when it assumes to act as trustee of a land trust of real property in Florida under similar circumstances; this instrument likewise declaring the interest of the beneficiaries to be personal property.

"Whether the interest of a beneficiary is an interest in real property or in personal property depends on the provisions of the trust instrument. Where the trust property is real property, the interest of the beneficiary is real property, unless the interest is so limited in duration that if it were a legal interest it would be personal property. Where real property is held in trust, and by the terms of the trust a duty is imposed on the trustee to sell it and hold the proceeds in trust or distribute the proceeds, the interest of the beneficiary is personal property, and this rule is applicable to participation certificates and mortgage bonds if the trustee, as the purchaser at the foreclosure sale, has the right to sell the property thus acquired and distribute the proceeds. The interest of beneficiaries who have, under the terms of the trust agreement, no right, title, or interest in the realty as such, either legal or equitable, but only an interest in the earnings and proceeds with power to direct the trustee to deal with the title and manage

and control the property, and the right to receive proceeds from rentals, which right is to be deemed personal property, is personal property only, and not real estate." (90 C. J. S. 79, §186). The opinions of the supreme court of this state upon kindred questions and subjects lead us to think that such court would very likely follow this rule if presented to it (*Christopher v. Mungen*, 61 Fla. 513, 55 So. 273; *Axtell v. Coons*, 82 Fla. 158, 89 So. 419; *Sorrels v. McNally*, 89 Fla. 457, 105 So. 106; *Standard Oil Co. v. Mehrstens*, 96 Fla. 455, 118 So. 216).

Where a trust instrument creates merely a passive trust by which the trustee acquires a naked title and the named beneficiary has complete control over the trust property, with the trustee having no control over the trust property other than such as is dictated by the beneficiary, then the title to the real property is in effect in the beneficiary and the beneficiary's title would be one of real property. The instrument considered by us in our opinion of Jan. 28, 1955 (055-18) was of this nature and in addition, the beneficiary was residing on the property and making the same his permanent home in Florida. The same general type of trust instrument might, under different circumstances and conditions, vest in the beneficiary a personal and not a real interest.

We have examined *Chicago Title and Trust Company v. Mercantile Bank*, 300 Ill. App. 329, 20 N.E. 2d 992; *Liberty National Bank v. Kosterlitz*, 329 Ill. App. 244, 67 N.E. 2d 876; *Masters v. Smythe*, 342 Ill. App. 185, 95 N.E. 2d 719; and *Breen v. Breen*, 411 Ill. 206, 103 N.E. 2d 625, and feel that the Florida court would follow like or similar rules as those announced in such cases. We are inclined to think that the Florida courts would hold the interest of the beneficiary in trust instruments like, or similar to, those handed us with the request for opinion, one of which is the form used by a Florida bank, where the beneficiary is or was not residing on the property and making the same his or her permanent home with the bank exercising no active duties in connection with the trust estate, to be personal property in accordance with the above Illinois cases.

It, therefore, appears that no positive general answer may be given to the above question, in that each instrument, together with the facts and circumstances surrounding it, must be specifically considered. However, we are inclined to construe the instruments handed us with the request for opinion, under their terms and the facts and circumstances attending them, as vesting personal and not real property in the beneficiaries had they encumbered Florida lands.

Your attention is also directed to §198.44, F. S., which exempts from inheritance taxation the personal property of non-resident decedents, other than tangible personal property having an actual situs in Florida, etc.

056-272—August 31, 1956

CRIMES**GAMBLING—BINGO—PRIVATE CLUB***To: R. N. Wilson, Chief of Police, Sarasota***QUESTION:**

Where bingo is played and prizes awarded to the winners following a dinner with a private club, with attendance limited to members and their immediate families, with a charge being made for the dinner but no additional charge for participation in the bingo game, does this constitute a violation of the criminal law?

Where a merchant sells his wares for their market value, but by way of inducement gives to each purchaser a ticket which entitles him to a chance to win a certain prize, to be determined by chance, he conducts a lottery (34 Am. Jur. 654, Lotteries, §10). Likewise, if bonds are issued for the purpose of obtaining a loan, by which the obligor undertakes to pay the principal with interest and a premium and also any additional sum which the holder may become entitled to in case the number of his bond draws a prize in a drawing to be held as specified, the scheme constitutes a lottery (34 Am. Jur. 658, Lotteries, §15; 54 C. J. S. 857, Lotteries, §10-b).

By analogy, it is my opinion that a lottery was being conducted because the purchase of the meals furnished an additional consideration, the chance to win a prize in the bingo game and because the other two elements necessary to constitute a lottery, viz., a prize and an award by chance, were also present.

056-273—August 31, 1956

LEGISLATURE**INTERIM COMMITTEE ON GAME AND FRESH WATER FISH
—POWERS AND DUTIES—APPROPRIATION—HOUSE
CONCURRENT RESOLUTION 40-XX, 1956***To: John M. Hathaway, Punta Gorda***QUESTION:**

1. Does the interim committee on game and fresh water fish, established under and pursuant to house concurrent resolution 40-XX of the 1956 extraordinary session of the legislature, have authority to subpoena and examine witnesses?

2. Does the said interim committee have authority to employ clerical and expert assistance to assist it in making the studies, investigations, and gathering of data required of it by said resolution?

3. May the said interim committee carry its studies and investigations, required of it under said resolution, into other states, territories and countries?

4. Is there any appropriation for paying such witnesses, clerical and expert help and the expenses of the committee?

This committee seems to be an extension of the committee set up during the regular session of the legislature for the same purpose. The said interim committee is required to "make a careful and comprehensive study of all matters relating to game and fresh water fish in Florida, including, but not limited to, the management, restoration and regulation of the game and fresh water fish of the state, and the control and management of hatcheries, sanctuaries, refuges, reservations and all other property now or hereafter owned or used for such purposes by the state and all laws relating thereto and their enforcement. . . ." This committee is required to make report to the 1957 regular session of the legislature. The said committee "is authorized to assemble such data by whatever means is deemed necessary, such as, holding public hearings, employing experts or other persons authorized to carry out its duties, and the taking of any other proper and necessary actions so as to properly and completely make its investigations hereunder and shall have all other authority and duties provided by Ch. 11, F. S. The said resolution further provides that "all expenses incident to employing experts, hearings held and investigations made by the committee . . . shall be paid as *legislative expense*, mileage and per diem of members which shall be paid as provided in §112.061, F. S."

For the purposes of this opinion, we will presume that said resolution is constitutional and valid, as it has never been the policy of this office to hold any enactment of the legislature unconstitutional, that question being by this office left to the courts. However, *by way of caution as to legislative committees to be organized in the future*, attention is directed to 81 C. J. S. 959-60, §42; 49 C. J. 259, §41, Notes 10-14; and annotations in 28 A. L. R. 1155-1159 and in Ann. Cas. 1916 B. 1147-8. These authorities cast doubt on the validity of legislative interim committees *not* established by acts of the legislature, or joint or concurrent resolutions where they have the force and effect of an act of the legislature.

In addition to its authority "to assemble data by whatever means deemed necessary, such as holding public hearings, employing experts or other persons . . .," necessary to properly and completely make its investigation, the said committee is given "all other authority and duties provided by Ch. 11, Florida Statutes." Under Ch. 11, F. S., legislative committees generally may administer oaths (§11.06, F. S.), subpoena witnesses (§11.08, F. S.), issue subpoena duces tecum (§11.10, F. S.), and, at least by inference (see §11.08, F. S.), hold investigations and hearings. The language of Ch. 11, F. S., does not seem to limit the application of said chapter to committees operating during actual sessions of the legislature, but is broad enough, except where otherwise expressly limited, to apply to interim committees. When said house concurrent resolution 40-XX is read with and in the light of Ch. 11, F. S., referred to by it as aforesaid, we feel that the interim committee organized under said resolution may subpoena witnesses and employ such clerical and expert assistance as may be necessary for it to carry out the requirements of the said concurrent resolution.

Section 11.13(3) (a), F. S., seems to recognize that legislative interim committees may sometimes have to go beyond the boundaries of the state in order to carry out the mandate of the legislature concerning them. In the light of this, we hold that if the legislative interim committee, organized under said concurrent resolution 40-XX shall by resolution or order duly adopted, find and determine that it cannot complete the duties imposed upon it by said concurrent resolution without going beyond the boundaries of the state and/or without holding hearings beyond the boundaries of the state, then it may carry its studies and investigations into other states, territories and countries. However, when holding hearings beyond the state, it may not issue subpoenas to witnesses requiring that they attend such a hearing.

The continuing appropriation contained in §11.12, F. S., appears to have been suspended by item 33, §282.01, F. S., during the biennium beginning July 1, 1955 and ending June 30, 1957. This being true, the appropriation made by said item 33 of §282.01, F. S., is applicable and not said §11.12, F. S. It is provided in and by said item 33 of §282.01, F. S., that "members of interim committees, authorized by law, of either branch of the legislature, and joint interim committees shall be paid" as therein provided unless otherwise provided by joint or concurrent resolution. The concurrent resolution under consideration provides that "mileage and per diem of members shall be paid as provided in §112.061, F. S." Witnesses subpoenaed by the committee are to be paid as provided in and by §11.10, F. S. Clerical and expert help may be paid from the appropriation made in item 33 of §282.01, F. S. under the same limitations as are temporary state employees.

Each of the above questions is, therefore, answered in the affirmative, subject to the limitations above mentioned or referred to.

056-274—September 4, 1956

WELFARE

STATE DEPARTMENT—ADMINISTRATION OF SPECIAL MILK PROGRAM—§409.02, F. S.

To: *Department of Public Welfare, Jacksonville*

QUESTION:

May the department of public welfare assume the administration of the federal special milk program for nonprofit institutions in Florida, other than public schools, devoted to the care and training of children?

Section 409.02, F. S., relating to the functions of the state department of public welfare, provides in part as follows:

"(1) The department shall, . . . conduct, supervise and administer, or cause to be administered, within the state, all social welfare and relief work which is or will be carried on by the use of federal or state funds, and receive and distribute all commodities donated by the U. S. or any agency thereof for any such social relief. *Social*

welfare within the meaning of this law shall include aid to dependent children, mothers' aid, old age relief, aid to the sick, blind, indigent, unemployed and similar unfortunates" (emphasis supplied).

It should be noted especially from the italicized portion of the above quoted statute that the functions of the state department of public welfare appear to be limited to eleemosynary and like purposes.

The pertinent provision of public law 752, 84th congress, relating to the special milk program for children, provides that the benefits of such program shall extend to "(2) nonprofit nursery schools, child-care centers, settlement houses, summer camps, and similar *nonprofit institutions* devoted to the care and training of children."

This bill eliminated the requirement that institutions receiving aid under the special milk program be limited to those serving underprivileged children. The benefits of this bill extend to the most expensive and exclusive institutions, summer camps, etc., devoted to the care and training of children, as well as to those maintained for less fortunate and underprivileged children.

It is apparent, therefore, that the purposes of the special milk program for children, as amended by public law 752, *supra*, could not be considered within the definition and scope of the term "social welfare" as enunciated in §409.02, *supra*.

The pertinent provision of the federal regulations promulgated pursuant to the act creating the special milk program for children provides as follows:

"§502.201 Administration. (a) Within the U. S. Department of Agriculture, the Agricultural Marketing Service (hereinafter referred to as AMS) shall act for and on behalf of the Commodity Credit Corporation (hereinafter referred to as CCC) in connection with the operation of this program. Within AMS, and under the general supervision of the Administrator of AMS, the Food Distribution Division (hereinafter referred to as FDD-AMS) shall be responsible for program administration.

"(b)" To the extent practicable and permissible under State law, responsibility for the administration of this program in schools and child-care institutions within the States shall be in the respective educational agency of the State; Provided, however, That another agency of the State, upon request by an appropriate State official, may be approved by FDD-AMS to administer the program in child-care institutions.

"(c) FDD-AMS shall administer the program in any class of schools (hereinafter referred to as private schools) and in child-care institutions in which the program is not administered by the State."

It is my understanding that at present and for some time the state department of education, through its school lunch division has administered this program in Florida as it pertains to tax-

supported public schools; and that the federal food distribution service of the agricultural marketing service has and is administering the program as it relates to nonprofit private schools. I can find no valid reason either for discontinuing this practice, or for not including with institutions presently under the administration of the federal agency, other institutions caring for children which are nonprofit and noncharitable in function and which have been included under the recent amendment to the milk program.

It is therefore my opinion, in light of §409.02, F. S., which restricts the functions of the department of public welfare to charitable purposes, that the department may administer only that portion of the special milk program as it relates to institutions maintained for underprivileged and dependent children, with the exception of public institutions presently being administered by the state department of education.

Your question is answered accordingly.

056-275—September 5, 1956

BANKS AND BANKING

FOREIGN BANKS—POWERS AND DUTIES—CONSTRUCTION
OF §§659.57 AND 660.10(4),(5), F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. May a foreign bank, holding funds in trust for the use and benefit of an employment retirement or pension fund, invest such funds in promissory notes or other evidence of indebtedness secured by lien or mortgage encumbering lands or tangible personal property having a situs in this state?

2. Should the above question be answered in the affirmative, then in case of the foreclosure of such a lien or mortgage encumbering property in this state, may such bank as trustee purchase the property foreclosed against at the foreclosure sale and hold the same as trustee for the use and benefit of the said retirement or pension fund?

Specifically, a banking corporation organized under the statutes of New York is presently acting as trustee for various employee retirement or pension funds. Under the plans for the administration of the trusts the trustee would purchase such securities secured by lien or mortgage encumbering real and tangible personal property having its situs in Florida. Such purchases would be transactions taking place in New York and other states other than Florida from the owners and holders of such securities. The said trustee will loan no funds in this state secured by liens or mortgages, but will purchase from others securities derived from loans made by others engaged in doing a mortgage loan or similar business in this state. The mortgages would be serviced for the bank by Florida mortgage companies. Having acquired securities which are secured by liens and mortgages encumbering lands in this state, it is

quite likely that in some instances foreclosure of such liens and mortgages will be necessary in enforcing payment of the securities. In such foreclosure proceedings, it may be necessary for the trustee to purchase at foreclosure sales to protect its interest in the lands sold and prevent loss to the trust estate through inadequate bidding at the foreclosure sale. This leads to a consideration of §§659.57 and 660.10, F. S., when the trustee is a foreign bank.

Said §659.57 provides that nothing in the banking code (chapters 658, 659, 660 and 661) shall be so construed as to prohibit a foreign bank purchasing securities secured by lien or mortgage encumbering property in this state servicing the obligations or enforcing such obligations in the courts of this state or acquiring the property under such liens and mortgages and selling and disposing of the properties so acquired.

Said §660.10(4) and (5), F. S., expressly prohibits *all corporations*, "except banks and trust companies incorporated under the laws of this state and having trust powers and except national banking associations located in this state and having trust powers," from acting "as trustee of any real estate in this state or any interest therein under any agreement whereby the beneficial interest in such property is vested in others," or acting as trustee under any instrument conveying or encumbering real or tangible personal property in this state to secure the payment of an indebtedness, unless there be a qualified co-trustee.

State and national banks have the right to act as trustee in accordance with their powers, the statutes regulating them, and the trust instruments, provided that in so doing in a foreign state such does not offend the laws of that state (see American Law Institute, Restatement of the Law-Trusts, §96; Bogart, Trusts and Trustees, §§134-136; Scott on Trusts, §§96.5 and 96.6; 12 U. S. C. A., §248(k)).

It is our opinion that, under the provisions of said §659.57, and possibly without its provisions, a foreign bank in its capacity as trustee may purchase, hold, service and enforce mortgage securities in the manner contemplated, and acquire title to the mortgaged property at foreclosure sale, or in lieu of foreclosure, and to dispose of and convey such property, subject to the limitation of the trustee holding such property as a trust investment, as referred to below. Such does not constitute acting as trustee in violation of said §660.10(5).

We think that said §659.57 and §660.10(5), when considered together, contemplate that the bank as trustee will acquire the title merely as an incident or result of the original investment in the mortgage security and that the trustee is under a duty to liquidate the property by sale and conveyance. In 90 C. J. S., pp. 546-7 (Title Trusts, §327) it is stated: "When it is necessary for the protection of the investment, the trustee may purchase the land on foreclosure of a mortgage held by the trust estate. The trustee should promptly liquidate property he has acquired by way of foreclosure, but the trustee is not to be surcharged where the property is practically unsalable." This rule is well recognized (see American Law Institute Restatement of the Law-Trusts, §§227(g) and 231(h) and Scott on Trusts, §231.1). This rule seems to be

applicable although the trustee may not under the trust purchase lands as an investment. The rule seems to be one of necessity to protect the trust estate from loss on its mortgage investments, where foreclosure becomes necessary. When title to lands is taken by a trustee at a foreclosure sale for the protection of the investment (because there were no other bidders or not adequate bids for the property foreclosed against and sold) such purchase is in connection with the enforcement of the obligation held by the trustee and not strictly an investment of trust funds in real property. The acquisition of title is not one of trust investment but one for liquidating the investment with as little loss to the estate as possible. It may be said to be a part of the collection of the obligation held by the trustee as an investment of the estate. When a bank as trustee holding obligations, (properly acquired by it under the laws of this state) secured by a mortgage encumbering lands in this state has to foreclose such mortgage and deems it necessary that it purchase the lands foreclosed against at the foreclosure sale, we do not think that such trustee in any way violates §660.10(4), F. S., unless it should attempt to make the lands so purchased an investment of the trust estate instead of liquidating it promptly as is contemplated by the above quotation from 90 C. J. S. 546-7, §327.

The 1st above question is answered in the affirmative, and the 2nd is also answered in the affirmative with the limitation mentioned in the last above paragraph hereof.

056-276—September 5, 1956

HIGHWAYS, BRIDGES AND FERRIES

TURNPIKE AUTHORITY—USE OF HIGHWAY PATROL PERSONNEL—CONSTRUCTION OF §340.23(2), F. S.

To: *H. N. Kirkman, Director, Department of Public Safety, Tallahassee*

QUESTIONS:

1. Are the patrol troopers assigned to the turnpike authority in addition and exclusive to the complement authorized solely for highway purposes?
2. Does §340.23, F. S. contemplate that salaries and expenses of patrol troopers assigned to the turnpike authority be paid directly by such authority?

AS TO QUESTION 1:

In my opinion the answer to this question should be in the affirmative.

Section 340.23(2), F. S., provides that the Florida highway patrol is vested with the power and charged with the duty to enforce the rules and regulations of the authority, and states:

“... Expenses incurred by said patrol in carrying out its powers and duties under this chapter *may be treated as a part of the cost of the operation of a project or projects and the department of public safety shall be re-*

imbursed by the authority for such expenses." (Emphasis supplied.)

It is apparent from the language of the above quoted statute, and particularly from the italicized language that the legislature contemplated the hiring of additional personnel by the department of public safety solely for the purpose of enforcing the rules and regulations of the turnpike authority; and that the expenses incurred by such personnel, which would include salaries, are to be paid by the authority. The effect on the complement authorized exclusively for highway purposes by the assignment of troopers to other projects was also discussed in opinion 055-306, dated Nov. 15, 1955, a copy of which is attached.

AS TO QUESTION 2:

In my opinion the answer to this question should be in the negative.

The intent of the legislature as relates to this question is determined by the use of the word "reimburse" employed in the above quoted statute. In its normal and usual sense, the word "reimburse" implies a payment back of that which has been expended. *Lyons v. Moiss's Ex'r.*, 183 S. W. 2d 493, 298 Ky. 858, 76 C. J. S. 617.

Whenever possible, and unless otherwise indicated, the meaning ascribed to a word or term used in a statute should be its normal and acceptable usage. Such is generally understood and requires no citation of authority for its support. There is nothing indicated in the above quoted statute to prevent construing the word in its normal sense.

In light of the foregoing, it is my opinion that §340.23(2), *supra*, does not contemplate that the turnpike authority shall pay directly the salaries and expenses of the highway patrol personnel assigned to the authority. However, inasmuch as such personnel are exclusive of the complement authorized solely for highway purposes, their salaries and expenses could not properly be considered in the department of public safety's budget upon which the legislative appropriation is determined; and therefore the department, theoretically at least, would not have funds available for paying such salaries and expenses.

It is apparent, therefore, that some acceptable procedure or plan is necessary to overcome the department's financial inadequacy and yet comply with the intent of the legislature.

In this regard, I would suggest that a plan or procedure be adopted whereby the department each month shall advise the turnpike authority, in advance, of the approximate expenses incurred and anticipated. If this is done, the authority could then deposit the necessary funds with the state treasurer to the account of the department of public safety; thereby enabling the comptroller to draw his warrants on such account for the payment of salaries and expenses of the troopers assigned to the project.

Your questions are answered accordingly.

056-277—September 6, 1956

TAXATION

ESTATE AND GIFT TAXES—SPECIAL LIENS—PERSONAL
LIABILITY OF TRANSFEREES—§§2.01, 689.11,
198.01, 198.02, 198.22, 198.33 AND 198.35,
F. S.; §11, ART. IX, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where a surviving spouse sells real property, which was held by such surviving spouse and the deceased spouse as an estate by the entirety, does the lien for unpaid estate taxes, due by the estate of the deceased spouse, attach to the property so sold in the hands of bona fide purchasers for value?

Under the common law, which is in force in this state by virtue of §2.01, F. S., where real property is conveyed by a single instrument, an estate by the entirety is created, and upon the death of either spouse the entire estate goes to the other (*English v. English*, 66 Fla. 427, 63 So. 822) to the exclusion of the decedent's heirs (*Menendez v. Rodriguez*, 106 Fla. 214, 143 So. 223) and notwithstanding contrary provisions in the will of the deceased spouse (*Bailey v. Smith*, 89 Fla. 303, 103 So. 833). Likewise, such an estate may be created as is provided in and by §689.11, F. S. The spouses are seized per tout (by the whole) and not per my et per tout (by the whole and by the moiety) in an estate by the entirety (*Wilson v. Florida Natl. Bank and Trust Co.*, Fla., 64 So. 2d 309). There is not only unity of possession but also unity of person springing from the relationship of husband and wife (*Junk v. Junk*, Fla., 65 So. 2d 728). An estate by the entirety cannot usually be charged with the separate debts of either spouse (*Richardson v. Grill*, 138 Fla. 787, 190 So. 255) and a judgment against one spouse is not a lien against such an estate and execution issued on such a judgment may not be levied on such estate (*Newman v. Equitable Life Assurance Soc.*, 119 Fla. 641, 160 So. 745). These rules, being derived from the common law and the statutes and not from the state constitution, are subject to legislative change.

The federal statutes (Title 26, §2040, of the U. S. Code,) provides that in determining the value of the gross estate of a decedent that the interests of such decedent in joint tenancies and estates by the entirety shall be included. Prior federal statutes and acts, as early as 1916, required the inclusion in the gross estate of the decedent, for estate and inheritance tax purposes, the value of properties held in tenancies by the entirety. The provision for including such estates by the entirety contained in the 1916 act was upheld in *Tyler v. U. S.*, 281 U. S. 497, 50 S. Ct. 356, 74 L. ed. 991. Such a provision was contained in the federal statutes when §11, Art. IX, State Const., was adopted in 1930, pursuant to which Ch. 198, F. S., was adopted. As used in said Ch. 198, F. S., the terms "gross estate" and "net estate" are to be determined from the federal internal revenue code (§198.01(8) and (9), F. S.). The legislature of this state, by Ch. 198, F. S., and the people by

the adoption of the 1930 amendment to §11, Art. IX, State Const., clearly intended to levy an inheritance tax upon estates by the entireties to the same extent as does the federal internal revenue code, but with the limitations provided in and by §11, Art. IX, State Const. The property subject to taxation under Ch. 198, F. S., and the enforcement of the tax are clearly geared to the federal statutes on the same question and may, and should be, taken into consideration when construing the state statutes on the same question.

Paragraph (2), sub §(a), §6324, title 26, of the federal internal revenue code, as revised and adopted by congress in 1954, contains provisions exempting property sold under the circumstances mentioned in the above question from the lien of the tax. We find no like provision in the Florida Statutes. Section 198.22, F. S., which was derived from an act of the Florida legislature of 1933, provides that "unless the tax is sooner paid in full, it shall be a lien for 10 years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien" (Emphasis supplied.) This lien may be continued in force for an additional 5 years by complying with §198.33, F. S. Section 198.22, F. S., appears to have been derived from §315 of the federal revenue act of 1926, which has long since been replaced by §6324, title 26, of the U. S. code and prior code provisions. We find nothing in the Florida Statutes which might be said to adopt said §6324 by reference. The provisions of said §§198.22 and 198.33, F. S., seem to be the applicable law in this state.

The gross estate of the decedent, mentioned in said §198.22, F. S., in the light of §198.01(8), F. S., includes the interest of a decedent passing to his or her spouse, upon death, in estates by the entireties. The lien mentioned in said §§198.22 and 198.33, F. S., encumbers this interest in the hands of the surviving spouse except as otherwise provided in said §198.22, as to debts and expenses of administration. We do not construe §198.35, F. S., as being sufficient to adopt federal statutes by reference, although such section may adopt rules of interpretation and construction.

In the light of the above and foregoing, we feel that the above question should be answered in the affirmative.

056-278—September 12, 1956

TAXATION

POWER OF A MUNICIPALITY (APALACHICOLA) TO TAX
BOATS—§§192.01, 192.03, 193.10, 200.01, 200.44, 205.01, 205.02,
167.03, 167.43, 372.16, 372.63 AND 372.64, F. S.

To: C. H. Bourke Floyd, City Attorney, Apalachicola

QUESTIONS:

1. Can a municipality place a tax on boats?
2. Can a municipality place a personal property tax on boats?

3. Can a municipality place a tax on boats in addition to the taxes now imposed by state law?

4. Can a municipality place a license tax on boats?

Boats are considered personal property for the purpose of taxation, by virtue of §192.03, F. S., which provides that for the purpose of taxation, personal property shall be construed to include, among other things, boats and vessels (see also §200.01, F. S.) and are required to be listed for assessment and taxation in the county in which the same may belong (§193.10, F. S.).

Section 200.44, F. S., provides that all yachts and boats of nonresident ownership which are enrolled, registered, or licensed at ports in states or countries other than Florida are exempt from the payment of personal property taxes levied by the state upon yachts and boats. The nonresident owner claiming this exemption in this section is required to show to the tax assessor that taxes on said yacht or boat have been paid in his state or county of residence.

However, although a boat may be registered in some other state, it may acquire taxable situs in this state (*Bush v. State*, 191 So. 515). A vessel may be assessed for taxation purposes without reference to its home port or residence of the principal owner or agent, when put to such purpose as to impress it with local character (*Arundel Corp. v. Sproul*, (1939) 136 Fla. 167, 186 So. 679).

In *Smith v. City of Miami* (Fla. 1948) 34 So. 2d 544-48, the court said:

"It is our view that ample power is given the city to impose license taxes on privileges, businesses, professions or occupations exercised or carried on within the municipality, for the purpose of raising revenue as well as for the purpose of regulation. Section 167.43, F. S., specifically authorizes the cities and towns of the state to raise money required for improvement and good government, through licenses on professions, businesses and occupations."

Tangible personal property includes boats and vessels (Sec. 200.01, F. S.). Unless expressly exempted from taxation, all real and personal property in the state, and all personal property belonging to persons residing in this state, is subject to taxation in the manner provided by law (§192.01, F. S.). For purpose of taxation "personal property" shall be construed to include boats and vessels (§192.03, F. S.). Boats and vessels are required to be listed for assessment and taxation in the county in which the same may belong (§193.10, F. S.).

Section 167.03, F. S., *empowers the city commission or town council to raise taxes by tax assessment upon personal property.*

Sections 205.01 and 205.02, F. S., empower a city to impose licenses on professions, business and occupations carried on within the corporation, all sums of money which may be required for the improvement and good government of the city, and for carrying out the powers and duties therein granted and imposed; and to enforce the receipt and collection of the same in the manner now

provided by the laws of the state for the assessment and collection of state taxes and licenses. However, §205.02, F. S., would not apply to boats unless the boat owner occupies himself with the business of building, renting, or otherwise dealing in boats as an occupation, in which event a city is authorized to impose a license tax on such occupation in accordance with the provisions of this section, i. e., an amount not to exceed 50% of the authorized state license tax.

Section 372.16(1), F. S., requires a license for all boats, vessels, schooners and launches equipped to take salt water products from salt waters of the state, to be procured from the director of conservation, while sub §(2) thereof places an additional tax on all boats used for commercial purposes under complete or partial alien or nonresident ownership. Section 372.63, F. S., regulates the licensing of boats used by a person engaged in business of renting boats for hunting or fishing in the fresh waters of the state, and provides that application for such license shall be made to the game and fresh water fish commission. Section 372.64, F. S., provides for licensing of commercial fishing boats engaged in fresh water fishing industry in the state.

Under the general powers of municipalities (and I see nothing in the charter for the city of Apalachicola to the contrary) your questions may be answered as follows:

Questions 1, 2 and 3 are in the affirmative when boats and vessels are taxed in the category of "personal property" and such taxation is for the purposes and within the intent of §167.43, F. S., provided the boats and vessels taxed have a taxable situs within the city.

Answering question 4, if a license tax on the boat itself is in the nature of an occupational tax, then a municipality is not authorized to tax same, within the purview of §§205.01 and 205.02, F. S. However, if the purpose of the tax is to tax the business of dealing in boats such as boat manufacture, rental, etc., which would amount to the taxing of a person, licensing him to do business or pursue his occupation, a municipality would be authorized to impose a license tax on the privilege. I am enclosing a copy of attorney general's opinions 053-228, 052-215, 052-18 and 051-76, relating to boat taxes which may be of some assistance.

056-279—September 12, 1956

SALE OF SECURITIES

SUBSTITUTION OF SECURITIES DEPOSITED UNDER §517.14,
F. S.—§§517.12, 517.13 AND 517.14, F. S.

To: *Florida Securities Commission, Tallahassee*

QUESTION:

Where securities deposited pursuant to §517.14, F. S., have been on deposit for more than 1 year, but not "for 1 year after the expiration of the term for which" deposited, may such securities be withdrawn and other securities substituted therefor?

Section 517.12, F. S., requires that every person registered in this state as a dealer in securities post a surety bond, with the Florida securities commission, in the form and in the amount set out in §517.13, F. S., conditioned upon such dealer conforming to and complying with the statutes of this state regulating the sale of securities. These bonds, by the terms of the statutes, are in force during the registration year of the dealer and for a year thereafter. Persons having claims against the dealer arising during the year for which such dealer is registered is given 1 year after the expiration of such registration in which to begin the enforcement of their claims against such dealer and his surety or securities posted by him as provided in and by §517.14, F. S., in lieu of such surety bond.

Under said §517.14, F. S., the registered dealer may, in lieu of such surety bond, "deposit with the Florida securities commission, U. S. government bonds of the value of \$5,000, or cash in the sum of \$5,000, or other securities satisfactory to the commission. . . ." Nowhere in the statutes do we find express authority for the dealer to withdraw the securities deposited by him under §517.14, F. S., and deposit others in lieu thereof. For example, we find nowhere in the statutes authority for substituting N. Y. state bonds for U. S. treasury notes, although under current market values the N. Y. state bonds may be quoted above the U. S. treasury notes.

Bonds deposited under said §517.14, F. S., are deposited for the protection of members of the public having transactions with the dealer making such deposit. After the securities have been deposited and the liability period (the registration year) has expired, the rights of possible claimants under such deposit become fixed. "Therefore, the commission has no legal authority to authorize any change in the bond or deposit from which possible claimants are entitled to satisfy their claim under the statute." (1941-2 Biennial Report, 681; see also 1941-2 Biennial Report 680; 1939-40 Biennial Report 382; 1935-6 Biennial Report 617). This presents the question of vested rights of claimants in and to the particular bonds deposited. Would a substitution of the N. Y. bonds for the U. S. treasury notes, in the example above mentioned, adversely affect the rights and interests of the said claimant?

Although provision is made in the form of the surety bond set out in §517.13, F. S., for the cancellation of the surety bond, by either the principal or surety, no provision appears in the statutes for releasing the surety from any liabilities accruing prior to the cancellation of the said bond. Where such a liability has accrued, we doubt that the substitution of a bond issued by another surety may transfer the 1st surety's liability to the 2nd surety unless and until such transfer be consented to, approved by the claimant. When a claimant has become vested with a right under a deposit of securities pursuant to §517.14, F. S., in the absence of statutes providing otherwise, we doubt that he may be required by action of the commission and the dealer to look to other securities.

The above question is, therefore, answered in the negative unless the commission shall be satisfied that no injury will or might accrue to a present claimant against the current deposit. Although, taking the above example, N. Y. state bonds might be

more valuable than U. S. treasury certificates on the current market, will they continue to be so until the final termination of the rights of the claimant? The posing of the question suggests its own answer; they may be, or they might not be, depending on the future.

056-280—September 14, 1956

INSURANCE

PROPOSED WARRANTY OF AUTO WARRANTY COMPANY

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTION:

If the following provision is added to the forms of warranty described below to wit: "It shall be presumed in the case of failure of parts specifically set forth in this warranty, and subject to the provisions herein contained, that the same resulted from defects in material or workmanship." Will such remove the objection that there presently exists an element of insurance therein?

Some days ago, Deputy Commissioner Walter E. Rountree discussed with a representative of this office the forms of automobile warranties proposed to be issued in Florida by Auto Warranty Company, of Augusta, Ga.; and in that connection had such representative talk by telephone with Hon. Sam Bucklew, Tampa, attorney for said company. Thereafter conferences were had with Mr. Bucklew. The latter has made a suggestion concerning the forms of warranty, quoted in the above question:

Under its forms of warranty, Auto Warranty Co. warrants that it will protect the holder of such a warranty from any costs or repairs which the holder may incur during a stated period with respect to a described motor vehicle on designated parts of the same, subject to the terms and conditions of the warranty to the extent of the reasonable price for repairs, replacement and labor which become necessary in the normal use of such vehicle. It is noted that in the wording of these warranties there is no exception made with respect to failure of parts as result of wear.

In opinion 050-250 (1949-1950 Biennial Rep. 525) we dealt with a warranty generally similar to those here considered. After citing quite a number of authorities and our constructions thereof, we concluded that opinion with the following: "In the light of the above and foregoing observations we feel that the above question, in so far as it relates to the correction of defective materials and workmanship, should be construed as a warranty, and in so far as it relates to the correction or repair of damage caused by wear, should be construed as an agreement of insurance within the purview of the statutes of this state."

In opinions 055-43, 055-68 and 055-109 we considered the form of a similar type of warranty proposed to be issued by National Bonded Cars, Inc. The nature of our objection to the form of that warranty was in accord with the conclusions reached in former opinion 050-250, the concluding paragraph of opinion 055-109 containing the following wording: "However . . . the wording

in the above paragraph, 'any defect in any warranted part not resulting solely from wear,' is recognition of wear as a contributing factor in event of failure of material. . . ." In opinion 056-203 we again considered the form of warranty of National Bonded Cars, Inc.; and we approved a provision containing the following wording: "National Bonded Cars, Inc. agrees that if its said certification is in error and any defect in any warranted part not resulting from wear shall be revealed, etc."

As result of conferences heretofore had with the attorney for National Bonded Cars, Inc., in connection with opinion 056-203, and more recently with the attorney for Auto Warranty Co., we have thoroughly reconsidered the effect of previous opinions 050-250, 055-43, 055-68, 055-109 and 056-203. We continue to adhere to the principles set forth in such previous opinions. However, there are practical aspects involved. There is the legitimate field of warranty against failure of parts by reason of defective workmanship or materials; and the effectiveness of contracts of such nature is not to be impaired by reason of the factor of wear. The proposed provision set forth in the above question has been submitted by the attorney for Auto Warranty Co. Without disturbing any sound legal principle dealt with in the previous opinions, it clarifies the intent of the warranty and confines its construction to that field, as distinguished from the field of insurance.

Hence, if Auto Warranty Co. shall deliver to the insurance commissioner the same forms of warranty presently filed with that officer, amended to include the provision in the above question, such will not constitute contracts of insurance and properly may be approved by that officer in so far as that question is concerned.

There is being delivered by this office to the attorney who represented National Bonded Cars, Inc., in connection with our issuance of opinion 056-203, a copy of this opinion.

It is suggested that if "Carlife Guaranty", dealt with in opinion 050-250 is being issued in Florida, that a copy of this opinion be furnished by the commissioner to those issuing such form of warranty.

056-281—September 14, 1956

CONSERVATION

GAME AND FRESH WATER FISH COMMISSION— CONFISCATION OF SPEAR FISHING EQUIPMENT FOR VIOLATIONS OF CHAPTER 31133, 1955— §§775.07 AND 370.02(11), F. S.

To: Charles A. Nugent, Jr., County Solicitor, West Palm Beach
QUESTION:

In cases of arrest and conviction under Ch. 31133, 1955, may the spear fishing equipment be confiscated or forfeited under the provisions of §370.02(11), F. S.?

Chapter 31133, 1955, is an act defining "salt water fish," "spear fishing," "salt waters," "intercoastal waters," and prohibits spear fishing in Palm Beach county between the hours

of sunset and sunrise; prohibits spear fishing within any inlet in Palm Beach county and provides punishment for the violation of the act. Section 2 thereof provides that "no person shall engage in spear fishing in any of the salt waters of Palm Beach county, Florida, between the hours of sunset and sunrise." Section 3 provides that "no person shall at any time engage in spear fishing within Jupiter Inlet, Palm Beach Inlet, South Lake Worth Inlet, Boca Raton Inlet, or any other inlet in Palm Beach county, Florida."

Section 4 of said act provides that violation of the act shall constitute a misdemeanor and shall be punished in accordance with law.

Section 775.07, F. S., provides punishment for misdemeanors where not otherwise provided by statute by fine not exceeding \$200 or imprisonment not exceeding 90 days.

Special or local statutes are to be construed strictly as to the extent of the territory in which they are operative and also as to the powers granted by them. Such acts carry nothing beyond the plain and reasonable meaning of the words employed, and nothing can be done under such acts in excess of that specified (82 C. J. S. 958).

However, since §370.02(11), F. S., is a general law providing for certain confiscation procedure in all cases of arrest and conviction for illegal taking, sale, possession, etc., of salt water fish, it is my opinion that same may apply to Ch. 31133, Sp. Acts 1955.

Your question is answered accordingly.

056-283—September 17, 1956

PROFESSIONS AND VOCATIONS

CHIROPRACTORS—ADMINISTRATION OF VITAMIN INJECTIONS—BLOOD TESTS—§460.11, F. S.

To: Daniel K. Kirk, State Board of Chiropractic Examiners, Jacksonville

QUESTIONS:

1. Is a chiropractor authorized to administer vitamin injections, within the purview of Ch. 460, F. S.?

2. Is a chiropractor authorized to take blood from a patient for purposes of examination and analyzation?

Section 460.11(2), F. S., provides that any chiropractor who has complied with the provisions of Ch. 460, F. S., may:

"(a) Examine, analyze and diagnose the human living body and its diseases by the use of any physical, chemical, electrical, thermal or radionic method, and use the x-ray diagnosing, and may use any other general method of examination for diagnosis and analysis taught in any school of chiropractic recognized at any time by the Florida state board of chiropractic examiners.

"(b) Chiropractors may adjust, manipulate or treat

the human body by manual, mechanical, electrical or natural methods, or by the use of physical means, physiotherapy (including light, heat, water or exercise) or *by the use of foods and food concentrates, food extracts*, and may apply first aid and hygiene, but chiropractors are expressly prohibited from prescribing or administering to any person any medicine or drug included in materia medica or from performing any surgery, except as hereinabove stated or from practicing obstetrics." (Emphasis supplied.)

Vitamin is defined by the standard dictionaries as: "Any of a group of constituents of most *foods* in their natural state of which very small quantities are essential for the normal nutrition of animals, and possibly of plants. Six distinct vitamins are recognized by the effect produced on animals when their diets are deficient in these vitamins, namely, (1) fat-soluble vitamin A, (2) water-soluble vitamin B, (3) water-soluble vitamin C, (4) fat-soluble vitamin D, (5) fat-soluble vitamin E, and (6) water-soluble vitamin G." (Emphasis added.)

This office has heretofore issued an opinion (051-83) on a similar question concerning the authority of persons licensed to practice chiropractic in this state, under Ch. 460, F. S., to administer foods, food concentrates and food extracts other than orally, such as subcutaneously, intravenously, intramembraneously or intramuscularly, wherein is stated:

"Accordingly, in view of the broad application of the word 'use' in the statute, and in the absence of any indication that such word was intended to mean only oral use, it is my opinion that licensed chiropractors have the legal right to use foods, food concentrates and food extracts in the treatment of the human body by the various means set forth in the question, provided such chiropractors are technically qualified to employ such methods."

Therefore, your 1st question is answered in the affirmative, provided such vitamin injections may be classified as a form of food and your board determines that such practitioners are technically qualified as to training to employ such methods. However, if such injections as a question of fact may be classified as medicine, chiropractors are barred from its use. In *People v. Fowler*, 84 p. 2d 326, 333, it was held that the words "medicine" and "surgery", as used in the California chiropractic act, were intended to deny chiropractors "the use of drugs and medical preparations and the severing or penetrating of the tissue of human beings."

As to your 2nd question, §460.11(2) (a), F. S., enumerates the methods by which a chiropractor may examine, analyze and diagnose the human living body and its diseases, among which is included "*any other general method of examination for diagnosis and analysis taught in any school of chiropractic recognized at any time by the Florida state board of chiropractic examiners.*" (Emphasis supplied.)

One of the meanings of the word "analysis" is "the deter-

mination of the elements of a chemical compound, the proportions of the constituents, the proportion of a special ingredient, or the presence of impurities or adulterations;" and to "analyze" is to examine minutely or critically, or to make an analysis of. Section 460.11(3) authorizes doctors of chiropractic to "analyze the physical conditions of the human body to determine the abnormal functions of the human organism . . ." Therefore, it appears to be a question of fact as to whether the Florida state board of chiropractic examiners recognizes the taking of blood from a patient for examination as a necessary method of examination for diagnosis and analysis and whether such practice is taught in the schools of chiropractic recognized by the board.

Thus, as in the 1st question, it appears to be a matter of fact for the board to determine whether or not the taking of blood from a patient would be included within the authority of a chiropractor to diagnose and analyze the human living body and its diseases. Consideration should also be given to whether or not the insertion of an instrument by penetrating the tissue of a human being would constitute "surgery" within the purview of §460.11, F. S. Certainly, if the general method of examination for diagnosis and analysis taught in schools of chiropractic recognized by the board includes technical training in the taking of blood for analysis, it is my opinion that a licensed chiropractor has the legal right to employ such method within the scope of the chiropractic act of Ch. 460, F. S.

056-284—September 20, 1956

CONSERVATION

NATIONAL FORESTS—POWER OF GAME COMMISSION TO REGULATE CARRYING OF FIREARMS— §§790.11 AND 372.74, F. S.

To: *A. D. Aldrich, Director, Game and Fresh Water Fish
Commission, Tallahassee*

QUESTIONS:

1. Is the carrying of firearms in national forests during the trapping season, which normally extends for one month beyond the close of the hunting season, prohibited under the provisions of §790.11, F. S.?
2. If not, does the game and fresh water fish commission have authority to make, adopt and promulgate a rule prohibiting the carrying of firearms in national forests during the trapping season?

Section 790.11, F. S., prohibits a person carrying a gun during the hunting season in a national forest unless he first obtains a valid hunting license and a special permit from the county commissioners of the county where such national forest is located.

National forests are under the jurisdiction of the U. S. department of interior and subject to being regulated by rules and regulations of said federal department. However, §372.74, F. S., authorizes the game and fresh water fish commission, in cooperation

with the U. S. forest service, to make, adopt, promulgate, amend and repeal rules and regulations, consistent with law, for the further or better control of hunting, fishing, and control of wild life in the national forests enumerated in §372.74, F. S.; also to shorten or close seasons on any species of game, bird, fish, reptile, or furbearing animal when necessary to assure the maintenance of an adequate supply of wild life, provided such rule or regulation does not change the general authority conferred by licenses prescribed by law, nor conflict with the laws of Florida.

We do not rule on the validity of such statute; however, we feel it well to emphasize the paramount jurisdiction of the federal government in such national forest, and any authority or regulation exercised by the state is subordinate thereto.

In view of the foregoing and since trapping is a term used merely to designate the manner in which game is hunted or taken, and the season for taking game by means of traps is extended one month longer than the season for taking game by other means, it appears that the game and fresh water fish commission in cooperation with the U. S. forest service may adopt a rule prohibiting the carrying of firearms in national forests during the trapping season, if same is necessary for further or better control of hunting and control of wild life as provided in §372.74, F. S. Such action shall also be approved by the board of county commissioners in each county concerned.

A further suggestion would be for a request to be made to the boards of county commissioners for permits issued under §790.11, F. S., to be dated or written so as to prohibit the carrying of firearms thereunder during that part of the hunting season known as the trapping season.

Your questions are answered accordingly. However, I do not know of any authority for the game and fresh water fish commission to exercise any jurisdiction over hunting in national forests *except in cooperation and subject to approval of the U. S. department of interior.*

056-285—September 26, 1956

PUBLIC HEALTH

MENTAL HEALTH—SCHOLARSHIPS FOR PSYCHIATRIC SOCIAL WORKER—PAYMENT OF NOTES— §402.07, F. S.

To: *Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee*

QUESTION:

May a student who holds a scholarship for psychiatric social worker who dropped out of school at the end of one year receive credit for services in the public welfare office toward retiring scholarship notes as provided in §402.07 ". . . the recipient thereof must agree in writing to practice his or her profession in the state for one year for each year of grant immediately

AFTER GRADUATION or in lieu thereof to repay the full amount of the scholarship and/or stipend together with interest at the rate of 5% per annum"?

Your letter contains the following factual explanation of the circumstances involved:

"The council on training and research in mental health states in the minutes of its meeting of May 17-18, 1956, 'The student who interrupts his training or stops his training at the end of the first year does not have adequate education and training to function effectively in a psychiatric setting.' The training program culminates in the degree, master of social work, at the end of two years."

The law (§402.07, F. S.), as quoted in your question, requires the scholarship recipient to practice his profession in Florida a year for each year of grant *immediately after* graduation. The implication of this language would appear to be that the scholarship holder is not qualified to render the required services contemplated by the legislature until after graduation. This is confirmed by the statement of the council on training and research in mental health quoted above.

I think it clear therefore that a student who drops the course in question after only one year could not receive credit for services in this field to be applied against repayment of his scholarship loan.

Such student would be required to repay the scholarship loan immediately unless he had temporarily dropped out of school with the consent and approval of the proper officials and agreed to resume his training under the scholarship within a reasonable time.

Permission to allow a student to interrupt his training under this program is discretionary with the persons responsible for the scholarship program and such permission should not be granted without good cause, such as the health of the student or to avoid economic hardship on students who might find it impossible to stay in school continuously for a 2-year period. In such instances there should be a definite agreement with the student as to the length of time he intends to interrupt his training and his agreement in writing to complete the course within a definite time should be obtained if his scholarship status is to be maintained.

Subject to the above observations, your question is answered in the negative.

056-286—September 26, 1956

**MOTOR VEHICLES
REGULATION OF TRAFFIC ON HIGHWAYS—ACCIDENT
REPORTS, INSPECTION OF—§317.17, F. S.**

To: John J. Twomey, Assistant City Attorney, Tampa

QUESTION:

Is the police department of the city of Tampa permitted to allow an examination by newspaper reporters,

insurance adjusters, lawyers for parties involved, or other persons, of the accident reports referred to in §317.17, F. S.?

In my opinion the answer to your question is in the negative.

Section 317.17, F. S., where pertinent to the question, provides as follows:

"All accident reports made by persons involved in accidents shall be without prejudice to the individual so reporting and shall be for the confidential use of the department or other state agencies having use of the records for accident prevention purposes, except that the department may disclose the identity of a person involved in an accident when such identity is not otherwise known or when such person denied his presence at such accident . . ." (Emphasis supplied).

Section 317.19, F. S., authorizes municipalities to require motor vehicle operators to file a similar accident report with the proper department of the city, and states:

"All such reports shall be for the confidential use of the city and subject to the provisions of §317.17, F. S."

I direct your attention to the italicized portion of §317.17, F. S., supra, that such reports are those "made by persons in accidents" and they shall be treated as "confidential".

The Florida supreme court has held that such reports are confidential and cannot be used in evidence without defeating the purpose of the statute. I submit that the same reasoning applies as to disclosing the contents of such reports for purposes other than those described in such section.

The legislature considered that such reports shall be confidential. If this were not so, it would be improper to require a driver to make a report which might, at times, amount to a declaration against interest. (See *Robinson v. Pepper*, 94 Fla. 1184, 116 So. 4.)

The foregoing, however, does not mean, nor does it intend to infer, that the report made by the officer investigating the accident is immune from inspection.

The statutes specifically provide that a copy of any report of a highway accident made by a trooper of the department of public safety shall be furnished upon request in writing "to any person in interest, or his or her attorney." (§321.05, F. S.).

Section 119.01, F. S., relating to inspection of public records, provides as follows:

"All state, county and municipal records shall at all times be open for a personal inspection of any citizen of Florida, and those in charge of such records shall not refuse this privilege to any citizen."

In opinions previously rendered by this office relating to the above quoted statute, in summary held, with stated exceptions,

that a public record, as contemplated by such section as subject to public inspection, is any writing or record made by a public officer pursuant to his official duties. See opinions of the attorney general 051-81 and 056-102, rendered April 6, 1951 and March 28, 1956 respectively, copies of which are attached hereto.

Your question is answered accordingly.

056-287—September 26, 1956

TAXATION

REDEMPTION OF TAX SALE CERTIFICATE WITHOUT REDEEMING SUBSEQUENT OMITTED TAXES— §§95.021, 192.21, 194.47, AND 196.12, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where lands were sold for delinquent taxes for 1935 on Sept. 7, 1936, and tax sale certificate 229 was issued, and the taxes for 1936, 1937 and 1938 were omitted from the tax roll as "tax certificate" lands, what was the effect of the payment of a sum equal to the principal of said tax sale certificate, with penalties and interest, on June 9, 1939, without redeeming the subsequent omitted taxes for 1936, 1937 and 1938?

The taxes for 1935, evidenced by tax sale certificate 229 of the tax sale of 1936, as well as the subsequent omitted taxes for 1936, 1937, 1938 and 1939, became liens as of Jan. 1 of the respective tax years, superior to all other liens, which liens "continue in full force and effect until discharged by payment." (§192.21, F. S.). This lien for taxes may not be defeated by any act of omission or commission on the part of the tax assessor, tax collector, clerk of the circuit court, etc. (§192.21, F. S.). When county held tax sale certificates are redeemed or purchased, the person so redeeming or purchasing the said certificates is required to pay all subsequent and omitted taxes upon the lands encumbered by the said certificate or the part redeemed (§194.06, F. S.).

Where there is a failure to sell lands for delinquent taxes and issue a tax sale certificate thereon, as is required by law, such taxes are subject to redemption as are tax sale certificates notwithstanding the failure of the tax collector to sell said lands and issue a tax sale certificate thereon (*State v. Gay*, 133 Fla. 826, 183 So. 463). In *State v. Sloan*, 135 Fla. 179, 184 So. 781, the tax collector had issued a single tax sale certificate encumbering lands for both ad valorem taxes and drainage assessments. The said tax sale certificate was redeemed under the Murphy act (Ch. 18296, 1937); however, it was held that drainage taxes were not within the said Murphy act and that the purchaser under the Murphy act would not be entitled to an assignment of the certificate unless and until the drainage taxes were paid in full. In other words, there was a payment on the tax sale certificate under the Murphy act but not a payment in full. The subsequent and omitted taxes attach themselves to the state or county held tax sale certificate and the said certificate may not be legally redeemed without also redeeming the subsequent and omitted taxes.

We are, therefore, of the opinion that the attempted redemption of the 1936 tax sale certificate without also redeeming the subsequent omitted taxes merely and only amounted to a payment on the taxes due and that the sums assessed as subsequent and omitted taxes remained a lien upon the lands. As the tax sale certificate was issued more than 20 years ago there may be some question as to the application of §196.12, F. S., as implemented by §95.021, F. S., to the tax lien; this being true, it is suggested that the tax certificate (treating the attempted redemption in 1939 as a payment on the certificate and subsequent omitted taxes) be included in the next certificate of tax delinquent lands made by the clerk of the circuit court under and pursuant to §194.47, F. S., and that it be included in the next county tax certificate foreclosure under said §194.47. Unless the owner should desire to redeem the taxes due under the assessments or subsequent omitted taxes for the year subsequent to 1935 not already paid, this proceeding is suggested, although we feel that the tax sale certificate is still open, and might be purchased by an individual and a tax deed be issued thereon; however, the purchaser of such certificate would probably be buying a law suit.

056-288—September 27, 1956

TAXATION

CERTIFICATION OF EVALUATIONS AND MILLAGES IN CERTAIN COUNTIES—§193.25 AND 193.29, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. When should the county tax assessor, in counties having combined tax assessment and tax collection offices, certify the equalized valuations to the taxing districts and municipalities from which they are required to determine their millages?
2. When should such taxing districts and municipalities certify their millages, based on such valuations, to the county tax assessor?
3. Where such millages are not certified to the county tax assessor within the time required, how should he proceed in making up and extending the tax rolls?

These questions arise because of certain provisions in the state constitution and statutes and laws implementing them, whereby county tax assessors in certain counties assess all ad valorem taxes, including taxing district and municipal taxes. These implementing statutes and laws require the county tax assessor, within a stated period of time from and after the county tax rolls are "equalized and returned to the county tax assessor by the equalization board," to certify the equalized valuations of taxable properties within the taxing districts and municipalities to the governing bodies thereof. This period of time is usually fixed at 15 days after the tax rolls are returned to the tax assessor, although in at least one case the time is fixed at 10 days. Within a fixed period of time from and after the valuations have been certified to the

taxing districts and municipalities by the tax assessor, they are required to certify their millages to the said tax assessor; usually this period of time is fixed at 30 days.

The county tax assessor is required, by §193.25, F. S., to complete the assessment roll "on or before the 1st Monday in July in every year," on which day he is required to meet with the board of county commissioners for the purpose of reviewing and equalizing the valuations placed on the taxable properties by the said tax assessor. However, the board of county commissioners may extend this time for completing the tax rolls for a period not exceeding 30 days; this being true, the county equalization board hearings should be held beginning not later than the 1st Monday in August of each year. The period of time within which the county tax assessor must certify to the taxing districts and municipalities the taxable valuations of property within their borders runs from the time the tax rolls are "equalized and returned to the county tax assessor by the equalization board," which will usually be some time in July. The time within which the said taxing districts and municipalities must certify their millages to the county tax assessor runs from the time the valuations are certified to them by the tax assessor.

We see no reason why the county tax assessor may not advise the taxing districts and municipalities of the valuations of the taxable properties within their boundaries, merely as information only, to assist them in making preliminary estimates of millages and taxes; however, under no circumstances may this information be considered as a compliance with the requirement that the equalized values be certified when the tax rolls are equalized and returned to the county tax assessor as aforesaid. The county tax assessor is required, although preliminary estimates may have been furnished, to make the certification upon the return of the equalized tax rolls to him.

This leads to the question of the powers and duties of the county tax assessor upon the failure of the taxing districts and municipalities to certify their millages to him within the time required by the statutes and laws. The statutes, by §193.29, F. S., requires the completion of the tax rolls and their approval by the board of county commissioners by the 1st Monday in October of each year so that it will be in the hands of the county tax collector by Nov. 1 of the tax year, so that tax collections may be commenced on said Nov. 1. The goal to be reached is tax collections beginning on Nov. 1.

We must presume that the legislature determined that a period of 30 days was ample and sufficient time within which taxing districts and municipalities may determine their millages and certify them to the county tax assessor. We feel that this period of time is a mandatory requirement; although we further feel that there is no prohibition against the county tax assessor accepting a certificate of millages after the running of the said period of time so long as such acceptance will not unduly delay the completion of the tax roll beyond the 1st Monday in October of the tax year. This leads to a consideration of what should the tax assessor do in case the millages are not certified by any taxing district or municipality in time so that he has to proceed with

the completion of the tax roll without such millages. To fail to levy any millages at all for the taxing district or municipality might be very detrimental to the public of such taxing district or municipality. This being true, we suggest the use of the millages for the previous year where they may be ascertained from the prior tax roll.

From the above and foregoing statutes, laws and observations, we feel that it is the duty of the county tax assessor:

1. To make his certificate of valuations to the taxing districts and municipalities when the tax rolls are "equalized and returned to the county tax assessor by the equalization board," or within the time limit fixed by the applicable laws (usually 15 days, but in at least one instance 10 days);

2. The taxing districts and municipalities should make their certificates of millages to the county tax assessor as soon after his certification to them of the valuations as practicable, but not later than the time limited for such certificates (in most cases this time is fixed at 30 days); and

3. The county tax assessor, where no millages are certified by a taxing district or municipality until it would be too late to complete the tax roll, should give such taxing district or municipality notice that he will use the millages for the prior year, if the same are available to him, unless the millages are forthwith certified, and on failure to so certify, he may use the millages for the previous year.

056-289—September 27, 1956

TAXATION

OCCUPATIONAL LICENSE TAXES—SALES MANAGERS AND SOLICITORS OF REAL SILK HOSIERY MILLS— §205.59, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are the sales managers and solicitors appointed by the Real Silk Hosiery Mills and similar business firms for Florida subject to occupational licenses and license taxes under §205.59, F. S., or other statutes or laws of Florida?

We have before us a copy of the "Selling Manager Agreement" entered into between the Real Silk Hosiery Mills, Inc., and its selling manager for Polk county, with Highlands county as open territory, under which the hosiery mills appoint the said selling manager for the above territory, and which selling manager agrees to take orders for the hosiery mills' products, by himself and through solicitors working under his local direction. The sales manager and his solicitors go from house to house seeking orders of the products of the said hosiery mills. When a purchaser is found, the person making the solicitation fills out an order blank, which is usually transmitted through the selling manager to the

hosiery mills at its general offices in Indianapolis, Ind. If accepted, the products purchased are transmitted in interstate commerce to the purchaser, either direct or through the selling manager or his solicitors.

We find no substantial distinction between the selling plans set out in *Real Silk Hosiery Mills v. Portland*, 268 U. S. 325, 45 S. Ct. 525, 69 L. ed. 982, and those used by the hosiery mills today. It was held in this case that the persons soliciting orders for the hosiery mills' products were engaged in interstate commerce and that the license tax involved in that case was a burden on interstate commerce within the purview of the commerce clause of the federal constitution. This case seems to have been followed as late as *Memphis Steam Laundry v. Stone*, 342 U. S. 389, 72 S. Ct. 424, 96 L. ed. 436. See also Annotation in 162 A. L. R. 857, and *Cason v. Quinby*, 60 Fla. 35, 53 So. 741, *Wilk v. Bartow*, 86 Fla. 186, 97 So. 307; and *Myers v. City of Miami*, 100 Fla. 1537, 131 So. 375.

The above-mentioned authorities indicate a negative answer to the above stated question; unless the "selling manager" may be brought within the purview of *Dorsett v. Overstreet*, 154 Fla. 566, 18 So. 2d 759, 155 A. L. R. 228. This case involved a person, referred to by the court as a "broker," who, patronizing several non-resident concerns, took orders from his customers for goods, wares and merchandise, generally and not for particular businesses or concerns. When he had obtained an order for a particular item of merchandise, unless the customer specified a particular manufacturer or dealer, he selected the manufacturer or dealer to furnish the same and mailed the order to such manufacturer or dealer. Here the so-called "selling manager" is not only an agent or employee of the manufacturer or dealer but solicits and takes orders specifically for such manufacturer or dealer and never selects other manufacturers or dealers as was done in the *Dorsett v. Overstreet* case, where the person soliciting and taking orders of the goods, wares and merchandise was an independent middleman, and not the exclusive representative of the manufacturer or dealer. Here the "selling manager" is the agent of the hosiery mills and not an independent middleman, as in *Dorsett v. Overstreet*. In this connection see annotation in 155 A. L. R. 239-253. The facts in this case seem to bring it within *Cason v. Quinby*, *supra*, *Wilk v. Bartow*, *supra*, and *Myers v. City of Miami*, and not within *Dorsett v. Overstreet*.

The above question is, therefore, answered in the negative.

056-290—September 27, 1956

EDUCATION

COMPULSORY SCHOOL ATTENDANCE—ATTENDANCE DEFINED—FIELD TRIPS—§232.141, F. S.

To: *Thomas D. Bailey, State Superintendent of Public Instruction,
Tallahassee*

QUESTION:

If a county demonstration agent or a home demonstration agent attached to the university of Florida as a faculty member should accompany public school pupils

in 4-H clubs so that they might attend events connected with such activities as fairs, cattle shows, etc., would the supervision of the above-mentioned persons satisfy the legal requirements of §232.141, F. S.?

Section 232.141, F. S. provides:

*"Attendance checked twice daily; attendance defined.—*The attendance of all public school pupils shall be checked morning and afternoon of each school day and recorded in the teacher's register or by some approved system of recording attendance; provided that pupils may be counted in attendance only if they are actually present or if away from school on field trips or other activities sponsored by the schools under the actual supervision of school authorities."

In my opinion, the above definition of "field trips" or "other activities sponsored by the schools" would cover the situation contemplated in your question, provided, of course, the trip to the cattle show or fair was a recognized part of the educational program in the specific school involved and was so sponsored by the local school officials. The language of the statute "under the actual supervision of school authorities" does not remove all discretion from the local school officials as to the adult who shall be designated to accompany the group of students and supervise this part of their educational training. I believe that a faculty member of the university of Florida working locally in cooperation with county school officials in teaching agriculture, home economics and similar subjects could be properly designated by the school authorities to accompany public school students on field trips of this kind. Such action would be discretionary with local school officials and it would of course be incumbent upon said officials not to abuse such discretionary authority since the safety, welfare and education of the school children participating in field trips of this kind are a paramount consideration and responsibility of the county school superintendent, school board and other local school officials and teachers.

Subject to the above observations, your question is answered in the affirmative.

056-291—September 27, 1956

CITIES AND TOWNS

GENERAL POWERS OF MUNICIPALITIES—CONSTRUCTION OF §167.431, F. S., LEVY OF TAX ON PUBLIC SERVICES

To: John E. Cicero, Public Utilities Counsel, Miami

QUESTION:

May a municipality levy a tax on oxygen, acetylene welding gas, carbon dioxide, hydrogen, nitrogen, and similar gases, under the authority of §167.431, F. S.?

Section 167.431, F. S., authorizes the cities and towns of this state to levy and collect "on each and every purchase of electricity, metered or bottled gas (natural, liquefied petroleum gas, or manu-

factured), water service, telephone service and telegraph service in their corporate limits" a tax as therein provided. The above question excludes taxes on the sale of electricity, water, telephone and telegraph services. We are therefore concerned only with the gases included in the phrase "metered or bottled gas (natural, liquefied petroleum or manufactured)" The question does not seem to involve *metered gas*; this being true, we come to a construction of the term "bottled gas" as used in said §167.431, F. S. A statute must be construed as a whole, or in its entirety (82 C. J. S. 691, §345; *Forehand v. Manly*, 147 Fla. 287, 2 So. 2d 864, text 867) and not by parts. The words within the parentheses, "natural, liquefied petroleum gas and manufactured," following the term "bottled gas" is as much a part of the statute as any other part (82 C. J. S. 105, §65, note 63) and must be given effect. The legislature, by inserting such words in the statute doubtless intended to explain and limit the term "bottled gas" used by it.

Section 167.431, F. S., being a taxing statute, should be construed strictly against the taxing authority and in favor of the taxpayer (*Florida Nat. Bank v. Simpson*, Fla., 59 So. 2d 751; *Overstreet v. Ty-Tan, Inc.*, Fla., 48 So. 2d 158; *Delinquent Taxes v. Monticello*, 159 Fla. 134, 31 So. 2d 905) and any ambiguity in a taxing statute must be resolved in favor of the taxpayer (*Cunningham v. Stefanidi*, 144 Fla. 214, 197 So. 722; *State v. Sweat*, 113 Fla. 797, 152 So. 432, text 433-4). In this statute, the general words "bottled gas" are followed by the parenthetic words "natural, liquefied petroleum gas or manufactured," evidently by way of explanation or limitation of the general term "bottled gas."

General words or terms in a statute followed by specific words or terms are often held to be restricted by the specific words (82 C. J. S. 654, §331; 50 Am. Jur. 241, §247; *Townsend v. State*, 63 Fla. 46, 57 So. 611; *Ex Parte Amos*, 93 Fla. 5, 112 So. 289, text 293). The term "natural, liquefied petroleum gas, or manufactured" appears to have been intended as a limitation upon the words "bottled gas." Without considering the said parenthetic words, we note that the statutes relate to the sale and purchase of electricity, water service, telephone service, and telegraph service, each of which is a utility in nature and usually regulated by statute. We, therefore, are of the opinion that the legislature by the term "metered or bottled gas (natural, liquefied petroleum gas and manufactured)" intended to tax metered gases sold as utilities and the bottled gases sold in competition with such metered gases. This act may not be construed as extending to non-gaseous commodities, such as fuel oil (*City of Orlando v. Johnson*, 160 Fla. 622, 36 So. 2d 209).

We do not think that bottled oxygen, acetylene welding gas, carbon dioxide, hydrogen, nitrogen and similar gases may be said to be natural, liquefied petroleum or manufactured gases so as to be within the purview of said §167.431, F. S. To be subject to taxation under said §167.431, F. S., a bottled gas must be either a natural, liquefied petroleum or natural gas and such a gas as is usually used for fuel for heating, cooking, etc.

The above question, as posed in this opinion, is answered in the negative. We have only considered the authority of a municipi-

pality under said §167.431 and not charter provisions in legislative charters.

056-292—September 28, 1956

CORPORATIONS

MERGER OF CORPORATIONS—FILING FEES AND TAXES— §§608.05, 608.20-608.26, AND 613.02, F. S.

To: *R. A. Gray, Secretary of State, Tallahassee*

QUESTION:

Are the following constructions concerning corporate mergers in relation to corporation filing fees and taxes correct:

1. In the merger of two foreign corporations if the continuing corporation does not have a permit to do business in Florida at the time of the merger it is not entitled to any credit on charter tax paid by the other merged corporation because of the permit it had.

2. A foreign corporation merging with another and such continuing corporation had a permit to do business in Florida at the time of the merger would be entitled to credit of the charter tax it had previously paid when showing an increased allocation of capital by reason of the merger or otherwise.

3. Two foreign corporations, both having permits to transact business in Florida at the time of merger—the surviving corporation is entitled to credit for the charter tax it had previously paid. It is not entitled to credit of charter tax previously paid by the other corporation party to the merger.

4. Two domestic corporations (both of course authorized to do business in Florida) merge. If the amount of the authorized capital of the continuing corporation is the same—or does not exceed in amount—the sum of the authorized capital of the two corporations prior to merger, no additional charter tax is due by the continuing corporation.

Sections 608.20-608.26, F. S., relate to mergers and consolidations of corporations. Section 608.20 provides that, "Any two or more corporations existing under the laws of this state may consolidate into a new corporation or merge into any one of the constituent corporations," in the manner provided in that section. Section 608.21, F. S., provides for the merger of domestic and foreign corporations. Section 608.22, F. S., provides in part that, "Upon the effective date of the consolidation or merger, the separate existence of the constituent corporations or all of such constituent corporations except the one into which the other constituent corporations have been merged, as the case may be, shall cease, and the constituent corporations shall become a single corporation . . ." Section 608.25, F. S., provides: "The capital of a consolidated or merged

corporation shall be the amount stated in the consolidation or merger agreement with which the consolidated or merged corporation shall begin business . . .", with further provisions relating to additional stock and capital.

Section 608.05, F. S., begins with the wording, "Upon filing of any articles of incorporation, amendment thereof, or other paper relating to the incorporation, merger, consolidation or dissolution of any corporation in the office of the secretary of state, the fees and taxes provided in the following schedules shall be paid to him for the use of the state." Section 608.05(5), F. S., provides: "(a) The amount of fees and filing taxes to be collected by the secretary of state before he shall approve any amendment or merger or consolidation agreement increasing authorized capital stock shall be equal to the fees and filing taxes required for an original certificate of incorporation authorizing the total capital stock to be outstanding after the amendment or consolidation or merger agreement, except that all filing fees paid with respect to shares authorized prior to such amendment or agreement, and which are actually included in the authorized capital existing at the time of the increase, shall be deducted. (b) The fee for filing a certificate of dissolution or an amendment of a certificate of incorporation or merger or consolidation agreement which does not increase the authorized capital stock shall be \$10."

Section 613.02, F. S., relating to foreign corporations obtaining permits to engage in business in this state provides the fees to be paid with respect to its capital to be employed in the state.

It is apparent from the provisions of §§608.20-608.26, F. S., that a distinction exists between constituent corporations consolidating, on the one hand, or merging. "Consolidation" as used contemplates the forming of a new corporation, resulting in the separate existence of the constituent corporations ceasing; "merger" contemplates constituent corporations merging with one a party to the agreement, leaving undisturbed the existence of a continuing corporation, but extinguishing the other constituent corporations. While with respect to corporation fees and taxes, no distinction is made between consolidation and merger agreements (see above-quoted §608.05(5), F. S.), the mentioned distinction does exist. Generally on the subject, see 13 Am. Jur. 1085, 1086, §1176; 19 C. J. S. 1364-1367, §1604.

The constructions set forth in the question deal with mergers and not consolidations — situations contemplating combinations whereby one of the constituent corporations remains in being. While there is the mentioned credit upon corporation fees and taxes in instances where domestic corporations merge or consolidate, no such credit is mentioned in §613.02, F. S., with respect to fees required of foreign corporations.

On the basis of the above remarks, reasonably it follows that all four constructions of these mentioned and related statutes are correct, with a slight conditioning remark concerning the fourth construction. It is correct provided that the shares of domestic corporations parties to a merger agreement and with respect to which "filing taxes" have previously been paid, "are actually included in the authorized capital existing at the time of the increase."

056-293—September 28, 1956

ELECTORS AND ELECTIONS

APPOINTMENT, NOMINATION AND ELECTION OF JUSTICES OF THE PEACE AND CONSTABLES IN DUVAL COUNTY—CH. 25806, 1949, §100.111, F. S.

To: *LeRoy Collins, Governor of Florida, Tallahassee*

STATEMENT OF FACTS:

On Sept. 19, 1956, the supreme court of Florida filed its opinion in *George Harris, et al., Appellants, v. Sarah Bryan, et al., Appellees*, Case No. 27,623, affirming the declaratory decree of the circuit court, Duval county, which decree held Ch. 25806, Sp. Acts of 1949, to be unconstitutional.

Prior to the filing of the above stated opinion and in accordance with said Ch. 25806, 5 justices of the peace and 5 constables were elected in the Duval county primaries as nominees of the Democratic party. Subsequent to the primaries and as a result of the decision of the circuit court, in the above styled cause, the Duval county Democratic committee nominated 9 justices of the peace and 9 constables as the Democratic nominees for the general election for the respective 9 districts.

QUESTIONS:

1. Upon the decision . . . becoming final will Duval county have any qualified justices of the peace or constables in office?
2. If your answer to the above question is in the negative, what vacancies will exist and what are my duties in respect to filling such vacancies?
3. Am I, as governor, authorized to call a special election to determine the Democratic nominees whose names should appear on the ballot in the general election or were such nominees properly selected by the Duval county Democratic committee?

The effect of the decision of the supreme court of Florida in the case referred to above is that the 5 justice of the peace districts set up in Duval county under Ch. 25806, 1949, shall cease to exist and that the 9 justice of the peace districts existing in Duval county immediately prior to the adoption of §21, Art. V, Fla. Const., are the legally constituted justice of the peace districts of Duval county. Since the 5 justices of the peace and the 5 constables now serving in Duval county were elected to the offices created in the districts established by Ch. 25806, 1949, and since the effect of the mentioned decree was to abolish such districts and offices and declare 9 other districts to be the lawful districts in that county, upon such decision becoming final, there will be 9 justice of the peace offices and 9 constable offices vacant in that county. Pursuant to his constitutional authority the governor may fill such vacancies by appointment for terms to expire on the

1st Tuesday after the 1st Monday in January, 1957. The 4-year terms beginning on the last mentioned date will be filled by such persons who may have been elected to such offices at the general election in November, 1956.

As to your 3rd question, without commenting on the validity of the nominations made by the Duval county Democratic executive committee as opposed to the nominations made at the 1956 primary elections, there is no law which imposes upon you the duty to call a special primary election with respect to the justice of the peace and constable situation in Duval county. Such vacancies in nomination as may exist can, under §100.111(6), F. S., be filled by the appropriate county executive committees, and there is no occasion for a special primary to be called.

In view of the foregoing it is my opinion that the questions should be answered as follows:

1. When the decision of the supreme court of Florida in the case of *Harris v. Bryan* (Opinion filed Sept. 19, 1956) becomes final, vacancies in office will occur with respect to the offices of justice of the peace and constable in the 9 justice of the peace districts which existed in Duval county immediately prior to the adoption of §21, Art. V, Fla. Const., at the general election in 1944.

2. The mentioned vacancies should be filled by appointment of the governor for terms expiring on the 1st Tuesday after the 1st Monday in January, 1957, at which time the persons elected to such offices at the 1956 general election will take office for 4-year terms.

3. There is no authority for the governor to call special primary elections to provide party nominees for the mentioned offices, and §100.111(6), F. S., permits the filling of such vacancies in nomination as may exist by the Duval county Democratic executive committee and the Duval county Republican executive committee respectively.

Enclosed for your convenience is a copy of opinion 056-213 which is concerned with the effectiveness of the official acts of the 5 incumbent justices of the peace of Duval county during the period of the effectiveness of the supersedeas issued pending the appeal in the above-mentioned case of *Harris v. Bryan*.

056-294—September 28, 1956

CITIES AND TOWNS

FIREMEN'S RELIEF AND PENSION FUND; BOARD OF TRUSTEES, MEMBERSHIP AND POWERS—§§175.01-175.05, F. S.

To: *Gordon C. Huie, Haines City*

QUESTIONS:

1. In view of the provisions of §175.02, F. S., providing that the board of trustees (of a firemen's relief and pension fund) shall consist of the mayor, chief of the fire department and a regularly employed fireman chosen by the legislative body of the city upon recom-

mendation of a majority of the regularly employed firemen, can the city continue to maintain a fireman's relief and pension fund if it has no paid firemen or fireman who can qualify for the board of trustees?

2. In view of the powers enumerated in §175.03, F. S., would the trustees be authorized to refund to presently employed firemen moneys they had contributed to the fund over the years?

3. If the city should decide to repeal its ordinance establishing the fund and cease to be within the provisions of §175.01, F. S., what is the proper procedure or method for dissolution and what disposition can legally be made of accumulated funds remaining in the firemen's relief and pension fund upon such termination of participation or dissolution?

The request for opinion states that it is now proposed that regularly employed firemen be relieved of designation as firemen and employed in substantially the same line of work under a reorganization plan employing them in the police department which has no pension fund, thus in theory causing them to become eligible for OASI benefits; that the city further proposes to keep in effect, for the sole benefit of the volunteer firemen, its present relief and pension fund, which now amounts to some \$7,000; and it is further proposed that the presently employed firemen will be refunded a combined total of some \$900 they have paid into the fund over the years and release the fund and the city of all liability and pension rights.

Subject to the further comments succeeding the answers given, in my opinion the questions are answered as follows:

1. This question of course derives from the proposal that all paid firemen be transferred to the police department. It is recognized that the governing body of the fund shall consist of the mayor, chief of the fire department, and a regularly employed fireman chosen by the legislative body of the city upon recommendation of regularly employed firemen. However, if the city would cease to employ firemen and rely solely upon its fire chief and volunteer firemen who qualify as such under Ch. 175, F. S., it should be recalled that we are here concerned with a pension system and possible vested rights, and such a system would not be abolished for want of designated trustees.

2. Section 175.04(2), F. S., provides that 2% of the salary of each fireman shall be paid into said fund, and in the same sentence it is provided that, "no fireman or volunteer fireman shall have any right to said money so paid into said fund except as provided in this chapter." There is no provision for refund to a fireman who ceases to be employed as such by the city. This is in accord with our former opinion 051-196 (1951-1952 Biennial Report 267).

3. The fund contemplated by Ch. 175, F. S., is created "in each incorporated city or town of this state . . . which now has or which may hereafter have a regularly organized fire department and which now owns and uses or which may hereafter own and use equipment and apparatus of a value exceeding \$5,000 in serviceable

condition . . ." It appears from the request for opinion that heretofore the city adopted the ordinance contemplated by §175.05, F. S., and has had the benefit of premium receipts taxes provided thereby. Hence, without question we assume that at the time the city adopted said ordinance it came within the above qualifying wording; and we assume further that the city continues to qualify under such quoted wording. Hence, in absence of a special act providing otherwise, the fund exists in such city by reason of the direct and positive wording of Ch. 175, F. S. We held in opinion 051-297 (1951-1952 Biennial Report 271) that where a city had so qualified under the wording in §175.01, F. S., and had adopted the ordinance authorized by §175.05, F. S., and continued to meet the requirements of §175.01, F. S., it could not abolish such fund by ordinance. In absence of possible special laws relating to the subject or other aspects of which we are not aware, we adhere to the above conclusion reached in former opinion 051-297. See further comments concerning abolishing of the system set forth below.

We condition certain of the above conclusions with the following comments:

It is reasonably apparent that the proposed shifting of paid employees from the fire department to the police department is related to the desire to obtain OASI coverage for such employees. Employees designated as members of the police department but whose duties are those of firemen quite probably would be classed as engaged in service in firemen's positions under the federal social security act (Title 42, U. S. C. A. §418(d)(5)(A)). However, with respect to the relationship of municipal employees in firemen's and policemen's positions to such benefits under said federal law, it is earnestly suggested that inquiry be made of Herbert Miller, assistant director of OASI, Florida industrial commission, Tallahassee. It is our understanding that when enabling state legislation is adopted at the next regular session of the Florida legislature, OASI benefits will be made available to municipal employees in firemen's positions. However, again we suggest you write Mr. Miller concerning the matter.

The above questions deal with a retirement and pension system and rights thereunder. We have given you what we think are the correct answers. However, since there are involved such a system and these rights, if the city should desire to take any step to curtail or abolish the same, we suggest that such be done only after the questions have been submitted to the court in a proper declaratory judgment proceedings and therein have received judicial approval of any such move.

056-295—October 1, 1956

INTERNAL IMPROVEMENT FUND

PINELLAS COUNTY WATER AND NAVIGATION CONTROL
AUTHORITY—CONSTRUCTION OF CH. 31182, 1955 AND
PRIOR LAWS—CH. 253, F. S.

To: *LeRoy Collins, Governor of Florida, Tallahassee*

QUESTION:

Is Ch. 31182, 1955, applicable to submerged lands

purchased under and pursuant to §253.12, et seq., F. S., so that it must be complied with before such lands may be filled in, or otherwise improved?

The specific area under consideration is the lands conveyed by the trustees of the internal improvement fund in Boca Ciega Bay, in Pinellas county. One parcel, of 6.46 acres, having been deeded on Dec. 10, 1952, two others, 148.20 acres, on Dec. 28, 1954 (pursuant to contracts of Dec. 11, 1952 and April 24, 1953), another, 208.10 acres, on March 29, 1956 (pursuant to contract of March 16, 1953) and two others, 139.90 acres, on Aug. 23, 1956 (pursuant to contracts of May 19, 1953 and June 2, 1953). Only the conveyance of Dec. 28, 1954, makes any reference to dredging or filling in the lands purchased; the others make no reference to dredging or filling in the lands conveyed. The said conveyance of Dec. 28, 1954, merely makes certain limitations concerning the taking of fill material and its use. Only by implication may this deed be said to grant a permission to fill in the lands purchased.

Section 253.15, F. S., provides that when submerged lands are sold pursuant to §253.12, et seq., F. S., that "the purchaser shall have the right to bulkhead and fill in the same, as provided by §309.01," F. S. Section 309.01, F. S., regulates the manner of filling in submerged lands so that no injury will occur to navigation or to ports and harbors. This section was derived from an act of 1881 as amended in 1895. We find nothing in these sections which would prevent the legislature under its police powers from fixing other and further limitations upon the dredging and filling of submerged lands owned or purchased by individuals, firms or corporations.

Section 253.03, F. S., vests in and charges the trustees of the internal improvement fund with the administration, management, control, supervision, conservation and protection of "all lands owned by the state by right of sovereignty . . . all tidal lands, all lands covered by shallow waters of the ocean, gulf, or bays or lagoons thereof, and all lands owned by the state covered by fresh water . . ." This section of the statutes vests in the trustees of the internal improvement fund no jurisdiction or control over the filling or dredging of submerged lands owned by individuals, firms or corporations, even though they were purchased from the state or the trustees under §253.12, et seq., F. S., or any other statute or law.

In order to provide for the adequate regulation and control of all water, water courses, waterways, inlets, bays and bayous, in Pinellas county, and their alteration by dredging, filling, pumping, or otherwise altering the shore line, land contours and water areas, the Pinellas county water and navigation control authority was created and established, by Ch. 31182, 1955, for the purpose of protecting public rights, public welfare, protecting public riparian rights and preserving the natural beauty and attractiveness of the bays, bayous, harbors, streams, water courses and inlets in said county, as well as to assist boating activities and navigation in said county. This authority is expressly given power and authority to "regulate and exercise control over the dredging and filling of all submerged bottom lands in the waters of Pinellas county, together

with all islands, sandbars, swamp and overflow lands *including sovereignty lands.*" The said authority may file recommendation with the trustees of the internal improvement fund concerning the sale of lands under said §253.12, et seq., F. S., although such recommendations appear to be advisory only. (See §2 of the act.) The authority's regulation and control are made applicable to the "filling and dredging of all submerged lands, islands, sand bars, swamp and overflowed lands, including sovereignty lands," in Pinellas county (§4 of the act). Persons desiring to fill in submerged lands, extend islands, or construct islands in the navigable waters of Pinellas county, are required to apply to the authority for permits therefor, in the manner provided (see §8 of the act). In this connection said §8 expressly provides that "all pending applications for permits for dredging, pumping of sand and filling, filed pursuant to Ch. 29427, Sp. Acts, 1953, shall be cancelled without prejudice, and be of no further force and effect, as if the same had not been filed. . . ."

The authority, "in order to prevent undesirable situations which might result from promiscuous and uncontrolled filling of bottom land and the excavating of basins or channels without regard to what might result therefrom" may obtain engineering and other data and advice, including the holding of public hearings. The determination of the authority as to any application is subject to court review. (See §§8 and 9 of the act.) No permit from the authority seems to be required for the construction of a dock or wharf by an upland owner, although the same must be constructed in accordance with any rules and regulation that may be adopted by the authority for such purpose (§10 of the act). Persons making application to the trustees of the internal improvement fund for the purchase of lands under §253.12, F. S., are required to file a copy of their application with the authority, and the authority may make recommendations concerning the same to the said trustees. (See §12 of the act.) The findings and orders of the authority may be enforced by proceedings in equity (§15 of the act) and violations of the said act are made a misdemeanor (see §16 of the act). Any recommendations by the authority to the trustees of the internal improvement fund, concerning the sale and conveyance of submerged lands, will not bind the authority to grant a permit for the filling or dredging of such lands (§12, sub §(e) of the act). We find no exception in this act as to submerged lands owned by persons, firms and corporations at the time of its enactment or lands that may be subsequently acquired.

The said act vests in the authority jurisdiction and power to "regulate and exercise control over the dredging and filling of all submerged bottom lands in the waters of Pinellas county . . . , including sovereignty lands." (§2 of the act). This provision seems to be all inclusive and is applicable to the state and its agencies, as well as all persons, firms and corporations; but not to the federal government. The provisions and requirements of Ch. 29427, 1953, now repealed, covered about the same general field as does the present act above discussed. Permits issued under this act expire 2 years from their date (see §5 of the act).

We come now to the question of the nature of said 1953 and 1955 acts regulating water bottoms in Pinellas county. Police

power has been said to be the exercise of the sovereign right of government to promote order, safety, health, morals and general welfare of society (16 C. J. S. 889, §174). It is an inherent attribute of sovereignty (16 C. J. S. 891, §175) whose scope is difficult to fix. The constitutional right of property is subject to the legitimate exercise of the police powers of the state, which may enact statutes regulating, restraining and prohibiting those things deemed harmful to the well-being of the public (16 C. J. S. 1056, §209, note 53). The state, through the exercise of its police powers may impose restrictions upon the use of property in the interest of the public health, morals, safety and welfare (*Miami Beach v. Ocean and Inland Co.*, 147 Fla. 480, 3 So. 2d 364). Zoning statutes and ordinances have usually been upheld as a valid exercise of the police powers of the state (58 Am. Jur. 950, §18; 16 C. J. S. 1206-1209, §239; 16-A C. J. S., 326, §§506 and 1179, §703). Pursuant to the exercise of the police power, the right of private property may be limited, restricted and impaired so as to promote the general welfare, as well as to promote and improve public order (16 C. J. S. 1058, §209).

The navigable waters of the U. S. are subject to the control of congress, in so far as commerce is concerned, which has the power to legislate with respect thereto so far as commerce is concerned (65 C. J. S. 61, §10). Congress, by §1, Title 33, of the U. S. code, has made it the duty of the secretary of the army to prescribe and enforce "such regulations for the use, administration and navigation of the navigable waters of the U. S. as in his judgment the public necessity may require." The powers delegated to the secretary of the army are exercised by and through the U. S. army engineers. Licenses or permits issued by the secretary of the army, by and through the army engineers, are mere licenses to do the work and not grants of power to do it. Such licenses or permits are merely findings and declarations that the structure or work will not be detrimental to navigation, and standing alone do not supersede the control of a state over its navigable waters and lands under water. (65 C. J. S. 67, §11.) Unlike the federal government, a state in the regulation of navigable waters and the lands thereunder is not limited to regulations for the purpose of navigation and commerce, but may regulate and control navigable waters and the lands thereunder for any purpose within the scope of its sovereign, governmental and police powers (65 C. J. S. 63, §10). A license or permit from the U. S. engineers to dredge or fill in an area in navigable waters is merely a declaration that such dredging or filling in will not unduly interfere with navigation on such navigable waters; it is merely a license to do such dredging or filling and not a grant of power to do dredging or filling. A license or permit to dredge or fill in an area under navigable waters, where such dredging or filling in is not expressly designed to improve navigation, being only a license to dredge or fill in and not a power to dredge or fill in, is subject to any state regulations or rules, applicable to such dredging or filling in, adopted under the police powers of the state.

Chapter 31182, 1955, is an exercise of the police powers of the state, as was Ch. 29427, 1953, now repealed. Said Ch. 31182, 1955, is similar in nature to a zoning ordinance, as was also Ch. 29427, 1953, and is applicable to the dredging and filling of all submerged lands, as well as all islands, sandbars, swamp and over-

flowed lands, including all sovereignty lands, in Pinellas county, generally. As with zoning statutes and ordinances, the application or attempted application of the statute may under some facts and circumstances violate constitutional rights; however, under these circumstances it is the application and not the statute that would be invalid.

Something has been mentioned concerning the sufficiency of the notice, published under and pursuant to §21, Art. III, State Const., of intention to apply for the enactment of said Ch. 31182, 1955; however, this would raise a constitutional question which this office leaves to the courts. Furthermore, should said Ch. 31182 be invalid, Ch. 29427, 1953, probably would not have been repealed and may remain in force and effect.

The above stated question is, therefore, answered in the affirmative, subject to the last above observations.

056-296—October 2, 1956

COURTS

JUSTICE OF THE PEACE — BREACH OF THE PEACE; DEFINITION, AUTHORITY TO ISSUE WARRANT

To: J. Tom Watson, Justice of the Peace, Lakeland

QUESTION:

Has a justice of the peace legal authority to issue a warrant in his jurisdiction charging an individual with a breach of the peace in the following situation: Where in a closely inhabited neighborhood, not within a corporate city limits, a "party" is held attended by at least 30 people, lasting from 9:30 p.m. until 3:00 a.m. wherein there was loud cursing and singing of obscene songs, strong evidence of intoxication; also occupants of 10 homes in the immediate vicinity were disturbed and one of the informants said her 9- and 10-year-old sons were kept awake most of the night and could plainly hear the obscene songs, said party being louder from 11:00 p.m. until 3:00 a.m.?

As to the right of a justice of the peace to issue a warrant charging an individual with breach of the peace, not within a corporate city limits, where such a disturbance as above mentioned exists, this office, after a thorough study of the authorities, answers the question in the affirmative.

As to breach of the peace, it is set out and defined in 11 Corpus Juris Secundum, Breach of the Peace, §2, p. 818, as follows:

"Breach of the peace is a *common law offense*. It has been said that it is not a *specific offense*, although it may be, and at times is, recognized as such by statute or otherwise.

"The offense may consist of acts of public turbulence or indecorum in violation of the common peace and quiet, of an invasion of the security and protection which the

laws afford to every citizen, or a violation of any law enacted to preserve peace and good order, or of acts such as tend to excite violent resentment or to provoke or excite others to break the peace. The acts involved, to constitute a breach of the peace, must also be voluntary, unnecessary, and contrary to ordinary human conduct. *Whether or not a given act or state of conduct amounts to a breach of the peace depends upon the circumstances attending the act.*" (Emphasis supplied.)

Therefore the term "breach of the peace" amounts to an offense which may in effect cover many offenses.

As to "disturbing the peace," this offense is usually couched in the offense of "breach of the peace." (See Am. Jur., Vol. 8, §3; 4 Fla. Jur., Breach of the Peace, §2; Vol. 3, F. L. P., Breach of the Peace, §3.) However, a breach of the peace might possibly be charged where no disturbance exists (*Johnson v. State*, 51 Fla. 44, 40 So. 678).

In 4 Fla. Jur., Breach of the Peace, §2, footnote 5, we find that disturbing the peace, disorderly conduct and breach of the peace are not defined by statute in Florida, possibly because these are offenses more appropriately within the purview of city or town ordinances.

Wharton's Criminal Law, Vol. 2, §1881, p. 2212, defines the offense of breach of the peace as follows:

"Breach of the peace occurs through personal violence, and also through acts or words, whether of turbulence and open disorder or of public indecorum. It includes saying or doing that which tends to provoke or incite others to violence; all acts and attempts to produce disorder by oral or written expressions or communications for the purpose of weakening legal, religious, or moral restraints against excesses, in word or act, of emotions, affections, or desires; the saying or doing that which alarms or arouses terror or fear, or creates disquieting apprehensions, or disturbs the tranquility and repose enjoyed by good citizens where order prevails."

L. R. A., 22, p. 353, state in note on *blasphemy and profanity as crimes indictable* at common law, the following:

"The public use of profane and blasphemous language in the presence and hearing of divers persons is as (sic: an) indictable offense. *State v. Steele*, 3 Heisk. 135.

"As tending not only to a disturbance of the peace and to corrupt the moral of the community, but also to undermine the foundations of Christianity, which is justly regarded in a certain sense as a part of the common law of the land. . . . So public profane swearing, as well as blasphemy, was an indictable offense at the common law, but it must take such form and be uttered under such circumstances as will constitute a public nuisance, the mere utterance of a single profane word not being sufficient to constitute an offense punishable by indictment provided it be

not loud or with repetitions. . . . If three or four persons be present and hear the words uttered there is sufficient evidence of guilt. *Goree v. State*, 71 Ala. 7." (Emphasis supplied.)

Inasmuch as Florida has no statute defining breach of the peace and as the acts in question happened without the jurisdiction of any municipality where such conduct might have been covered by ordinance, the question as to whether or not a breach of the peace occurred under the circumstances set out in the above factual situation would have to be governed by the common law.

After carefully considering the authorities dealing with the offense of breach of the peace, it would seem that the facts presented by your question would support an arrest warrant for a common law breach of the peace.

056-297—October 2, 1956

CRIMINAL PROCEDURE

AUTOPSIES — DUTY OF FUNERAL DIRECTOR TO RELEASE BODY—§§932.57, 470.22, 470.28, 936.02, 936.03, F. S., AND CH. 31063, 1955.

To: *Richard H. Cooper, Orange County Solicitor, Orlando*

QUESTIONS:

1. Where relatives of a decedent object to the performance of an autopsy on a body in the possession of a funeral home, does the funeral home have any authority to refuse to release the body to a medical examiner for the purpose of an autopsy either by the officers designated by §932.57, F. S., or Ch. 31063, 1955?

2. If a funeral director refuses to release a body to a medical examiner for the performance of an autopsy, when the medical examiner is authorized and directed to perform an autopsy under the provisions of either §932.57, F. S., or Ch. 31063, 1955, what action can be taken, if any, to compel the funeral director to release the body and to what penalty and punishment, if any, does the funeral director subject himself to, by so refusing?

AS TO QUESTION 1:

It must be recognized that autopsies are sometimes essential to protection of health and the discovery of crime. In such a case, the welfare of society demands that the state or its authorized representatives be permitted to conduct an examination by dissection if necessary without reference to the wishes of the relatives of the dead. A legitimate public purpose takes priority over a private purpose. Section 932.57, F. S., relating to the power of certain prosecutors to order autopsies, grants a county solicitor power to have autopsies performed *whenever in his opinion* such autopsies are necessary in order to ascertain whether death resulted from a criminal act or as a result of criminal negligence, the exercise of the power explicitly being discretionary.

Section 470.22, F. S., prohibits an embalmer from proceeding to embalm a dead human body when he has knowledge of any fact sufficient to raise the suspicion of crime in connection with the cause of the death of the deceased until permission of the coroner or other proper officials in whose jurisdiction the embalming is to be performed has been obtained. The exercising of the discretionary power of the county solicitor to have an autopsy performed, as provided by §932.57, F. S., supra, whereupon this duly authorized officer could order an autopsy performed, when communicated to a funeral home would reasonably supply knowledge of a fact sufficient to raise the suspicion of crime in connection with the cause of death of the deceased. Thus it would be unlawful under §470.22, F. S., for the funeral home to proceed to embalm the body until permission of the proper official in whose jurisdiction the embalming is to be performed has been obtained. The county solicitor desiring an autopsy to be performed when such is communicated to the funeral home would clearly seem to be sufficient to prohibit any subsequent embalming of the body, under law. Should the funeral director so proceed in embalming the body, he would be subject to the penalty of §470.28, F. S., which provides both a fine and imprisonment for violation of Ch. 470, F. S.

Chapter 31063, Sp. Acts of 1955, specifically creates the office of county medical examiner in Orange county and grants to him the power and authority to make an autopsy as may be requested by the proper prosecuting attorney. Section 3 of this law specifically sets forth that should any person die in any suspicious or unusual manner, the county medical examiner shall have the power and authority to perform such duties as may be provided by law and by this particular act, as well as to make such examination, investigations and autopsies as may be requested by the proper prosecuting attorney. Section 4 of this act provides that upon request of certain officers, the county medical examiner *shall go to and may take charge* of the body of such person. Section 5 of this act provides that if in the *opinion* of the county medical examiner or proper prosecuting attorney, an autopsy is necessary, the same shall be performed by the county medical examiner.

Thus the statutes are clear in granting the power to have an autopsy performed to either the proper prosecuting attorney or the county medical examiner, whenever in their respective opinions, such an autopsy is necessary.

The power to make an autopsy being perfectly clear, the funeral home would be unwarranted in resisting the proper authority or refusing to release the body to a medical examiner for the performance of an autopsy authorized by law. The medical examiner under the statute is a legally authorized person and the performance of an autopsy would be in the lawful execution of a legal duty.

The medical examiner making or performing an autopsy would clearly be acting within proper statutory authority. As such, a funeral home would have no authority to refuse to release the body to said examiner, even though the relatives of the deceased object to the performance of an autopsy.

15 Am. Jur., Dead Bodies, §28, sets forth the proper rule to

the effect that an official autopsy may be permitted *without reference to the wishes of the relatives of the dead*. The welfare of society demands that such investigations take priority in that autopsies oftentimes are essential to the discovery of crime. 25 C. J. S., Dead Bodies, §8 (2), pp. 1027-1028, supports this view to the effect that there is no liability *where performed under legal sanction*. Florida clearly provides the necessary procedures for the performance of an autopsy, and the funeral director has no authority to refuse to release a body to a medical examiner for the performance of said autopsy. These observations seem to answer your above question 1.

AS TO QUESTION 2:

It would seem that should the embalmer have notice from the medical examiner of the latter's desire to perform an autopsy, such would constitute knowledge of a fact sufficient to raise the fact of suspicion of crime in connection with the cause of the death of the deceased, thereby making it unlawful to embalm the body, as pointed out in question 1, *supra*, under the authority of §470.22, F. S.

The general rule as found in 15 Am. Jur. 849, acknowledges the fact that sometimes autopsies are essential to the protection of health and the discovery of crime. As that volume specifically points out, in such a case, the welfare of society demands that the state or its authorized representatives (in this case, the county medical examiner) be permitted to conduct an examination by dissection if necessary *without reference to the wishes of the relatives of the dead*. Hence, under long recognized rules of law, a coroner has the right to perform an autopsy or have one performed where reason therefor exists to determine by what means the deceased met his death. This factor is recognized by the last cited authority, at p. 849. The general purpose of an autopsy is to determine, where there has been a death from an unknown cause, by what means the person met his death. The conditions under which an autopsy should be performed are prescribed by §932.57, F. S., and Ch. 31063, Sp. Acts of 1955, both cited statutes making the performance of an autopsy discretionary with the proper authorities as outlined in question 1, *supra*. Section 5 also provides that in case of a coroner's inquest, a copy of the medical examiner's report shall be furnished to the justice of the peace and the attendance of this county medical examiner or the doctor making such autopsy at such inquest, shall be mandatory when requested by the justice of the peace holding such inquest.

Chapter 936, F. S., specifically provides for inquests of the dead. Section 936.02, F. S., provides when inquests may be taken, and sub §(4) of that section sets forth *that such may be ordered by a court of record* having jurisdiction of felonies upon petition of the prosecuting attorney thereof. Section 936.03, F. S., provides that the coroner shall make a preliminary investigation into the facts and circumstances surrounding the death. If upon consideration of such reports and upon such further investigation of the facts and circumstances surrounding the death as the proper authority may deem necessary, said authority finds that there is reasonable ground for believing that such death was caused by the criminal acts or criminal negligence of another and further finds that

an inquest is necessary, he shall direct that the coroner forthwith cause the coroner's jury to be summoned and appear before him at a specified time and place, to inquire, *after a view of the dead body, how and in what manner* and by whom the deceased came to death. Thereupon, a coroner's jury shall be summoned for such purposes. The coroner clearly having authority by statute to cause a coroner's jury to be summoned to appear before him to inquire, *after a view of the dead body, how and in what manner* and by whom the deceased came by death, it is clear the legislative intent is that the county medical examiner has the authority under the new statute to perform an autopsy in order to determine the cause of death, etc. Since an inquest may be ordered by a court of record having the jurisdiction of felonies, under §936.02, F. S., it would necessarily follow that a funeral home director would have to release the body to the proper authorities for the purpose of determining, *after a view of the dead body, how and in what manner* and by whom the deceased came to death. Moreover, should an inquest be taken when otherwise ordered by a court of record having jurisdiction of felonies, upon petition of the prosecuting attorney thereof, as provided by §936.02 (4), F. S., the refusal of a funeral director to release the body to a duly authorized medical examiner would constitute contempt. The supreme court of Florida has held that any act which is calculated to embarrass, hinder or obstruct the court in the administration of justice or which is calculated to lessen its authority or its dignity is a contempt (*Clein v. State*, 52 So. 2d 117). And as found in *State v. Petteway*, 131 Fla. 516, 179 So. 666, the disobedience of a court's lawful order is such interference with due administration of justice as to constitute contempt.

Thus it would seem that a funeral director's refusal to release a body to a medical examiner when an inquest has been ordered by a court of record having jurisdiction of felonies, would result in disobedience of a court's lawful order, so interfering with the due administration of justice as to constitute contempt.

Another possible course of action to compel the funeral director to release the body would be to obtain a mandatory injunction. This extraordinary remedial process commands the performance of some positive act, and it is well settled that courts of equity have jurisdiction in proper cases to compel the performance of an act as well as to restrain it. It is resorted to usually for the purpose of effectuating full and complete justice (*See 43 C. J. S. 409*), and the Florida courts are committed to the doctrine that such relief will not be granted until after final hearing *except* in rare cases *where the right is clear and free from reasonable doubt*. (*American Fire & Casualty Co. v. Roder et al.* 160 Fla. 700, 36 So. 2d 270). The right to have an autopsy performed is quite clear and free from reasonable doubt by the explicit legislative provisions of §932.57, F. S., and Ch. 31063, Sp. Acts of 1955, the latter of which grants such power to either the proper prosecuting attorney or the county medical examiner, whenever in their respective opinions such an autopsy is deemed necessary.

Thus, it would appear that in answer to your question 2 that an inquest could be held when ordered by the proper court upon petition of the prosecuting attorney, with the refusal of a funeral

director to release the body constituting contempt. Moreover, the use of the extreme remedial device of a mandatory injunction to compel positive action by the funeral director to release the body to the proper official for the performance of an autopsy would appear to be most appropriate. This is so since the right to have an autopsy performed is clear and free from reasonable doubt. No autopsy could be performed unless the funeral director released the body, and such circumstances clearly constitute an exception for the proper use of such positive action. These observations seem to answer your question 2.

056-298—October 3, 1956

STATE BUDGET COMMISSION

REVOLVING FUNDS—DEPOSITING IN BANKS—ESTABLISHMENT BY BUDGET COMMISSION—§§18.101, 240.092, 240.10, 240.101 AND 381.191, F. S.

To: *State Budget Commission, Tallahassee*

QUESTION:

1. May state agencies, boards, bureaus, commissions, institutions and departments, whose offices are located in Tallahassee, having revolving funds, deposit such funds in banks under §18.101(2), F. S.?

2. May the state budget commission set up revolving funds for state agencies, boards, bureaus, commissions, institutions and departments whose offices are located in Tallahassee?

These questions call for a construction of §18.101(2), F. S., and the determination of its application in Tallahassee. Said §18.101(1), is expressly limited to those state agencies, boards, bureaus, commissions, institutions and departments *whose offices are located elsewhere than in Tallahassee*. Nowhere in §18.101(2), is there any language expressly limiting its application to state agencies, boards, bureaus, commissions, institutions and departments whose offices are located elsewhere than in Tallahassee. Subsection (1) of the said section relates to the deposit of *public funds collected* by state agencies, boards, bureaus, commissions, institutions and departments, while subsection (2) relates to the deposit of revolving funds maintained by state agencies, boards, bureaus, commissions, institutions and departments.

Subsection (1) of said section was designed to permit the deposit of moneys collected by those state agencies, boards, bureaus, commissions, institutions and departments whose offices are located in places other than Tallahassee. There seems to be a logical reason for providing for the banking of such collections in the localities where collected. In Tallahassee it is convenient to deposit such collections in the state treasury; but outside of Tallahassee, such collections, which usually consist of large sums of money, as well as checks and other negotiable paper, are expensive to transmit to Tallahassee. Further, where checks and other negotiable paper are taken in connection with the collection of state funds, should they be transmitted to Tallahassee for deposit in the state treas-

ury, there would be a delay of several days, sometimes amounting to a week or two, before they are returned to the bank or other institution on which drawn. Should such checks turn out to be "bad checks" the fact that they are sent to Tallahassee will cause a delay of several days in determining their validity, while their deposit in the locality where received will save time in making this determination.

Subsection (2) of the said section relates to the deposit of moneys and funds in revolving accounts for state agencies, boards, bureaus, commissions, institutions and departments. The establishment of revolving accounts for state agencies, boards, bureaus, commissions, institutions and departments has often been for convenience, as well as to avoid the issuance of state warrants for amounts so small that the issuance and payment of the warrant may cost more than the face amount of the warrant. Revolving funds were used by the state livestock sanitary board, during tick eradication days, and by the Florida board of forestry, in its early days, when refunds in connection with cattle dipping, and compensation for fire fighting for short periods of time, sometimes only an hour or so, were often for sums less in amount than the cost of issuing and paying a state warrant. The purpose of subsection (2) of the said section permits the maintenance of the revolving fund in the bank instead of maintaining it in cash and oftentimes in an unsafe place. If revolving funds must be maintained in the state treasury with warrants being issued against them in the usual course, their very purpose would be defeated. The reason for depositing a revolving fund in a bank and maintaining it there, instead of maintaining the fund in cash in an office, is as strong in Tallahassee as in other locations throughout the state.

Although there appears to be valid reason for limiting the deposit of collections to places without Tallahassee, (such deposits may be made in Tallahassee in the state treasury as easily and as conveniently as in a bank), and excluding such deposits in Tallahassee, we find no like or similar reason for excluding revolving funds maintained in Tallahassee and including them in other sections of the state. Turning now to Ch. 28133, 1953, from which said §18.101, F. S., was derived, we find the portion of the title to said act when referring to the deposit of funds collected by state agencies, boards, bureaus, commissions, institutions and departments, limits the same to those agencies, boards, etc., whose offices are located elsewhere than in Tallahassee; however, the portion of the title which refers to deposits of revolving funds contains no such limitation.

The above observations lead us to the conclusion, and we so hold, that §18.101(2), F. S., is not limited to state agencies, boards, bureaus, commissions, institutions and departments "whose offices are located elsewhere than in Tallahassee," but also extends to those whose offices are located in Tallahassee. The 1st question is, therefore, answered in the affirmative.

There is express statutory authority for the setting up of revolving funds for agencies and institutions under the control of the board of commissioners of state institutions, the board of control, the state plant board, and the state soil conservation board,

to be established through resolutions of said agencies (§§240.092, 240.10 and 240.101, F. S.). The legislature set up a revolving fund for university research contracts (§241.62, F. S.), and one for the motor vehicle commissioner (§318.05, F. S.), and the state board of health may establish one for certain purposes, by and with the approval of the state budget commission (§381.191, F. S.). The legislature appears to have established one for the statutory revision department (§16.46, F. S.). Only one of the above mentioned revolving funds appears to be established with the consent of the state budget commission.

This brings us to the question of what revolving funds are referred to in §18.101(2), F. S., which provides that "revolving funds *authorized by the state budget commission* for all state agencies, boards, bureaus, commissions, institutions and departments, may be deposited by such agencies, boards, . . . in banks designated by the governor, comptroller and treasurer for such revolving fund deposits. . . ." Did the legislature by this provision intend to refer to revolving funds authorized or approved by the state budget commission under other statutes and laws, which would seem to be the one provided in and by §381.191, F. S.; or was it the intention of the legislature to grant, by said §18.101 (2), authority to the state budget commission to authorize or establish revolving funds for state agencies, boards, bureaus, commissions, institutions and departments when deemed necessary by the said board? Unless said subsection be construed as authorizing the establishment of such revolving funds, it would be of such limited application as to amount to an empty gesture on the part of the legislature. Where the meaning of a statute is doubtful, the law favors a rational, sensible construction (*Realty, Bond, Etc., Co. v. Engler*, 104 Fla. 329, 143 So. 152; *Haworth v. Chapman*, 113 Fla. 591, 152 So. 663; *State Department of Public Welfare v. Bland*, Fla., 66 So. 2d 59). We, therefore, feel that it was the intention of the legislature, by §18.101(2), F. S., to recognize and approve the establishment of revolving funds for all state agencies, boards, bureaus, commissions, institutions and departments, whether their offices be located within or without Tallahassee, by the state budget commission when the need for such revolving funds is clearly demonstrated. Such funds should never be established or be permitted to continue as a means of avoiding the requirements of §§4 and 10, Art. IX, State Const., or any statute of the state. The advancing of funds from such revolving funds by way of advances on salaries or expenses yet to be incurred would appear to be violative of said §10, of Art. IX, State Const.

These observations lead to the conclusion that the state budget commission may establish revolving funds under the above and foregoing limitations, which in turn answers the 2nd question in the affirmative.

056-300—October 10, 1956

SOCIAL WELFARE

DEPARTMENT OF PUBLIC WELFARE—PUBLIC ASSISTANCE, FRAUDULENT REPRESENTATION FOR PURPOSE OF OBTAINING—§409.36, F. S.

To: A. W. Graessle, Jr., Department of Public Welfare, Jacksonville

QUESTION:

Is an applicant or recipient of public assistance subject to prosecution under §409.36, F. S., for the withholding or concealment of information as to income or other resources which, if known, would result in lesser or no welfare funds being paid?

In my opinion the answer to the above question should be in the affirmative.

Section 409.36, F. S., where pertinent to the question, provides as follows:

“(1) Whoever knowingly obtains, or attempts to obtain, or aids or abets any person in obtaining or attempting to obtain, by means of a false statement or *representation* or by false impersonation, or by other fraudulent device, assistance or service to which he is not entitled, or assistance or service greater than that to which he is justly entitled . . . shall be guilty of a misdemeanor . . .

“(2) Upon becoming aware that any applicant or recipient has, by mis-statement, or by *withholding facts*, violated or attempted to violate, knowingly, any provision of this law . . . it shall be the duty . . . to promptly make a written report . . . to the department.” (Emphasis supplied.)

It is my understanding that the question presented herein was prompted by the absence of words specifically referring to withholding of information or facts in subsection (1) of the above quoted section defining the misdemeanor. If such is a proper objection it is overcome by the use of the word “representation” in subsection (1), and the further clarification of legislative intent through the presence of the term “withholding facts” in subsection (2).

It has been held by compelling legal authority that a “representation” is not restricted to the assertion of a fact, but there may be by conduct a constructive or implied assertion that a fact does exist. (See 77 C. J. S. 260.) Certainly the representation that public assistance is necessary by withholding information and feigning poverty is as fraudulent as the actual assertion of need when in fact such does not exist.

A representation may be accomplished by silence, in certain cases. (See *Ricks v. State*, 69 S. E. 576.) Silence, or concealment, under circumstances when one ought to speak and reveal the truth, is regarded as being in effect a representation. Even the concealment of a part of the truth with respect to the whole fact

has been held by eminent legal authority to give rise to a "representation" (Watson v. Prather, 65 S. W. 439; Palmer v. Welch, 154 S. W. 433).

Obviously, one of the purposes for which the legislature created the above law was to discourage, by punishing, applicants or recipients of public assistance who are aware that they are not legally entitled to such aid. Every fraudulent representation, no matter how accomplished, deprives the needy of that much assistance.

Mindful of the admonition that penal statutes should be strictly construed, and if any doubt exists it should be resolved in favor of an accused, I am nevertheless constrained to the opinion that the deliberate withholding of information with the knowledge that such is essential to the determination of need is a false representation and within the purview of the above quoted statute.

Your question is answered accordingly.

056-301—October 10, 1956

PUBLIC HEALTH

STATE BOARD OF HEALTH — CONVEYANCE OF REAL PROPERTY — CONSIDERATION — §381.171, F. S.

To: *William S. Walker, State Board of Health, Jacksonville*

QUESTION:

May the state board of health convey real property owned by or for it to a county or municipality in consideration of an agreement or covenant on the part of such county or municipality to furnish the said board of health office space for its regional or local office or offices?

Under sub §(2) of §381.171, F. S., the state board of health "may sell, lease or convey, in the name of the state for the use and benefit of the board, any land or buildings owned by the state for the use and benefit of the board, which lands and buildings are no longer necessary for the purposes of carrying out the purposes of" Ch. 381, F. S.

It appears from the file that the state board of health, or the state for the use and benefit of the state board of health, is the owner of certain lands in the city of West Palm Beach, having a present value of about \$25,000. It further appears that the said property was acquired on Oct. 26, 1900, by deed of conveyance from the Good Samaritan Hospital Assn. This conveyance appears to be in the usual form and contains no reservations or limitations upon the use or sale and conveyance of the said property. The state board of health, being an agency of the state and not a corporation, is an arm of the state so that a conveyance made to the board would in effect be a conveyance to the state for the use and benefit of the board. The above-mentioned property in West Palm Beach appears to be within the purview of said sub §(2) of §381.171, F. S.

It is noted that conveyances made by the board under said

sub § (2) of §381.171, are made for "the use and benefit of the board," which provision clearly indicates that the consideration received is to be for the use and benefit of the board. The authority to "sell, lease or convey in the name of the state for the use and benefit of the board," seems to contemplate a sale, lease or conveyance for a consideration and prevents the board donating or transferring its real property without consideration. However, we find nothing in the statute requiring that such sales, leases or conveyances be for a cash or monetary consideration. A conveyance based upon a covenant or agreement to furnish the board with needed office or other needed space for a period of time or perpetually would seem to be a sufficient consideration, if the space to be furnished is commensurate to the value of the property conveyed.

In the light of the above mentioned authorities and observations, the above question is answered in the affirmative.

056-302—October 12, 1956

STATE PRISON FARM

SUFFICIENCY OF METHOD USED FOR DISPOSITION OF BEEF CATTLE PRODUCED AT STATE PRISON FARM—§§952.10 AND 959.02, F. S.

To: *Bryan Willis, State Auditor, Tallahassee*

QUESTION:

May the board of commissioners of state institutions make arrangements with an abattoir, slaughter house or meat packing plant to receive beef cattle produced at the state prison farm in exchange for credit memoranda or certificates for the delivery of dressed beef to the said board for use in state institutions; conditioned, however, if the amount of the credit memoranda or certificates be not redeemed within 60 days that the board be paid the stated amount in cash?

This question involves either an exchange or barter of beef cattle for dressed beef or the sale of beef cattle and the purchase of dressed beef. The history of the state prison farm and its purpose may have some bearing upon this question and the power, jurisdiction and authority of the board of commissioners of state institutions in this connection.

The legislature, by Ch. 5941, 1909, appropriated \$50,000 to be used, by the board of commissioners of state institutions, in the purchase of lands "suitable for agricultural purposes" to be used as a state prison. We are advised that the board purchased 8,154 acres of land under this authorization and appropriation, and obtained an option to purchase 7,445 acres of additional lands. The legislature, by Ch. 6134, 1911, appropriated funds for the purchase of the optioned lands, pursuant to which the option was exercised and the lands purchased. After the purchase of the above lands, aggregating more than 15,000 acres, the legislature, by Ch. 6530, 1913, established a state prison farm on the lands so purchased; which lands now constitute the state prison farm.

The fact that the 1909 legislature directed the purchase of lands "suitable for agricultural purposes," and the provision in §14 of said Ch. 6530 that "all proceeds from the sale of any and all products of the state prison farm shall be deposited with the state treasurer . . .," and §952.10, F. S., which authorizes the use of state convicts in growing sugar cane and other crops, clearly indicates an intention on the part of the legislature that ordinary and usual farming operations be carried on at the state prison farm. We, therefore, conclude that the state prison farm is in the nature of a farming operation, as well as a state prison; that the usual farming operations in the section of the state where the prison farm is located was contemplated by the legislature when the prison farm was established. The area purchased and the area now owned by the state for prison farm operations may well contemplate not only the usual farming operations in the area of the state where the prison farm is located but timber and livestock operations as well.

Farming operations often include stock raising, as well as crop raising (35 C. J. S. 746-750; also Fla. Indus. Com. v. Growers Equip. Co., 152 Fla. 595, 12 So. 2d 889, text 894). Farm products have been held to include livestock, swine and sheep, poultry, dairy products, and many other things (35 C. J. S. 750, notes 20 and 21). Cattle raising has been carried on in connection with farming operations for many years by farmers in the portion of the state where the state prison farm is located, as well as elsewhere. Doubtless the legislature, when the provisions were made for the purchase of the prison farm and when it was established as a state prison (1909, 1911 and 1913), contemplated cattle raising as one of the farming operations and as a source of food for the state prisoners, as well as for other state institutions.

Livestock raising, like many farming operations, is largely seasonal. Calves are usually born in the spring of the year. Cattle are ready for market and are usually sold in the fall of the year after the summer grazing season is over or about over. This being true, the slaughter of cattle at the prison farm is not a day-to-day operation, but by its nature, seasonal. The want of sufficient cold storage facilities at the prison farm or other state institutions prevents the storage of large quantities of dressed meat by the state. These circumstances and facts show that the state is not equipped to handle the dressed meat as and when ready for slaughter. Some arrangement must, therefore, be made for the obtaining of dressed meat as and when needed by the several state institutions using prison farm meat.

We come next to a determination and construction of the plan or arrangement mentioned in the above question. The said arrangement bears a similarity to the barter system formerly used by grist and rolling mills. The farmers took their grain to these mills and received in exchange for their grain, meal or flour in an equivalent amount, less toll charged; unless a fee was charged for the milling of the grain. Usually for a bushel of grain, the farmer received 48 pounds of meal or flour. Sometimes the farmer received meal or flour milled from his grain; however, in most instances he received meal or flour milled from grain of like grade. These transactions were not sales and purchases, but were in the

nature of a barter of grain for meal or flour. The transactions mentioned in the request for opinion have many features of a barter of livestock for dressed meat, with a further agreement converting the barter arrangement into a sale if the dressed meat is not taken up by the state within 60 days. Such an arrangement between a cattle farmer and a slaughterhouse would seem to be a valid one. The barter arrangement might also be one providing for the delivery of a certain number of pounds of dressed meat for a certain number of pounds of cattle on the hoof. The barter arrangement used is one for meat at the market price to a fixed value. We construe the arrangement to be one of barter with an added feature converting the barter into a sale at the end of 60 days as to any dressed meat not called for by the state within 60 days after the delivery of the livestock to the slaughterhouse.

Doubtless it was contemplated by the contracting parties that the meat to be delivered for any lot of livestock would and could be used by the state within 60 days. Where the meat is not used within 60 days, there would seem to be an indication that the state might be producing meat faster than it was able to use it. This would seem to justify the arrangement converting the barter arrangement into one of sale at the end of 60 days as to uncalled-for meat. The request for opinion indicates that bids are called for when the cattle are offered for slaughter. This would seem to be justified in connection with the 60-day limitation after which the barter arrangement is converted into a sale as to uncalled-for meat. The arrangement being primarily one of barter and not of sale, we find nothing illegal about it, although it is converted, by the agreement, into a sale as to uncalled-for meat at the end of 60 days.

The above question is, therefore, answered in the affirmative, with the following observations:

1. The so-called credit memoranda are not in lieu of cash but are indica of the dressed meat to be received by the state in return for the cattle received, and may be assigned to any state institution using meat in the manner provided by law.

2. The delivery of the cattle to the slaughterhouse in exchange for dressed meat is not violative of §10, Art. IX, State Const.; in this connection the 60-day provision mentioned does not authorize or become a sale until the end of the 60-day period.

3. There is no delay in depositing the money received for state livestock for a 60-day period, this because the sale is not completed until the 60-day period has run.

4. We find no evidence that the funds received, if any, from the packing houses at the end of 60 days have been deposited in the industrial trust fund (§954.51, F. S.), therefore we do not think that it is proper for us to discuss this matter.

5. After examining the acts from which §§116.13 and 116.14, F. S., were derived, we fail to find that they have any application to the state prison farm.

6. We do not think that cattle raising is the growing of crops or the sale of manufactured or mined goods, wares or merchandise, within either §952.10 or §959.02, F. S.

7. Although dressed meat obtained for the state under the barter arrangement is not strictly speaking a "sale" we feel that the state purchasing council statute (Ch. 287, F. S.) should be complied with as nearly as may be under the circumstances.

056-303—October 12, 1956

PUBLIC HEALTH

FLORIDA FARM COLONY—DISPOSITION OF BODIES OF PATIENTS WHOSE PARENTS ARE INDIGENTS— §245.06, F. S.

To: *R. C. Philips, Superintendent Florida Farm Colony, Gainesville*

QUESTION:

Does §245.06, F. S., require the Florida farm colony to deliver the bodies of deceased patients to the state anatomical board if the parents or guardians of the deceased patients are known but are financially unable to pay for burial and request burial at the farm colony's own cemetery plot?

Section 245.06, F. S., provides, in part:

"Unclaimed dead bodies, disposition, procedure.—All public officers, agents or employees of every county, city, village, town or municipality and every person in charge of any prison, morgue, hospital, funeral parlor or mortuary and all other persons coming into possession, charge or control of any dead human body which is unclaimed or which is required to be buried at public expense are hereby required to notify, immediately, the anatomical board of the state, or such person or persons as may from time to time be designated by the said board, whenever any such body or bodies come into his possession, charge or control; . . . the board shall make reasonable effort to determine the identity of the body and shall further make reasonable effort to contact any relatives of such deceased person; upon the receipt by a licensed embalmer or funeral director of an unclaimed body or one which must be buried at public expense, such embalmer or funeral director shall embalm said body by the most acceptable procedure; such dead human bodies as described in this chapter shall be delivered to the board through its duly authorized agents as soon as possible after death, provided that nothing herein shall affect the right of a coroner or a justice of the peace to hold such dead body for the purpose of investigating the cause of death, nor shall this chapter affect the right of any court of competent jurisdiction from entering an order affecting the disposition of such body."

Although this act does make a reference to bodies to be buried at public expense, it is my opinion that the legislature did not intend this to be the governing factor in determining which bodies are to be turned over to the anatomical board.

The principal and governing factor in such cases is, in my opinion, that the body be unclaimed and the relatives unknown. Since this is not the situation contemplated in your request for an opinion, your question is answered in the negative.

056-304—October 12, 1956

TAXATION

DISPOSITION OF OUTSTANDING TAX SALE CERTIFICATE AFTER COUNTY FORECLOSURE—§§194.47 AND 194.55, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where, when title to real property becomes vested in a county pursuant to a foreclosure under §194.47, F. S., there is outstanding a tax sale certificate, held by a person, firm or corporation, encumbering the lands, what are the rights of the said tax sale certificate holder and what disposition may be made of his tax sale certificate?

Often when a county delinquent tax foreclosure is had there will be outstanding tax sale certificates in the hands of persons, firms or corporations encumbering the same lands; usually such certificates are prior in date to the ones involved in the foreclosure; however, sometimes they are subsequent to those involved in the foreclosure. Although the statutes require that lands encumbered by a county held tax sale certificate be assessed to "county certificate" and that no taxes be extended, often through oversight or error this statute will not be followed and a tax sale will be held on such an assessment and a subsequent tax sale certificate will be issued. The request for opinion involves a tax sale certificate of the latter class.

An examination of §194.55, F. S., reveals a duty on the clerk of the circuit court, upon the sale of tax delinquent lands obtained by the county pursuant to a delinquent tax foreclosure, to calculate and ascertain the amount of the several tax and assessment levies that would have been due except for the foreclosure, the amount of the costs and expenses, etc., and to "first pay the expenses and costs of sale, and the fees of the county tax assessor, the county tax collector and the clerk of the circuit court, and shall distribute the balance of the proceeds from the sale of the lands to the . . . and individually held state, county or municipal tax sale certificates or individually held drainage assessment certificates, not barred by law, shall participate pro rata in such distribution in proportion that the same bear to the total of all unpaid liens for general taxes and accrued annual drainage assessments, taxes and liens," however, no individual, firm or corporation may receive an amount in excess of the sum or sums necessary to redeem their taxes or tax liens. There is no distinction made in this statutory provision between privately held tax sale certificates, whether they be subsequent or prior to the tax sale certificates forming the basis for the county's title. Where

there is a privately held tax sale certificate issued subsequently to the tax sale certificate upon which a county delinquent tax foreclosure was predicated, we do not think that a refund of the amount paid for such certificate may be made, the rights of such tax sale certificate holder are determined and controlled by §194.55, F. S.

The above observations seem to answer the above question.

056-305—October 16, 1956

COUNTY ORGANIZATION, OFFICERS AND REGULATIONS
EXPENDITURE OF COUNTY FUNDS BY FEE OFFICER FOR
NATIONAL CONVENTION—§145.02, F. S.

To: Bryan Willis, State Auditor, Tallahassee

QUESTION:

May certain expenditures incident to the national convention of officials of which the county officer is a member, be charged to the expenses of the office of the county officer under Ch. 145, F. S., irrespective of whether or not the county commissioners of the county are empowered to expend funds for county publicity?

In order to crystallize the question you ask, for example, may a county tax assessor, clerk of the circuit court, or other county fee officer, charge to the operation of his office, expenses incurred by reason of entertaining the national convention of his association.

This calls for the consideration of §145.02, F. S., defining net income, which insofar as here material is stated to be the income remaining after deducting "... necessary expenditures for the proper operation of the office."

Recently, we have held that the cost of booklets, pamphlets, films, radio and television programs, designed to promote safety and better law enforcement, is a proper expense of the sheriff's office, (opinion 056-172 dated June 12, 1956). We also held in opinion 055-285, dated Oct. 27, 1955, that reasonable sums may be charged to office expense of the sheriff for the junior deputy program. More recently, in opinion 056-178, dated June 20, 1956, we outlined the formula to determine whether or not a county judge might charge his reasonable expenses incurred in attending his association's convention outside the state or in a foreign country. There we fixed the criteria as whether or not the attendance of the officer benefits his county.

None of the above mentioned opinions assist us in arriving at a conclusion in this instance. While favorable publicity may naturally flow to a county entertaining a national convention, it would require considerable stretch of the imagination to conclude that such entertainment rendered the officer more valuable to his county in the discharge of his official duties, as contemplated by opinion 056-178.

Normally, publicity given to a county is a function under supervision of the board of county commissioners by virtue of a special act. We note that Ch. 8661, 1921, as amended by Ch. 18470,

1937, empowers the board of county commissioners of Dade county to levy not more than one mill for county publicity. However, we do not think the publicity which flows from such a convention is the measuring stick to be applied. In all the opinions above referred to, we were dealing with the expenses incurred by the individual officer in connection with the proper operation of the office, as distinguished from expenses here incurred by way of financing a convention of persons having no official position or standing with the county against which it is proposed to charge the expenses.

It is my opinion that the expenses contemplated would not constitute a necessary expenditure for the proper operation of the office, and the question should be answered in the negative.

056-306—October 16, 1956

COURTS

PROPOSED AMENDMENT TO ART. V, STATE CONST.—CONSTRUCTION OF WORDS APPEAL “AS A MATTER OF RIGHT”

To: *LeRoy Collins, Governor of Florida, Tallahassee*

QUESTION:

If the proposed amendment 1 to the judiciary article provides for an appeal as a “matter of right,” does this mean that the appellant will have an indefinite time within which to prosecute his appeal, so that he can thus delay appeals unduly and thereby disrupt the economy of the state?

An appeal “as a matter of right” is simply an appeal in which the court *must* take jurisdiction, as distinguished from *certiorari*, where the assertion of jurisdiction by the court is discretionary.

Litigants now can appeal as a matter of right, and this has been our practice in Florida for generations because the time within which the appeal may be taken is limited by court rule. Many years ago litigants were allowed two years to perfect an appeal. Now, it is cut down to 60 days in civil cases and 90 days in criminal cases by court rule.

If amendment 1 is adopted and if Art. V, State Const., is thus revised, the right to prescribe time limits on appeal will be continued in the supreme court of Florida or in the legislature. The revised article, in other words, simply continues the current practice under the existing constitution of allowing the supreme court or the legislature to set time limits for taking appeals.

This is done in two different ways: First, §3 of the new article confers on the supreme court the power to make rules governing procedure (as the court now does); Secondly, §26 of the new article continues in effect all existing provisions of law and all court rules not inconsistent with the remainder of the revised article.

Thus, if article V is revised by the passage of amendment 1 on the forthcoming ballot, the time limits on appeal will remain exactly as they are now unless the court or legislature changes them, which either has the power to do whether amendment 1 is passed or not.

The question is answered in the negative.

056-307—October 17, 1956

LIQUORS AND BEVERAGES

LOCAL OPTION ELECTION—DUTY OF COUNTY COMMISSIONERS—CH. 567, F. S.

To: *Thos. J. Shave, Jr., Board of County Commissioners, Nassau County*

QUESTIONS:

1. In view of the general election law of Florida, as applied to the requirements of Ch. 567, F. S., is it necessary for an elector to sign his name to the petition exactly as it appears in the registration books of the county, and if so, should the name be signed as it is typed or printed in the registration book or as the elector signed his name in the registration book, or would either signature be acceptable?

2. Should an elector sign his name in a manner different than either of the names in the registration book how should the supervisor of registration or the board of county commissioners determine that the elector has PERSONALLY signed the petition, that is, by affidavit or personal appearance of the elector or affidavit of some third person who witnessed the signature?

3. Is it proper for the board of county commissioners to accept and rely solely on the certificate of the supervisor of registration as to whether there are signatures of one-fourth of the duly qualified electors of the county personally signed to the petition, and if not, what is the requirement of the board in making this determination?

4. What is the proper date upon which to determine the total number of duly qualified electors in the county in order to determine the required number of signers of the petition, that is, should this number be determined as of the date of the filing of the petition or the date upon which the supervisor of registration files the certificate declaring the total number of duly qualified electors of the county?

Subsection (1) of §567.01, F. S., provides as follows:

"The board of county commissioners of each county shall order an election to decide whether the sale of intoxicating liquors, wines or beer shall be prohibited in said county and if not prohibited, to decide the method of sale, upon the presentation to said board at a regular or

special meeting, of a written application asking for such a determination in the county in which said application is made signed by one-fourth of the registered voters of the county. The signature of each registered voter shall be personally signed to such application."

The foregoing questions are answered respectively as follows:

1. The signatures on a petition or application for a local option election are sufficient if they are personally signed by a person who is a registered voter in the county. The fact that a name may not be printed in the registration books or signed in the registration books in exactly the same manner that it is signed on the petition does not necessarily mean that it is not the name of the same person or that it was not personally signed by such person. Thus, although it is preferable that the names and signatures on the petition be the same as on the registration books, it is not necessary that they be identical.

The duty of the board of county commissioners is to determine whether one-fourth of the registered voters of the county personally affixed their names to the petition and not whether a person's signature or handwriting is the same on the petition as on the registration books, or whether the signer used only his initials on signing the petition when in his registration he used his full name. (See 1949-50 Biennial Report of Attorney General, p. 500, and 1947-48 Biennial Report of the Attorney General, p. 504.)

Such discrepancies are important, however, to the extent that they may indicate to the board, acting in its sound discretion, that a particular name was not personally signed to the petition or that the person signing was not a qualified voter. Although such determinations may place a considerable burden on the board it is the duty of its members to make such determinations. (See *State v. Gessner*, (Fla.), 26 So. 2d 896)

2. If there is a reasonable doubt about the validity of a signature on the petition, there is no reason why the board of county commissioners could not accept evidence as to its validity in the form of an affidavit by the person who signed the petition, or by a witness to such person's signature.

3. Chapter 567, F. S., does not specify the type of proof that the board must have with respect to the sufficiency of the petition. If the board feels that the certificate of the supervisor is sufficient proof that the petition complies with the law, such certificate can be accepted by the board as evidence of the sufficiency of the petition, and the election may be ordered by the board. However, according to the opinion of the Florida supreme court in *State v. Gessner*, cited above, the board must accept the duty of making the final decision as to whether the petition is legally sufficient. (See also *Pearson v. Taylor*, (Fla.), 32 So. 2d 826, to the effect that election cures insufficiency of petition.)

4. Section 567.01, F. S., requires that the board of county commissioners order a local option election "upon the presentation to said board at a regular or special meeting, of a written application . . . signed by one-fourth of the registered voters of the

county." The determination as to whether the petition has been signed by one-fourth of the registered voters must be made on the basis of the total number of voters registered in the county on the day the presentation of the application is made. It is the validity of the petition on the day it is presented that sets in motion the machinery for the local option election.

These comments appear to answer your question as accurately as possible under the circumstances.

056-308—October 23, 1956

CRIMINAL PROCEDURE

EXTRADITION FOR NONSUPPORT OF EX-WIFE—§§88.061 AND 941.06, F. S.

To: *Quentin V. Long, Assistant State Attorney, Ft. Lauderdale*

QUESTION:

Can a man who has been a resident of the state for 7 years be extradited under §88.061, F. S., as amended in 1955, by his ex-wife who was divorced from him in 1949 and now resides in Michigan, where there are no children born to the parties?

Under the constitution and the laws of the U. S. whoever shall be accused of having committed a crime in the demanding state and has fled from justice thereof, shall, upon a legally sufficient request from the executive authority of the demanding state be delivered up and held for the executive authority of the demanding state or his duly appointed agent. See §2, Art. IV, Fed. Const. and title 18, §3182 (formerly 662) U. S. code.

Under the laws of Florida and of the demanding state (if that state has also enacted the uniform criminal extradition act; our Ch. 941, F. S.) the accused's constructive presence in the demanding state also warrants that we hold him for the executive authority who has legally demanded him for committing an act in our state or in a third state which intentionally results in a crime in the demanding state. See *Ennist v. Baden*, 158 Fla. 141, 28 So. 2d 160; §941.06, F. S.

Under the uniform reciprocal enforcement of support law, if the demanding and asylum states have enacted the same, extradition for the crime of nonsupport is aided by removing the necessary allegation of presence or non-presence in the demanding state. Under that act no allegation of actual presence (§3, uniform criminal extradition act; §941.03, F. S.) or constructive presence (§6, uniform criminal extradition act; §941.06, F. S.) need be alleged.

The common denominator under all three of the above cited laws is "crime". Under all three of the above laws the accused must be charged with the commission of a crime in the demanding state. Therefore, from the facts you recite in your question the ex-wife who resides in Michigan must first lodge a proper and timely criminal complaint against the intended accused who resides in Florida. *This presupposes the existence of a Michigan criminal*

statute making nonsupport under the facts peculiar to your case a crime.

Therefore, if an ex-wife can and does make a proper and timely criminal complaint for nonsupport, it is my opinion that the executive authority of the demanding state may request the return of the accused under §88.061, *supra*, providing the demanding state has enacted the uniform reciprocal enforcement of support law. The validity of extradition under this last mentioned section has been upheld in *Harrison v. State, Ala.*, 77 So. 2d 384; cert. denied 77 So. 2d 387; *Ex parte Coleman, Tex.*, 245 S.W. 2d 712; and in the very recent opinion of our supreme court, which is not—at the time of this writing—final, of *State of Florida & Rex Sweat v. Julian C. Bennett*, case 27,626, opinion filed Sept. 21, 1956.

056-309—October 23, 1956

COMMERCIAL RELATIONS

INTEREST AND USURY—INTEREST IN ADVANCE, CASH DISCOUNT OR BONUS—LONG AND SHORT TERM LOANS — §687.02, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. Where an individual obtains a loan from a banking institution doing business in this state, for a fixed period of time, with interest in advance at the rate of 6% per annum, subject to a fixed bank discount of 6%, is such loan violative of §687.02, F. S.?

2. Does the payment of interest in advance for more than 1 year have any effect upon the 1st question?

Section 687.02, F. S., in so far as here material, provides that "all contracts, other than of a corporation, for the payment of interest upon loan, advance of money, or forbearance to enforce the collection of any debt, or upon any contract whatever at a higher rate of interest than 10% per annum are hereby declared usurious" This part of said §687.02, F. S., is substantially the same as the one considered in *Purvis v. Frink*, 57 Fla. 519, 49 So. 1023, where a loan of \$700 was made on interest at the rate of 10% per annum payable quarterly in advance. The first quarterly payment was deducted from the loan so that the borrower received only the sum of \$682.50 from the lender, this sum was held by the court to be "the actual principal sum received." The loan was held to be in violation of the usury statutes.

In *Wilson v. Conner*, 106 Fla. 6, 142 So. 606, there was deducted from a \$10,000 loan one year's interest in the sum of \$800 and a bonus or discount for making the loan of \$500, making a total of \$1,300, so that the borrower received only \$8,700, making the cost of the loan for 1 year in excess of 13.9% thereof. The loan was held to be in violation of the usury statutes.

In *Carr v. Cole*, 119 Fla. 260, 161 So. 392, a promissory note in the sum of \$10,000, antedated 2 months and bearing 8% interest,

was made and delivered to a lender by a borrower, the borrower receiving the sum of \$8,600 from the lender. This note was held to be violative of the usury statutes.

The bank discount of 6% of principal, mentioned in the 1st above question, is often merely a device or contrivance to obtain additional compensation to the interest charged or to be charged for the loan. Where a loan within the 1st above question is made for 1 year, the discount and interest will be the equivalent of interest on the principal of the loan of 12% and in excess of 13.6% on the moneys actually received by the borrower. If for eighteen months the above percentages become 10% and 11.7%; if for two years the percentages become 9% and 10.9%; and if for 3 years the percentages become 8% and 10.5%. All of these examples appear to be within the rule in *Purvis v. Frink*, supra, *Wilson v. Conner*, supra, and *Carr v. Cole*, supra.

We find in 55 Am. Jur. 353, §41, a statement to the effect that "the practice of taking interest in advance at the highest legal rate on short-term loans originated in the custom of banks and those dealing in commercial paper in the course of trade, and, although admittedly usurious in principle, has now become a recognized legal right, provided it is not availed of merely to disguise a usurious transaction." Even where this rule is followed, it appears to be confined to short term loans and does not apply in the case of long term loans (91 C. J. S. 613, §34, notes 34 and 35). The line of demarcation between what is a short term loan and what is a long term loan is not clear (91 C. J. S. 613, §34, note 36); however, there is considerable authority that a short term loan should be limited to not more than 1 year (91 C. J. S. 613, §34, notes 38 and 39). To the same effect see also 55 Am. Jur. 354, §42. We find no Florida cases on this question.

In the light of the above authorities we are inclined to the view that the 1st question should be answered in the affirmative, even under the commercial practice mentioned in 55 Am. Jur. 353, §41, and 91 C. J. S. 613, §34, above mentioned; however, should the rate of interest, or the rate of discount, or both, be reduced so that the combined total would not exceed 10%, and the term of the note be limited to 1 year, or the retained interest under such reduction be limited to 1 year, then a different rule might be applicable if we are to follow the above-mentioned rule in 55 Am. Jur. 353, §41, and 91 C. J. S. 613, §34. But in the face of the positive holdings of the Florida court in *Purvis v. Frink*, supra, *Wilson v. Conner*, supra, and *Carr v. Cole*, supra, we hesitate to adopt the said rule until clarified by the supreme court of this state.

Generally, the two above questions are answered, the 1st in the affirmative, and the 2nd in the negative.

056-310—October 25, 1956

CRIMINAL PROCEDURE

DUTY AND JURISDICTION OF MAGISTRATES—JUSTICE OF THE PEACE—§§902.01, 902.18, 909.04, 79.01 AND 37.03, F. S., §22, ART. V, FLA. CONST.

To: *E. P. DeFriest, Jr., Justice of the Peace, Fort Pierce*

QUESTION:

May a justice of the peace recall his decision and

alter a charge after a defendant has been remanded to a higher court?

Section 22, Art. V, Fla. Const., and §37.03, F. S., designate justices of the peace "committing magistrates." The duties of magistrates are outlined in Ch. 902, F. S. Those duties peculiar to your question are set out by §§902.01 and 902.18, F. S., (relating respectively to duties of a magistrate as to defendants he is not empowered to try and the duties of a magistrate after having remanded a defendant for trial).

The general rule with reference to the jurisdiction of magistrates in the situation posed by your question is recited in 22 C. J. S. 507, to-wit:

"In the absence of a statute, the functions of the examining magistrate and his jurisdiction over accused terminate when he commits or remands him, or when he takes his recognizance or admits him to bail, and he has no authority to grant a rehearing or new examination. If injustice has been done, complete relief can be obtained by a writ of habeas corpus from the proper court. An order of committal for trial at once confers jurisdiction of accused on the trial court, and he can be discharged or released on bail only by a court having power to entertain a writ of habeas corpus."

Sections 79.01 and 909.04, F. S. afford defendants who have been remanded for trial alternative remedies should they feel they are unlawfully detained.

Inasmuch as no statute vests any "post-commitment" jurisdiction in our justices of the peace, I am of the opinion that your question must be answered in the negative.

056-311—October 25, 1956

LEGISLATURE

**SPEAKER-DESIGNATE—HOUSE OF REPRESENTATIVES—
AUTHORITY TO CONVENE EXTRAORDINARY SESSION
ON DATE OF GENERAL ELECTION—§3, ART. VII,
§9, ART. XVIII, §§8 AND 13, ART. IV, AND §11,
ART. III, STATE CONST.**

To: Ted David, Speaker, House of Representatives, Tallahassee
QUESTION:

Does the speaker or the speaker-designate of the house of representatives have authority to convene the extraordinary session of the legislature, convened pursuant to §3, Art. VII, State Const., on Nov. 6, 1956, in accordance with the terms of senate concurrent resolution 33-X of the said extraordinary session?

The general election of Florida will "be held in each county in this state on the 1st Tuesday after the 1st Monday in November" of this year; which date will be November 6, 1956 (§9, Art. XVIII,

State Const.). The general election polls will close at 7:00 p.m. of said Nov. 6, 1956, as regulated by the standard time in use in the locality where the polls are located (§100.011, F. S.). The said senate concurrent resolution 33-X, recessed the said extraordinary session until seven o'clock on said Nov. 6, 1956. The legislature follows and complies with Eastern standard time, the standard time applicable in Tallahassee, where legislative sessions are held.

The terms of members of the house of representatives of Florida begin and end on the day of the general election, the terms of the existing members ending at the close of the election and the election of their successors, and the term of the incoming members begins on the same day and at the same time. On the closing of the general election in each county the terms of the outgoing members end and the terms of the incoming members begin. For the purpose of this opinion we must presume that at the very moment seven o'clock arrives on the afternoon of November 6, 1956, there will be a change in the membership of the house of representatives of Florida (See Advisory Opinion to the Governor, Fla., 88 So. 2d Adv. 131 and cases therein cited on p. 133). Any business transacted at a session beginning at seven o'clock in the afternoon of Nov. 6, 1956, would have to be transacted by the incoming members elected at the general election held on Nov. 6, 1956; this is true notwithstanding that the terms of the members from counties west of the Apalachicola river do not end and begin until one hour after the terms of the members east of the said Apalachicola river, as the members west of the river could not make up a quorum for the transaction of business. Any extraordinary session of the legislature called after the general election is composed of the newly elected members (Advisory Opinion, 76 Fla. 418, 79 So. 874, text 875).

On June 7, 1956, the justices of the supreme court (Advisory Opinion, Fla., 88 So. 2d 131, text 132 and 133), pursuant to §13, Art. IV, State Const., advised "that in the event the current session of the Legislature functioning pursuant to a call under §3, Art. VII, State Const., should undertake to recess to a time following the next general election, then in order to reconvene the Legislature after Nov. 6, 1956, it would be necessary for you to issue an additional call under the authority granted you by §8, Art. IV, of the Constitution . . ." The power of the entire membership of the house and half of the senate "to act as a part of the legislative branch of the government expires when the polls are officially closed on Nov. 6, 1956." "The current members of the Legislature cannot bind members of the Legislature elected on Nov. 6, 1956, by a recess resolution extending past the next general election."

The legislature has recessed to a time after the general election on Nov. 6, 1956. Inasmuch as the supreme court of Florida has held in Advisory Opinion, 88 So. 2d 131, that it cannot reconvene without an additional call from the governor under §8, Art. IV, State Const., §11, Art. III, State Const., is inapplicable to the instant question. Had it not been for this latest advisory opinion, my view would have been that pursuant to the view expressed in Advisory Opinion, 14 Fla. 289, that the occurrence of the general election would not have, in effect, adjourned the legislature sitting in extraordinary session.

It is my opinion, in the light of the foregoing observations, that the question should be answered in the negative.

056-312—October 26, 1956

CRIMINAL PROCEDURE

ARRESTS—POWER OF "NON-UNIFORMED" DEPUTY SHERIFF IN UNMARKED CAR TO MAKE— §§125.45, 146.06, 861.01 AND 901.15, F. S.

To: *W. Marion Hendry, Justice of the Peace, Tampa*

QUESTION:

Does a "non-uniformed" deputy sheriff in an unmarked car, have the right to make an arrest for a traffic violation on the public highways either within or without the limits of incorporated areas?

Section 125.45, F. S., authorizes the county commissioners to pay for certain services, equipment and material upon requisition of a sheriff. Any authorization for uniforms and appropriately marked vehicles must arise from §125.45(2)(h), F. S. As that section clearly indicates, neither uniforms nor appropriately marked vehicles are required. In the case of *Ippolito v. State, Fla.*, 80 So. 2d 332, our court found nothing illegal or unlawful in the arrest effected by non-uniformed peace officers in an unmarked vehicle.

I do not believe §146.06, F. S. is applicable to a deputy sheriff as it relates only to *traffic officers* in such counties as have appointed traffic officers under the authority of said chapter. Furthermore, said section is clearly limited in its application, to unincorporated areas.

You stated in your letter that the offense complained of (obstructing a public road by double parking thereon and thereby creating an obstruction—in violation of §861.01, F. S.) occurred in the city of Tampa.

Section 861.01, F. S., provides the following:

"Whoever obstructs any public road or established highway by fencing across or into the same, or by willfully causing any other obstruction in or to such road or highway, or any part thereof, shall be punished by fine not exceeding \$100, or by imprisonment for a term not exceeding 60 days, and the judgment of the court shall also be that the obstruction be removed."

In interpreting this statute, our court in *State v. Coleman*, 155 Fla. 555, 20 So. 2d 911 held:

"The rule generally approved by the authorities is that a public road is a generic term applied to all kinds of public ways open to the public for passage (Cases cited). We need not go beyond our own jurisdiction for an expression which we feel is applicable here. *Amos et al v. Matthews*, 99 Fla. 1, 126 So. 308, 331:

'... That holding rests upon the reason that the streets of a municipality, in appropriate instances, and for purposes of maintenance, may constitute public roads of the county of which the municipality is a component part'."

See also 25 Am. Jur. 510, also 25 Am. Jur. 459.

It goes without saying that a deputy sheriff is a peace officer under the laws of the state. Section 901.15, F. S., provides in part as follows:

"A peace officer may without warrant arrest a person:

"(1) When the person to be arrested has committed a felony or *misdemeanor* or violation of a municipal ordinance in his presence. In the case of such arrest for a misdemeanor or a violation of a municipal ordinance, the arrest shall be made immediately or on fresh pursuit." (Emphasis supplied.)

Our court in interpreting this statute in the case of *Malone v. Howell*, 140 Fla. 693, 192 So. 224, held that an arrest without a warrant for a misdemeanor to be lawful can *only* be made where the offense was committed in the presence of the officer in such manner to be actually detected by the officer by the use of one of his senses.

Since deputy sheriffs are not required to wear any particular uniform or drive an appropriately marked vehicle, and since they are authorized to arrest with or without warrants, persons committing, in their presence, *violations of the laws of Florida*, your question is answered in the affirmative.

056-313—October 30, 1956

COURTS

CIRCUIT COURT ORDER ALLOWING ADDITIONAL COMPENSATION TO GRAND JURY WITNESSES

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Is the state bound by an order of the circuit court providing compensation to witnesses subpoenaed to appear and testify before a grand jury, in addition to usual per diem and mileage, as reimbursement for meals and lodging for 3 days while appearing before the grand jury?

Specifically the above question involves two persons who reside in Dade county, who were subpoenaed to appear and testify before the grand jury for Hillsborough county, and who did so appear and testify. By an order made and entered on Sept. 20, 1956, the circuit court for Hillsborough county, recognized that the two witnesses had been "required to remain in the city of Tampa 3 days" and in consequence thereof "incurred expense money

for meals and lodging" for which reimbursement was sought by or in behalf of the said witnesses. The court, after reciting the above facts, ordered that "each of said witnesses be paid \$6 for meals, \$9 for lodging, 3 days witness fees and mileage from Miami." The witness fees and mileage are not in question, there being ample statutory authority therefor; we are here concerned only with the portion of the order providing expense money for meals and lodging.

We find nothing in the statutes and laws of this state that may reasonably be construed as authorizing such payments for meals and lodging in addition to per diem and mileage. At common law no witness fee was paid (58 Am. Jur. 501, §874) unless expressly provided for by statute. The said order of Sept. 20, 1956, in so far as it provides expense money for meals and lodging, appears to be erroneous. "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment until reversed, is regarded as binding in every other court." (Malone v. Meres, 91 Fla. 709, 109 So. 677, text 683, and Harvey v. City of St. Petersburg, 138 Fla. 597, 189 So. 861, text 865; see also Towns v. State, 102 Fla. 188, 135 So. 822, text 823; Myers v. Harkins, 102 Fla. 577, 136 So. 382, text 386; Childs v. Boots, 112 Fla. 277, 152 So. 212, text 213; Sparks v. Ewing, 120 Fla. 520, 163 So. 112, text 114; 50 C. J. S. 40, §618; 30 Am. Jur. 901, §148). A party may not refuse to comply with the mandate of a judgment on the ground that it is erroneous (31 Am. Jur. 355, §865) and such an erroneous judgment may be enforced (Griffin v. Mitchell, 197 Ark. 1175, 127 S. W. 2d 640). There is a distinction between an erroneous judgment and a void one; a *void* judgment may be stricken by motion or collaterally assailed at any time, but a *voidable* one is binding until set aside in some direct action, which in most instances must be brought within the time allowed for an appeal (see In Re. Begg's Estate, 152 Fla. 277, 12 So. 2d 115, text 116). This brings us to a consideration of whether the order in question is *void* or *merely voidable*.

The order in question is entitled in the circuit court in and for Hillsborough county, at law, in the case of State of Florida v. John T. Council, and bears No. 31,118-L. It seems that the witnesses in question were subpoenaed to appear in connection with the state's charge against the said John T. Council. Where the statutes or common law so provide, costs may be taxed against the state (20 C. J. S. 701, §457) or the county (20 C. J. S. 699, §456). "Error in allowing items not properly taxable (as costs) is not an excess of jurisdiction and certiorari will not lie to correct such error (20 C. J. S. 692, §452, Note 9). Such an error when a part of a final judgment must be reached by motion or other direct attack. Had a dispute arisen as to the amount of per diem and mileage the said witnesses were entitled to, doubtless the judge would have had authority to determine the said amount by order. The state was the one who had subpoenaed the witnesses, and they were required to appear in a cause to which the state was a party. We feel that the court had jurisdiction to ascertain and adjudicate the fees and compensation of the two witnesses, which he did although in making such determination he erred in making an allowance for meals and lodging. The

judgment although not supported by law and erroneous was and is not void, and is binding on the parties unless and until reversed in some proper proceeding. Such a proceeding against such judgment should be a direct and not a collateral attack.

We, therefore, conclude that the order seems to be without authority of law and therefore erroneous; however, we deem it merely voidable and not void, and this being true the state is probably bound by it unless and until reversed or set aside in a proper proceeding. *State v. Lewis, Fla., 72 So. 2d 823*, was a declaratory proceeding without parties and therefore not in point here.

These observations answer the above question as well as it may here be answered.

056-314—October 31, 1956

TAXATION

AD VALOREM TAXATION OF CONCRETE MIXERS AND LARGE CRANES MOUNTED ON MOTOR VEHICLE CHASSIS—§320.08, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are large concrete mixers and large cranes mounted on motor vehicle chassis operated over the highways of this state subject to tangible personal property taxes?

A similar question was considered by this office in its opinion of March 23, 1950 (050-144) where the controlling consideration was deemed to be the primary use of the vehicle and its equipment. If the primary use of the vehicle and its equipment is transportation, it should be classified as a motor vehicle; but if the primary use of the vehicle and its equipment is the performance of some service other than transportation, then the motor vehicle and its equipment should be considered as separate.

The "GW" Series classification in §320.08, F. S., was designed for use in licensing motor trucks where the use of the equipment thereon is the primary use and transportation the secondary use. The physical characteristics of the combination are not always controlling.

Ordinarily, the classification made by the motor vehicle department when licensing the vehicle should be accepted by the tax assessor, unless he is satisfied that an error has been made in such classification, in which case he should advise the motor vehicle department of his finding, giving full facts and circumstances as found by him, so that the department may make an investigation and determine the proper classification, correcting the one previously made by it, if found incorrect.

Most of the large cement-mixing trucks have been designed primarily for the transportation of cement and should, together with their equipment, be deemed a motor vehicle not subject to ad valorem taxes; unless such vehicle bears a "GW" series license,

in which case the equipment should be deemed subject to ad valorem taxation.

We are not sufficiently acquainted with the "large cranes mounted on motor vehicle chassis" and their purpose and use to discuss their status; however, we think that there may be such a difference in this type vehicle that each case must be determined from all available facts, including its classification by the motor vehicle department.

We feel that these observations furnish the formula from which the above question may be answered in most, if not all, cases.

056-315—November 1, 1956

CRIMES

GAMBLING LAWS—LOTTERY—§§849.08, 849.09, AND 849.11, F. S.

To: *Richard H. Cooper, County Solicitor, Orlando*

QUESTIONS:

1. Where a private corporation advertises a contest in a national magazine which is distributed in Florida, which contest requires a \$5 contribution to a scholarship program and consists of determining the sum total of various numbers located in a picture, does such scheme violate the Florida lottery or gambling law?

2. Should the above question be answered in the affirmative, would persons distributing the national magazine in Florida be guilty of a violation of the lottery or gambling law, and if not, would any persons in Florida connected with the publication be guilty of such a violation?

AS TO QUESTION 1:

It is well settled that there are three elements to a lottery, viz., (1) a prize, (2) an award by chance and (3) a consideration. It is perfectly clear that the above outlined scheme contains two of the elements of a lottery, viz., a prize and consideration. Whether or not the necessary element of an award by chance is also present is a more difficult matter to determine. It would appear that the plan outlined above is truly not a lottery because one of the essential elements of a lottery is lacking, viz., an award by chance. The element of chance which is essential to a lottery is truly not present where skill predominates over chance or luck (54 C. J. S., 846-847, §2-B-2; 34 Am. Jur. 649-650, Lotteries, §6). Although there is some chance or luck in the obtaining of the prize, it would appear that the totaling up of the many figures provides predominantly a game of skill. In fact, the attached description of the skill emphasizes that the contest of numbers is strictly a game of skill in that the participant must add the many digits to obtain the correct total. The said plan does not appear to violate either §§849.08, 849.09, or 849.11, F. S., because said plan does not involve a game or games of

chance, in that the described scheme appears to be basically a game of skill. As pointed out above, skill, rather than chance or luck predominates in adding together the numbers which make up the drawing and from them obtaining the sum total of the figures.

Nor does said plan appear to violate any other gambling statute of this state.

There being no true element of chance in the described advertising promotion, the scheme does not consist of a lottery. These observations seem to answer your above question 1.

AS TO QUESTION 2:

Because of the fact that the plan outlined above is not a lottery in that one of the essential elements of a lottery is lacking, viz., an award by chance, the persons distributing the magazine in Florida would be guilty of no violation of our gambling laws nor would any person in the state in connection with the publication be guilty of any violation in law.

056-316—November 1, 1956

CRIMES

WORTHLESS CHECK LAW—AUTHORITY TO ISSUE WARRANT FOR WORTHLESS OUT-OF-STATE CHECK IN PAYMENT OF GOODS DELIVERED TO OUT-OF-STATE JURISDICTION, §§832.05(2), (3) AND 674.01, F. S.

To: *Gordon G. Oldham, Jr., Prosecuting Attorney, Lake County*

QUESTION:

Does Lake county have jurisdiction to issue a criminal warrant for a worthless out-of-state check sent to said county in payment of goods delivered to the out-of-state jurisdiction under §832.05(2) F. S.?

While it may be that there is no desire to bring a charge of obtaining money under false pretenses in the given factual situation, it would seem that the explicit provisions of sub §§(2) or (3) of §832.05, F. S. comprehend the issue which you present. Subsection (2) of §832.05, F. S., specifically makes it unlawful for *any person, firm or corporation to deliver to another any check on any bank, with knowledge that at the time of drawing or delivering such check that the drawer thereof had not sufficient funds on deposit in or credit with such bank or depository with which to pay same on presentation.*

Subsection (3) of §832.05, F. S., makes it unlawful for any person, firm or corporation to obtain any goods by means of such worthless checks.

The penalty for violating the provisions of §832.05, F. S., is identical to that provided for the crime of larceny.

It would clearly seem that in the factual situation you present, that a worthless check had been delivered in Florida in payment of goods sent to the out-of-state jurisdiction.

The terminology of sub §§(2) and (3) of §832.05, F. S., prohibits the delivery of a worthless check, such apparently being done in violation of said section, provided the drawer had knowledge of the insufficient status of his bank account. "Delivery" is defined by §674.01, F. S., relating to negotiable instruments, as the transfer of possession, actual or constructive, from one person to another, and §832.05, F. S., clearly governs the situation which you describe since a worthless check was *delivered* in Florida in violation of said section.

It is quite clear that where an instrument is mailed to the payee with the express or implied authority of the payee, delivery is deemed to have taken place at the point of mailing. But where there exists no antecedent authority (on the part of the payee) the rule is to the effect that "delivery through the mails does not take place until the instrument is received by the payee." Britton on Bills and Notes, §50, p. 199. In accord with this principle is 10 C. J. S., Bills and Notes, §78, wherein that authority establishes that delivery is largely a matter of intention. In the situation you present, it seems clear that it was the intent of the vendor that payment for his wares be in Florida. Moreover, the last cited authority also sets forth the proper rule that if the check is not sent by mail at the request of the payee, the instrument is not delivered *until received*.

Perhaps one additional factor should be called to your attention. Section 941.06, F. S., and *Ennist v. Baden*, 158 Fla. 141, 28 So. 2d 160, should be followed when drafting the complaint. The decision so cited would require that a demand for extradition state that the person sought was present in the demanding state when the alleged crime was committed. When drafting the complaint, the facts should be set forth to show that the accused by his delivery of a worthless check in Florida violated our statute. This would establish a proper predicate for extradition under the *Ennist* case, *supra*, should such a step be necessary.

It appearing that an offense comprehended by sub §§(2) or (3) of §832.05, F. S., may have been committed, (if the maker had knowledge of the insufficient status of his bank account) an arrest warrant may be issued under the provisions of Ch. 901, F. S., and an information, affidavit and warrant may be sworn out in accordance with the provisions of Ch. 923, F. S.

056-317—November 1, 1956

HIGHWAYS, BRIDGES AND FERRIES

JACKSONVILLE EXPRESSWAY AUTHORITY, RELATIONSHIP TO BOARD OF ADMINISTRATION—CH. 349, F. S.

To: *Lucius A. Buck, Chairman; Jacksonville Expressway Authority, Jacksonville*

QUESTION:

Under the provisions of Ch. 349, F. S., (Chapter 29996, 1955) what are the respective rights, powers and duties of Jacksonville expressway authority and state board of administration, under circumstances now existing as set forth below, in relation to the following

particular matters: (1) The form of bond to be issued by the authority; (2) the execution of a lease-purchase agreement between the authority and the state road department; and (3) the power of the authority to enter into agreements with "any bank or trust company within or without the state, with the consent of said board," in event the state board of administration shall elect not to function as fiscal agent, as provided in sub §349.05(3), F. S.?

In this opinion said Ch. 29996, 1955, is referred to as Ch. 349, F. S.; Jacksonville expressway authority, state board of administration and state road department are respectively referred to as "authority," "board" and "department."

The exact question presented in the request for opinion is as follows: "I, therefore, as Chairman of the Authority and on behalf of the Authority respectfully request your formal opinion concerning the matters dealt with in the two above referred to opinions of Messrs. Rogers and Patterson." In view of the circumstances mentioned below, it reasonably appears only necessary to deal with the particular matters set forth in the question as stated.

The attorney general is the acting legal counsel for the board. Under our constitution and statutes relating to such officer and the board, quite apparently the advice of such officer relating to any powers or duties of the board reasonably should be given upon request of the board. Under existing circumstances, it is felt that no impropriety exists in giving this opinion. Chapter 29996, 1955, became law and effective 16 months ago. The factor of time urges that the above question be answered.

No necessity here exists to detail the intent and purpose of Ch. 349, F. S. It is sufficient to state that it created "a body politic and corporate, an agency of the state, to be known as 'Jacksonville expressway authority,'" and vested power in such authority, in cooperation with other agencies, to accomplish the construction and financing plan as set forth and detailed in said chapter.

Several conferences have been held between representatives of the authority and the board with respect to the provisions of a proposed bond indenture. Certain of these conferences were also attended by representatives of the department, of the underwriters, and of this office. All material differences concerning provisions of the proposed indenture were resolved except those pertaining to the forms of bonds. Those provisions contemplated the issue of wholly registered bonds and unregistered coupon bonds and transfer of bonds of each class for bonds of the other class. At the last conference the executive director of the board stated that the members of his board objected to such provisions to the extent that they provided for fully registered bonds, and urged that such registration provisions be limited to bond principal alone. An impasse has resulted. Attention is now directed to the items in the question.

(1) *Form of Bonds:*

No criticism reasonably may be directed to the authority or

the board concerning this issue. It appears that the authority's position derives from advice of legal and other consultants, including representatives of financial houses, employed by it. The position of the board derives from formidable practical considerations in relation to its functioning as fiscal agent.

We do not believe we are mistaken in the statement that the executive director of the board has not contended that the board could control the provisions of the indenture relating to this item. Indeed, at the last of said conferences, inquiry was directed to a representative of this office by a representative of Guaranty Trust Co. as to whether the question was a legal or a procedural one; and the answer was that it was a procedural one.

There seems little doubt that the authority has the exclusive power to determine this issue. The following provisions appear in §349.05(1), F. S.: "The bonds of the authority issued pursuant to the provisions of this chapter shall be *authorized by resolution of the members* thereof and . . . be in such form, *either coupon or fully registered, shall carry such registration, exchangeability and interchangeability privileges* . . . as such resolution or any resolution subsequent thereto may provide." (Emphasis supplied.)

Other provisions of Ch. 349, F. S., support this exclusive power of the authority in relation to its bonds; and we find no provisions which render this grant of power ambiguous.

(2) *Lease-Purchase Agreement:*

The construction plan contemplated by Ch. 349, F. S., to be carried out by the authority includes a "lease-purchase agreement" between the authority and the department.

Section 349.07, F. S., provides, in part, that, "In order to effectuate the purposes of this chapter and as authorized by this chapter, the authority may enter into a lease-purchase agreement with the state road department relating to and covering the Jacksonville expressway system." There follows a detailing of provisions which shall be included in said lease-purchase agreement; of provisions which may be included in such agreement; and other provisions relating to the respective powers of the authority and the department in relation to such agreement. One unnumbered paragraph in this section provides "No pledge of said Duval county gasoline tax funds as rentals under such lease-purchase agreement shall be made without the consent of the county of Duval evidenced by a resolution duly adopted by the board of county commissioners of said county. . . ." Chapter 349 does not in any of its other provisions require any other consent with respect to the execution of such an agreement.

Section 344.26, F. S., provides that, "The constitutional state board of administration shall take over the management, control, bond trusteeship, administration, custody and payment of all debt service or other funds or assets now or hereafter available for all bonds or debentures, issued to finance the construction or purchase of bridges or highways which are now or hereafter leased for a term of more than one year or purchased under installment purchase agreements by the state road department from any public body, county, district, municipality, or other public bridge author-

ity. Said state board of administration shall succeed to all the statutory powers of the respective officials of such public bodies, etc.", followed by enumerated powers and functions of the board appropriate and essential to any such issue of bonds. Section 344.261, F. S., requires that with respect to lease-purchase agreements as contemplated by §344.26, F. S. and as described, prior to their execution the department shall secure from the board "a statement approving the legal and fiscal sufficiency of such bonds . . . and the plan for their retirement." In this connection see §288.15(10) (a), F. S.

These statutes are not applicable to the bonds or the mentioned lease-purchase agreement of the authority; the provisions of Ch. 349, F. S., control with respect to this item. Hence, in my opinion, neither under the provisions of Ch. 349 nor any other statute is it required that the board approve the legal and fiscal sufficiency of bonds of the authority and the plan for their retirement or otherwise approve such lease-purchase agreement, as a prerequisite to the execution of such agreement.

(3) *Agreement between authority and bank
or trust company, with consent of board:*

The significance of this part of the above question lies not in any assertion by the board that it has the power to pass upon the legal sufficiency of such an agreement between the authority and some bank or trust company; rather its gravity derives from the necessity to determine whether the board is charged with any responsibility in connection with the provisions of such an agreement.

Section 349.05(3), F. S., provides in part: "The state board of administration of Florida shall be the fiscal agent of the authority for any bonds issued by the authority pursuant to this chapter, and the authority may enter into any deeds of trust, indentures or other agreements with said *fiscal agent*, or with any bank or trust company within or without the state, with the *consent* of said *board*, as security for such bonds . . . ;" followed by provisions relating to said bonds and the deed of trust, indenture or other agreement authorizing their issuance. (Emphasis supplied.)

The quoted wording is not too clear; but the italicized words "fiscal agent" and "board" would seem to make the meaning reasonably certain. Thus, the board shall be the fiscal agent of the authority with respect to such bonds, and the authority "may enter into any deeds of trust, indentures or other agreements with the fiscal agent," (i.e., the board as *fiscal agent*) "as security for such bonds." On the other hand there is the alternative provision that the authority "may enter into any deeds of trust, indentures or other agreements . . . with any bank or trust company within or without the state, with the consent of said board," (not the board as *fiscal agent*), "as security for such bonds." Reasonably, the mentioned alternative provision is to authorize action by the authority in the event the board cannot function as fiscal agent. Attention is now directed to the words, "with the *consent* of said board," and the significance of "consent."

Words in common use in a statute are to be given their plain and accepted meanings, unless used in a technical sense. E.g., *State v. Tunnicliffe*, Fla., 124 So. 279; *Gasson v. Gay*, Fla.,

49 So. 2d 525. However, there is the further rule that the language of a statute is to be considered in its entirety in ascertaining legislative intent; that the language used in a statute should be construed with reference to the purpose of the law, and the meaning of words is to be ascertained from their use in relation to such purpose. E.g., *Snowden v. Brown*, Fla., 53 So. 548; *State ex rel Hughes v. Wentworth*, Fla., 185 So. 357.

The word "consent" is generally defined as contemplating deliberation resulting in acquiescence after a weighing of factors in relationship to a given subject matter. E.g., *Words and Phrases*, Vol. 8A, pp. 185-206.

Subject to possible applicable law, a fiscal agent is not charged with the responsibility of dictating or approving the terms of a trust deed, indenture or other agreement for the security of the involved bond issue, or otherwise the legal sufficiency thereof. Rather the fiscal agent is concerned with performing functions required of it as provided by such an agreement. An examination of the provisions of Ch. 349, F. S., demonstrates that they do not charge the board with basic determinations concerning the construction and financing program prescribed thereby. The responsibility for such matters as to forms of the bonds, the amount of bonds to be issued, the application of their proceeds, and other factors required in the trust deed, indenture or other agreement as security for such bonds, is charged to and rests in the authority. Indeed, in this opinion we have pointed out that under the provisions of Ch. 349 the authority has exclusive control of the forms and classes of bonds within the limits of the law relative thereto, and that the board is charged with no responsibility in relation to the lease-purchase agreement to be entered into between the authority and the state road department.

To charge the board with the responsibility of determining the legal sufficiency of agreements prerequisite to the authority's entering into agreements with another bank or trust company, under the circumstances prescribed by §349.05(3), F. S., requires a construction of the above-quoted wording of said subsection to the effect that where the board determines it cannot function as fiscal agent for the authority, then the word "consent" is to be related to the nature of such an agreement and a bank or trust company party to such an agreement with the authority. Such a construction would charge the board with responsibility in relation to the basic determinations concerning the financing and construction plan provided by Ch. 349, F. S., not contemplated by the provisions of said chapter and hence would be contrary to the policy and intent dictated by the provisions of the chapter.

The situation is simply this: Section 349.05(3), F. S., states that the board shall be fiscal agent for the authority. That relationship would be created in pursuance of provisions of a deed of trust, indenture or other agreement of the authority, the acceptance of which by the board would constitute a mutual agreement between the board and the authority with respect to such fiscal agency. There is a permissible field of negotiation between the board and the authority limited solely to the matter of reaching a mutual agreement concerning the provisions of any such trust deed, indenture or other agreement in relation to the duties of the

fiscal agent as provided therein. If such mutual agreement is not reached and the board determines for any reason that it cannot function as such fiscal agent, then no field of negotiation between the board and the authority in relation to the provisions of the agreement for the security of the bonds remains.

Hence, it is that to preserve the policy and intent dictated by Ch. 349, F. S., and to do no violence to the accepted definition of the word "consent", the deliberation of the board implicit in the quoted word is not to be related to the provisions of an agreement of the authority for the security of its bonds with some bank or trust company, in the event the board announces it cannot function as fiscal agent; rather "consent" is related to the subject of fiscal agency, that is to say, that the deliberation required by the board under such term has to do solely with the question of whether it can function as fiscal agent.

In my opinion it was and is the legislative intent and desire that the board shall function as fiscal agent of the authority in this connection. However, if the board decides that it cannot so function, then the board is charged with only one duty, and that is to announce to the authority, by resolution or other formal action, that it cannot function as the authority's fiscal agent, and granting the board's consent that the authority may negotiate and enter into a trust deed, bond indenture or other agreement with a bank or trust company as security for the authority's bonds, as contemplated by the provisions of §349.05(3), F. S.

056-318—November 2, 1956

BEVERAGE LAW

LIQUOR LICENSES, SPECIAL TO GREEN MANSIONS, INC.—

CH. 31006, 1955; §§509.241, 561.20, 561.44, 562.14

AND 562.45, F. S.

To: *Thomas H. Anderson, Miami*

QUESTION:

Is Green Mansions, Inc. entitled to a liquor license in view of zoning ordinance #184 of the town of Miami Springs which specifically defines hotels and motels and provides that hotels having more than 50 guest rooms may receive a special liquor license, but makes no provision for motels as defined in the ordinance to receive such a license?

The supreme court of Florida held in *Singer v. Scarborough*, 20 So. 2d 126, and in *Mechlow v. Vocelle*, 156 Fla. 115, 22 So. 2d 631, that the director of the state beverage department may not require an applicant for a state license to sell intoxicating beverages to obtain, as a condition precedent to granting of such license, a license or permit from a city to sell intoxicating beverages.

Our court in the case of *City of Miami v. Kichinko*, 22 So. 2d 627, quoting from *Baker v. McCarthy*, 122 Fla. 749, 166 So. 280, and *Curtis v. Hutchingson*, 125 Fla. 433, 170 So. 133, stated:

"The State Beverage Law supersedes any charter powers of the city of Miami over the subject of intoxicating liquor. In the case of Langston v. Lundsford (involving the State Beverage Law) 122 Fla. 813, 165 So. 898, 900, the Court held:

*"The general rule that a general act will not be held to impliedly repeal or modify a special or local one * * * does not apply where the general act is a general revision of the whole subject, or where the two acts are so repugnant and irreconcilable as to indicate a legislative intent that the one should repeal or modify the other." (Emphasis supplied.)*

The court held in the Kichinko case, *supra*, that municipalities possess only such power as is conferred by express or implied provisions of law upon said municipalities and that insofar as beverages were concerned that the legislature intended to allow municipalities to do three things: (1) regulate the hours of sale independent of the general law (this hour regulation has been taken from the municipalities in Dade county and placed exclusively in the board of county commissioners, Ch. 30434, 1955), (2) create zones wherein intoxicating liquor may not be sold, and (3) regulate the sanitary conditions under which alcoholic beverages may be sold.

The state beverage act is a taxing as well as a regulatory statute intended to have uniform operation throughout the state, and the legislature in enacting the state beverage law intended to inhibit all powers of municipalities over the subject of intoxicating liquors except those specifically enumerated in §561.44, F. S., relating to zoning, §562.14, F. S., relating to regulating hours of sale, and §562.45, F. S., retaining in the towns and cities certain powers. This idea of uniform operation of laws regulating intoxicating beverages throughout the state has been upheld by our court over the years; *Sproul v. State ex rel Smith*, 153 Fla. 892, 16 So. 2d 109; *Bateman v. City of Winter Park*, 160 Fla. 906, 37 So. 2d 362; *Aboud v. City of Jacksonville*, 80 So. 2d 443.

It is admitted that when the court decided the Kichinko and Mechlow cases there was no limitation of liquor licenses according to population under the state law. However, §561.20, F. S., which limits liquor licenses to one license for each 2500 residents or major fraction thereof, provides in sub §(2) that this limitation does not apply to hotels, motels, motor courts or restaurants of certain types in Florida. The hotels or motels must possess not less than 50 guest rooms and if they so qualify they can be issued a special liquor license notwithstanding the limitations cited, *supra*.

It is our opinion that the words "hotel" and "motel" used in this statute are the structures generally recognized by the public and as defined in §509.241, F. S.

Therefore, it is my opinion that zoning ordinance #184 of the town of Miami Springs and Ch. 31006, Special Acts, 1955, insofar as they attempt to deny a special liquor license to the Green Mansions, Inc., purely on the basis that such applicant is a motel rather than a hotel under the definitions contained in

the ordinance, is inoperative because of the uniform provisions of the general law, *supra*. However, if the ordinance prohibits the sale of intoxicating liquors at this location and therefore is an ordinance relating to where intoxicating liquors may be sold rather than to how or the method of sale of intoxicating liquors, then and in that event, the ordinance would be valid so long as it is reasonable. *Simpson v. Goldwor*, 59 So. 2d 511; *Ragozzino v. Town of Lake Maitland*, 54 So. 2d 364; *Downsbrough v. Town of Lake Maitland*, 57 So. 2d 21.

I believe this answers your inquiry.

056-319—November 5, 1956

EDUCATION

BOARD OF PUBLIC INSTRUCTION, GILCHRIST COUNTY—
DISTRIBUTION OF RACE TRACK FUNDS—Chs. 30476,
1955; 28740, 1953; 27328, 1951; 25053, 1949; 18072,
1937; 14832, 1931 and §550.13, F. S.

To: *Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee*

QUESTIONS:

1. By authority of Ch. 27328, 1951, the board of public instruction of Gilchrist county was authorized to construct a gymnasium at Bell high school and to issue certificates against 10% of the state racing revenue received by the county under §550.13, F. S. Certificates were sold and the gymnasium completed. In July of this year enough funds had accrued to pay all of the certificates with interest. Since the state held these, this board was allowed to call the same before the due date. The board then transferred the surplus in the interest and sinking fund of \$12,000 plus to the general school fund and plan to use the same for other projects. The questions that we would like to have answered are as follows: Was the transfer of the surplus funds to the general fund legal and proper? Does the board have the authority to use the surplus funds for other projects without further legislative act? If the transfer was not legal or proper, what steps do you recommend the board take to correct the situation?

2. On Nov. 8, 1937, a special election was held in Gilchrist county for approval of local acts. Chapter 18072, 1937, was approved by a majority vote of the electors and became a law. This act provided that the racing revenue accruing to Gilchrist county under Ch. 14832, 1931 (same as §550.13 F. S. A.) shall be divided equally between the board of county commissioners and the board of public instruction. This act has never been repealed by a vote of the electors of Gilchrist county. However, in recent years the distribution of these funds has been changed by local or population acts and marked for specific projects. The question which the board would

like answered is as follows: Can the board of public instruction of Gilchrist county be denied one-half of the racing revenue accruing to said county without a vote of the qualified electors of the county, in view of the 1937 act and the election approving the same?

Chapter 30476, 1955, is apparently the latest enactment of the legislature on the distribution of race track funds to Gilchrist county. It provides:

"Section 1. Subsection (1) of §1, Ch. 27328, 1951, is hereby amended to read:

"Section 1. Hereafter all monies accruing to Gilchrist county, Florida, under and by virtue of the provisions of §550.13, F. S., or any amendments thereof, shall be apportioned, distributed and used as follows:

"(1) Ten per cent of such monies to the Gilchrist county park board, to be used exclusively for the purposes set forth in the act creating the Gilchrist county park board, until a total of \$30,000 shall have accrued to the said park board, when this 10% shall be apportioned and used exclusively for construction of public buildings, to pave streets of the county highway system and the construction of sidewalks in such city including parks and recreation centers or used for advertising by the said city."

Chapter 28740, 1953, relating to the distribution of race track revenue to Gilchrist county, provides as follows:

"Section 1. Subsection (1) of §1 of chapter 27328, Acts of 1951, is amended to read:

"(1) 10% of such monies to the city of Trenton in Gilchrist county to be kept in a separate fund and used exclusively to pave streets of the county highway system and the construction of sidewalks in such city including parks and recreational centers, or used for advertising by the said city.

"Section 2. Section 1 of chapter 27328, Acts of 1951, is amended by adding the following subsection:

"(5) Of the total of such funds in any year in excess of \$112,000, but not in excess of a total of \$3,000 in any year, shall be expended by the board of county commissioners in advertising Gilchrist county and for the promotion of agricultural projects. Any remainder above \$115,000 in any year shall be distributed as provided by this act.

"Section 3. The provisions of this act shall apply to all funds distributed to Gilchrist county for each year beginning with the first day of January of the calendar year, 1953.

"Became a law without the Governor's approval.

"Filed in Office Secretary of State June 15, 1953."

Chapter 27328, 1951, provided, among other things, in §1, par. (2), of the act that 10% of the race track funds allocated to the county must be kept in a separate fund to be used for the construction of a gymnasium for the Bell high school. According to your letter, the gymnasium has been constructed and the certificates issued to finance the building have been paid. This portion of the act has therefore served its purpose and is no longer operative. Earlier laws relating to this subject were Ch. 25053, 1949, and Ch. 18072, 1937.

The fact that a special act was voted upon by a referendum does not preclude a later session of the legislature from enacting laws on the same subject which would supersede the earlier act. The referendum provision in the earlier act is simply a method of implementing the act and does not foreclose further changes by the legislature.

This opinion does not consider the constitutionality of any of the special acts involved and referred to above since the question of constitutionality of legislative acts can only be determined by courts of proper jurisdiction.

Your 1st question is therefore answered as follows: The provisions of Ch. 27328, 1951, allocating funds to pay revenue certificates issued to construct a gymnasium at Bell high school are no longer operative since the purpose of the act earmarking said funds has been served. The race track funds allocated to Gilchrist county must therefore be distributed to the school board and used in accord with the relevant provisions of the 1955 act referred to above amending the 1953, 1951, 1949 and 1937 acts.

I am advised that the state comptroller's office has construed these acts to provide the following distribution of race track funds for Gilchrist county for 1955-56:

"(1) Of first \$112,000, 10% goes to the Gilchrist county park board until a total of \$30,000 has been distributed; (2) then this 10% will be distributed to the city of Trenton; (3) 10% to the board of public instruction for the Bell high school district gymnasium; (4) then \$2000 to the board of county commissioners for the emergency hospital fund; (5) balance of \$112,000 to be distributed 50-50 between county commissioners and board of public instruction; (6) next \$3000 to board of county commissioners for Gilchrist county advertising and agriculture fund; (7) after a total of \$115,000 has been distributed, future distribution to be as per (1), (2) and (4) above."

This distribution would appear to be in accord with the intent of the legislature, taking into consideration the various special acts referred to above. Since item (3) relating to the Bell school gymnasium is no longer necessary for that purpose, funds received under this item should be used for other necessary school purposes.

Your 2nd question is answered by the above observations.

056-320—October 30, 1956

COUNTY ORGANIZATION, OFFICERS AND REGULATIONS
COUNTY FINANCES—ANNUAL DUES, NATIONAL ASSOCIATION OF COUNTY PROSECUTING ATTORNEYS AS
COUNTY EXPENSE

To: Park H. Campbell, County Attorney, Dade County, Miami
QUESTION:

Are dues paid by county and prosecuting attorneys to the National Assn. of County and Prosecuting Attorneys, a non-profit corporation, properly payable from county funds?

In opinion 051-303, dated Sept. 5, 1951 (AGO 1951-52, p. 51) we held that dues paid by a sheriff to the Florida Sheriffs' Assn. were a proper expense of the office. After referring to several opinions of former attorneys general we stated:

"In further support of this theory, it must be noted that it has been the practical departmental construction of most state agencies and county officials for many years to recognize and pay dues to official organizations as legitimate expenses of the office, and, in so far as I am aware, this practice has never been questioned by the state auditor, comptroller or other agency having supervision of public funds."

Recently in opinion 056-178, dated June 20, 1956, we considered travel expense of a county judge in attending his association's convention outside the state or in a foreign country. The true test is whether or not the attendance of the officer benefits his county.

The 1956 handbook of the National Assn. of County and Prosecuting Attorneys states that among the purposes are sponsoring conferences and meeting of members "... for their official benefit and for the general welfare of the local governmental entities which they serve." (Emphasis supplied) It further states that the primary objective of the association "... is the promotion of the fullest cooperation among county and prosecuting attorneys, leading to the strict and honest enforcement of the law and the advancement of efficient local government.

Based upon the foregoing, it is my opinion the association meets the test set forth in opinion 056-178 in that the membership of county prosecutors and attorneys benefits the county they serve in that they are offered opportunities to further qualify themselves to discharge their official duties.

Therefore, reasonable dues may properly be paid from county funds, and your question is answered in the affirmative.

056-321—November 14, 1956

TAXATION

AD VALOREM TAXATION OF TRUST PROPERTIES — §1,
ART. IX, §16, ART. XVI, STATE CONST.; §§192.06, 199.02
AND CH. 617, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where property is vested in a non-profit corporation of this state to be held in trust perpetually, the income therefrom to be paid to certain named persons during their lives, and after the death of all of such persons, said income to be used for certain designated "religious, municipal, educational, literary or charitable purposes," is such property subject to ad valorem taxation, and if so to what extent?

We have examined the file handed us with the request for opinion, a copy of the last will and testament referred to in the request, and a copy of the charter of the nonprofit corporation named as the trustee in the said last will and testament, from which we find that a citizen and resident of this state died testate, in this state, on Dec. 14, 1953, and her said last will and testament was probated in this state on Jan. 27, 1954. We find that the said last will and testament, after making several special bequests of specific property and money, transferred "all the rest, residue and remainder" of the testator's "property, real, personal and mixed, wherever situated," to a certain nonprofit corporation organized and existing under and by virtue of Ch. 617, F. S., in trust to be administered, managed, invested and controlled, by the said corporation, with the income from such properties being paid to the widower and brother of the decedent so long as they or either of them shall live. After the death of both the widower and brother of the decedent "the remaining income from the trust shall constitute a perpetual fund for use by my trustee, with the advice and consent of the Advisory Board, for the benefit of apt students in the development of American literature and the promotion of its study. The benefits shall be available to any person between the ages of 18 and 35 who has shown talent for creative writing, without regard to residence, race, creed or color, except that some portion of the fund must be continuously available for American Negro students." Although the last will and testament clearly shows a desire that the corpus of the estate remain inviolate forever, provision is made for its invasion should the same be found necessary for "the best effectuation of the purposes" of the trust; however, we are inclined to construe this right of invasion to exist only after the termination of the payments of the income to the widower and brother of the deceased.

In this state all property, except government owned, is subject to ad valorem taxation, except such "as may be exempted by law for municipal, education, literary, scientific, religious or charitable purposes," (§1, Art. IX, State Const.) and the property of all corporations, with certain exceptions mentioned in the consti-

tution, is subject to "taxation unless such property be held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes." (§16, Art. XVI, State Const.). These provisions are limitations upon the power of the legislature to exempt from taxation any class of property except those particularly mentioned (*L. Maxcy, Inc. v. Fed. Land Bank*, 111 Fla. 116, 150 So. 248, text 250; *State v. St. Johns*, 143 Fla. 544, 197 So. 131, text 134; *State v. Doss*, 146 Fla. 752, 2 So. 2d 303, text 304). "Exemptions from taxation, whether stated in the constitution or in statutes, are to be construed against the claimant and in favor of the taxing power in cases of doubt. (*Steuart v. State*, 119 Fla. 117, 161 So. 378, text 379; *Overstreet v. Tubin*, Fla., 51 So. 2d 913, text 915; see also *Lumms v. Cushman*, Fla., 41 So. 2d 895, text 897). Sections 192.06 and 199.02, F. S., provide tax exemption of properties held and used for municipal, educational, religious, scientific, literary and charitable purposes. "Property exempt from taxation under the constitution for charitable and educational purposes has reference only to such property as is dedicated to the public and used exclusively for that purpose . . ." (*Johnson v. Sparkman*, 159 Fla. 276, 31 So. 2d 863, text 865; see also *Amos v. Jacksonville Realty and Mortgage Co.*, 77 Fla. 403, 81 So. 524, text 525; *Rast v. Hulvey*, 77 Fla. 74, 80 So. 750, text 752).

Although sub §(5) of §199.02, F. S., provides tax exemption for "intangible personal property *belonging* to any religious, benevolent or educational association," in the light of the above mentioned constitutional provisions and opinions of the supreme court of Florida the said provision should be construed as providing exemption for intangible personal property *belonging* to religious, benevolent or educational associations *which are used exclusively for religious, benevolent or educational purposes*, otherwise there might be some question as to the validity of the said statutory provision. Ownership alone is not sufficient to permit tax exemption; there must also be a use within the above constitutional provisions.

Under the terms of the last will and testament, the property vested in the trustee must be used to produce income to be paid to the widower and brother of the decedent during their lives, with no part of the corpus or income going for any religious, scientific, municipal, educational, literary or charitable purposes until after the death of the said widower and brother. Under the laws of this state exempting property used for religious, scientific, municipal, educational, literary or charitable purposes, the use made of the property is the main test of exemption (*Dr. William Howard Hay Foundation v. Wilcox*, 156 Fla. 704, 24 So. 2d 237) and "where property is not used for such purposes, it will not be exempt although intended for future use of a charitable character, or owned by a charitable institution" (84 C. J. S. 552, §282, Notes 58 and 59). We are, therefore, of the opinion that the corpus of the trust will be subject to ad valorem taxation so long as the same is used to produce income for the widower and brother of the decedent, or the survivor of them. The fact that the trust property may be held by a non-profit or eleemosynary corporation does not entitle it to tax exemption unless and until

it is used exclusively for some religious, scientific, municipal, educational, literary or charitable purpose or purposes.

We, therefore, answer the above question in the affirmative, and hold the corpus of the trust estate to be subject to taxation so long as the entire income is paid to or payable to the individuals named in the said last will and testament. Only when the trust, or a definite segregated portion thereof, is used exclusively for some religious, scientific, municipal, educational, literary or charitable purpose may the said estate, or segregated portion thereof, be exempted from ad valorem taxation.

056-322—November 15, 1956

REGULATION OF PROFESSIONS AND VOCATIONS

RADIOLOGISTS—JACKSON MEMORIAL HOSPITAL, DADE COUNTY—§§458.13(1), 125.01(4), Ch. 155, F. S. and §3, ART. XIII, STATE CONST.

To: *Park H. Campbell, County Attorney, Miami*

QUESTION:

Dade county operates Jackson Memorial hospital as a county function and in connection therewith maintains a department of radiology, where duly licensed doctors are employed at fixed salaries. In the case of "in-patients" all fees of the department are retained by the county, whereas fees received from "out-patients" are divided between the county and the radiologists up to a stipulated sum, when thereafter the balance is retained by the county. The relationship of doctor and patient is always maintained and the hospital merely bills for and collects the fees charged by the radiologists. Under such circumstances is the hospital practicing medicine in violation of law?

Section 458.13 (1), F. S., defines the practice of medicine as:

"Any person, except as hereinafter provided, shall be deemed to be practicing medicine within the purview of this chapter, who holds himself out as being able to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition, or who shall offer or undertake, by any means or method, to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition."

Section 3, Art. XIII, Fla. Const., in part provides:

"The respective counties of the state shall provide in the manner prescribed by law, for those of the inhabitants who by reason of age, infirmity or misfortune, may have claims upon the aid and sympathy of society; . . ."

Also, §125.01 (4), F. S., requires the board of county commissioners to ". . . provide for the poor and indigent people of the county."

The various counties under Ch. 155, F. S., are empowered to acquire, construct and maintain county hospitals. In addition, some

counties operate hospitals by authority of special or population acts. In any event, the operation of a hospital is recognized as a proper county function.

As we understand the facts, the department of radiology is an incident to the proper operation of the hospital and thereby renders efficient and complete medical attention and service to the residents of the county. The use of X-ray for treatment and diagnosis is considered essential to the practice of medicine. The county, as noted above, is required to render medical attention and treatment to its indigent citizens. I do not believe it is practicing medicine when performing this duty under the facts you have given us. The question should be answered in the negative.

This opinion is not in conflict with opinion 055-71 of March 25, 1955, holding that a non-profit corporation may not engage in the private practice of medicine by substituting itself in lieu of the physician in relation to the patient. Here the county operates the hospital and as an incident the department of radiology, primarily to further its program to provide public care and medical treatment for indigents. It also appears that the relationship of patient and physician is maintained by the medical staff of the department who have direct contact with the indigent patients. Furthermore, the billing and charging of such fees that are charged are handled so as to maintain this relationship. It follows that §458.13 (1), F. S., is not violated in this operation which is essentially public rather than a private practice in nature.

056-323—November 15, 1956

**COUNTY ORGANIZATIONS, OFFICERS AND REGULATIONS
COMPENSATION OF COUNTY OFFICIALS—EXPENSES OF
COUNTY ATTORNEY IN ATTENDING OUT-OF-STATE
PROFESSIONAL MEETINGS—§145.02, F. S.**

To: Park H. Campbell, County Attorney, Miami

QUESTION:

Are the reasonable expenses of the attorney for the board of county commissioners while attending meetings of the Nat'l Assn. of County and Prosecuting Attorneys properly payable from county funds?

In opinion 056-320 we held that reasonable dues of a county or prosecuting attorney might properly be paid from county funds in connection with his membership in the Nat'l Assn. of County and Prosecuting Attorneys.

Opinion 056-178, dated June 20, 1956, deals with the question of the expenses of a county judge in attending meetings of The Florida Bar, as well as his own association, both within the state and outside of the state. While the question there was whether or not under §145.02, F. S., such might be considered a necessary expenditure so as to be charged against his office, I feel that the principle is equally applicable here. We said there:

"However, the attendance of county officers to their

association meetings outside of the state or in a foreign country and other meetings, such as the County Judge attending Florida Bar meetings, may or may not be beneficial to the county, depending largely upon the nature of such meetings and the problems considered and studied. If the meeting is a mere social function, little, if any, benefit will flow to the county by reason of the attendance of county officers; other types of meetings may or may not be beneficial, depending on their nature and problem studied and considered. We do not think that it follows as a matter of law that the attendance of county officers to such meetings is ipso facto beneficial to the county; but before such expenses may be paid from public funds there must be a showing made by the officer, claiming expenses from public funds, of benefits flowing to the county by reason of his having attended such a meeting. This showing may be evidenced by the officer's affidavit or other satisfactory proof."

Should it be determined that the expense is for a county purpose in accordance with the above, it would then be necessary that the budget include an item from which such could properly be paid. (See *Adams v. Lott*, 112 Fla. 483, 150 So. 596.)

This answers the question as definitely as the same may be answered.

056-324—November 20, 1956

TAXATION

DOCUMENTARY STAMP TAXES; LOCAL TRANSFERS OF STOCK IN FOREIGN CORPORATION, ETC., §§201.04 AND 614.03 F. S.

To: *Ray E. Green, Comptroller, Tallahassee*

QUESTION:

Where certificates of stock in a foreign corporation are endorsed and delivered, or are delivered accompanied by a written assignment or power of attorney to assign or transfer, in this state are such transactions subject to documentary stamp taxes under Ch. 201, F. S.?

Under §201.04, F. S., a documentary stamp tax is imposed "on all sales, agreements to sell, or memoranda of sales or deliveries of, transfers of legal title to shares, or certificates of stock or profit or interest in property or accumulations in any corporation, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock interests or not . . ." The scheme of this statute is to tax the transfer of the title to shares of corporate stock and other mentioned rights, whether executory or executed, by documentary stamps to be affixed to those writings, and those only, which in a practical sense are the repository of

the agreement, or the instrument, or the vehicle for the ensuing change of title.

Except in the case of agreements and memoranda for the future transfer of shares of stock, it is the actual transfer of the title to shares of stock that is taxed, however evidenced. If the transfer is evidenced only by the books of the corporation, then the stamps are to be placed upon such books; if the transfer is effected by an agreement or memorandum, then the stamps are to be placed upon such instruments. The evidence of transfer taxed under the Florida statute is not every writing made in Florida concerning the sale or transfer of title to stock where the actual transfer is to be accomplished in another state (*Lee v. Brickwell*, 292 U. S. 415, 54 S. Ct. 727, 78 L. Ed. 1337). The answer to the above stated question seems to depend upon whether or not the title to the shares of stock passes in Florida or in some other state, for example, on the stock books of the corporation in some other state.

Transactions in Florida in connection with the sale and transfer of corporate stock in foreign corporations, except agreements for the future sale and transfer of such stock, where title may pass to such stock only upon the recording of such transaction on the books of the corporation, do not seem to be subject to taxation under §201.04, F. S. Although we are informed that provision requiring that stock transfers may be made only upon the records of the corporation and not otherwise appears in many of the states, we are also informed that substantially all, if not all, of the several states of the union, including Florida (Ch. 614, F. S.), have adopted the uniform stock transfer act, §1 of which provides that:

"Title to a certificate and to the shares represented thereby can be transferred only,

"(a) By delivery of the certificate indorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby, or

"(b) By delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign, or transfer the same or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby. Such assignment or power of attorney may be either in blank or to a specified person.

"The provisions of this section shall be applicable although the charter or articles of incorporation or code of regulations or by-laws of the corporation issuing the certificate and the certificate itself, provide that the shares represented thereby shall be transferable only on the books of the corporation or shall be registered by a registrar or transferred by a transfer agent."

Although most, if not all, of the states in adopting the uniform act have adopted the above provision from the said act, many have additional provisions, for example several of the states (Cal-

fornia, Kansas, Maryland, Missouri, Montana, etc.) have added provisions similar to paragraph (c), sub §(1), §614.03, F. S., which were added in Florida, to wit:

"(c) By delivery of the certificate with an assignment indorsed thereon or in a separate instrument signed by the trustee in bankruptcy, receiver, guardian, executor, administrator or other person duly authorized by law to transfer the certificate on behalf of the person appearing by the certificate to be the owner of the shares represented thereby."

The purpose of these statutes is to provide a system for transfer of stock that states might follow to simplify transactions that touch other states (*Standard Oil Co. v. New Jersey*, 341 U. S. 428, 71 S. Ct. 822, 95 L. Ed. 1078) and to give certificates of stock certain characteristics of negotiable paper (*Krizanek v. Smith*, 32 Del. Ch. 513, 87 A. 2d 871). Under the uniform act, the transfer of stock on the books of a corporation is not necessary to pass title to corporate stock (*Solz v. Exhibitors' Service Co.*, 334 Pa. 211, 5 A. 2d 899). The uniform stock transfer law may be relied on only in cases where the state of the incorporation of the foreign corporation in question has adopted the same, so that the statute will be operative in both the home state of the corporation, as well as in the state where transfers in the manner provided therein are made.

The above stated question is answered in the affirmative in cases where the home state of the foreign corporation has adopted the uniform stock transfer law or a like law, including extensions and additions to same, and the transfer of the title to the stock is complete in this state under such foreign statute or law. Where the home state of the foreign corporation has adopted the uniform law it should be presumed that the transfer is complete and title passes in this state pursuant to the uniform law unless and until clearly shown to be otherwise. Where the home state of a corporation has not adopted the uniform stock transfer law, or a like or similar law, and it be shown that under the laws of such state title to stock does not pass until entered upon the corporate records in that state notwithstanding transactions in this state then, except in connection with agreements for the sale and transfer of stock sometime in the future, no documentary stamp taxes would seem to be due. These observations seem to answer the above question as well as it may be here answered. The application of Ch. 201, F. S., to transfers of stock, issued by Florida corporations, in other states having the uniform stock transfer laws, is not here decided when such stock is brought into this state for the recording of such transfers on the books of the corporation in this state.

056-326—November 20, 1956

OFFICERS—DE FACTO, DE JURE

APPOINTMENT OF UNQUALIFIED PERSON TO DUVAL COUNTY BEACHES HOSPITAL BOARD—CH. 25807, 1949

To: LeRoy Collins, Governor of Florida, Tallahassee

QUESTIONS:

1. Where it is provided by law that the appointees of the governor to certain public offices must be residents of particular geographic areas and the governor inadvertently appoints someone who does not meet such residence requirements, what is the status of such appointee?

2. In such situation can the governor disregard the appointment of the unqualified person and appoint someone who is qualified?

3. If the unqualified appointee meets the residence requirement by moving his residence to the proper area, is the irregularity in his appointment cured so that he may continue to hold the office?

Chapter 25807, 1949, authorizes the governor to appoint the 5 members of the Duval County Beaches public hospital board. Two of the members must be residents of Jacksonville Beach, one a resident of Neptune Beach, one a resident of Atlantic Beach, and one a resident of that part of the hospital district lying north of Atlantic Beach. The act clearly contemplates that this scheme shall be continued with respect to all regular appointments and all appointments to fill vacancies. The governor's recent appointment of a man from Jacksonville Beach to fill a vacancy created by the death of the board member from Atlantic Beach does not follow the scheme set out in the law.

Florida recognizes the general rule that a de facto officer is one who under color of title and without lawful right exercises the functions of an office which he holds under such circumstances as are calculated to induce people without inquiry to assume that he is a de jure officer. (*State v. Gleason*, 12 Fla. 190; *State v. Tippet*, 101 Fla. 1117, 134 So. 52; *State v. Murphy*, 32 Fla. 138, 13 So. 705; and others.) When a person has such possession of a de jure office as to make him a de facto officer in law, his acts are, as a general rule, valid and binding as to third persons and the public. (*Sawyer v. State*, 94 Fla. 60, 113 So. 736; *Dwyer v. State*, 95 Fla. 846, 116 So. 726.)

The appointee in question is undoubtedly a de facto officer whose status as such was created by the inadvertent failure of the governor to appoint someone possessing the statutory qualifications for the office. (See 43 Am. Jur. 233.) According to the rule which appears to prevail under such circumstances, the appointment of an ineligible person is a nullity. Although it is sufficient in this case to give the appointee color of title to the office and make him a de facto officer, it can be disregarded as a nullity. (See 67 C. J. S. 156 and 42 Am. Jur. 955.)

A clear weight of authority does not seem to exist on the question of whether a subsequent removal of a disqualifying factor will permit the previously ineligible person to continue in office (See *State v. Gleason*, 12 Fla. 190, and *State v. Wiseheart*, 158 Fla. 267, 28 So. 2d 589). The better rule in the present case, since the appointment is considered as a nullity, would be that the appointee's moving of his residence to Atlantic Beach would not change his de facto status unless after the move he should be reappointed.

In view of these considerations, it is my opinion that your questions should be answered as follows:

1. The status of the appointee in question is that of a de facto officer whose official acts are valid as to the public generally and whose possession of the office to which he was appointed cannot be attacked collaterally.
2. The governor may consider the appointment as a nullity, may withdraw it, cancel any commission issued on the basis thereof, and appoint someone who is a resident of Atlantic Beach.
3. If the presently ineligible appointee should move his legal residence to Atlantic Beach, the invalidity of his previous appointment would not be cured, but he would then be eligible to be reappointed by the governor.

056-327—November 21, 1956

CRIMINAL PROCEDURE

ARREST WARRANTS — SERVICE ON SUNDAY — §§901.04 AND 47.46, F. S.

To: *Richard H. Cooper, County Solicitor, Orlando*

QUESTION:

May an arrest warrant be lawfully served on Sunday under authority of §901.04, F. S., despite the provisions of §47.46, F. S.?

Section 901.04, F. S., provides as follows:

"901.04 Direction and execution of warrant. — The warrant shall be directed to all and singular the sheriffs and constables of the state. It shall be executed only by a sheriff or constable of the county in which the arrest is made, unless the arrest is made in hot pursuit, in which event it may be executed by any sheriff or constable who is advised of the existence of said warrant. An arrest may be made on any day and at any time of the day or night."
(Emphasis supplied)

I interpret this statute as authorizing an arrest to be made under an arrest warrant on any day of the week, regardless of whether it be Sunday or some other day.

It is true that §47.46, F. S., provides that, unless the proceeding therein set forth is followed, the execution upon Sunday of

any warrant shall be void and the person serving or executing it or causing it to be served or executed shall be liable to a suit for damages for so doing.

However, I do not think that §47.46, F. S., is now the law of Florida with respect to the execution of an arrest warrant on Sunday because it has been superseded in that respect by §901.04, F. S. Section 47.46 had its inception in a statute which was enacted in 1828, while §901.04 was enacted as a part of the criminal code in 1939 and, being the last word of the legislature on this subject, is controlling.

Therefore, it is my opinion that the above stated question is properly answered in the affirmative.

056-328—November 21, 1956

COURTS

DESIGNATION OF SUBSTITUTE JUDGE UPON ENTRY OF ORDER OF DISQUALIFICATION — §38.09, F. S.

To: *LeRoy Collins, Governor of Florida, Tallahassee*

QUESTION:

A chancery case was filed in a judicial circuit which has several judges. It fell into Judge "A"'s division and, without adjudicating the case or disqualifying himself from hearing it, he assigned it to Judge "B", the acting senior circuit judge of the circuit, "for appropriate reassignment in accordance with the rules adopted by this court." Judge "B" reassigned the case to Judge "C", who was the senior circuit judge. The statutory steps required by law have been taken to disqualify Judge "C" from hearing the cause but you have not been furnished with a copy of an order of disqualification and presumably he has not entered such an order. Under these circumstances, does §38.09, F. S., confer upon you the power and authority to designate another judge to hear the case?

Section 38.09, F. S., reads as follows:

"38.09 Designation of judge to hear cause when order of disqualification entered.—*Every judge of the state shall upon the entry of an order of disqualification mail a copy of said order to the governor. UPON RECEIPT OF A COPY OF SUCH ORDER the governor shall thereupon designate another judge to hear said cause. The original of such designation by the governor shall be mailed therewith to the clerk of the court in which said cause is pending and shall be by said clerk filed in the cause. In designating another judge the governor shall have consideration for the convenience of parties and their counsel; provided, however that in the event any judge shall be disqualified as herein provided, upon application for any temporary writ of injunction or habeas corpus, he shall immediately enter an order of disqualification, whereupon said cause may be*

presented to any other judge of a court of the same jurisdiction as the court in which said cause is pending, and it shall be the duty of any such judge to hear and determine such matters until such substitute judge is so designated." (Emphasis supplied)

The said statute confers no jurisdictional power upon you to designate another judge until you receive a copy of an order of disqualification entered by the judge to be replaced and, not having received such a copy in the case here involved, you are without authority to proceed under said statute. You, of course, have no authority to require or demand that either of said judges enter an order of disqualification.

Whether Judge "A" had the right to take himself out of the case by assigning it to Judge "B" for reassignment is a question upon which you are not authorized to pass. The same is true as to Judge "B"'s reassignment of the case to Judge "C", and as to whether Judge "C" is disqualified. All of these questions are questions which only the courts have the authority to determine.

I see no reason to think that Judge "A"'s action in removing himself from the case by assigning it to Judge "B" was the legal equivalent of an order of disqualification within the contemplation of §38.09, F. S., and the same is true as to Judge "B"'s reassignment of the case to Judge "C".

Therefore, it is my opinion that the above-stated question is properly answered in the negative.

056-329—November 29, 1956

BANKS AND BANKING

OUT-OF-STATE BANKING ASSOCIATION—TRANSACTIONS EXEMPT FROM CODE—TRUST POWERS AND DUTIES—§§659.57 AND 660.10, F. S.

To: *Ray E. Green, Comptroller, Tallahassee*

QUESTION:

May a foreign banking association, having trust powers and holding funds in trust to be invested for the use and benefit of a retirement and pension fund, make direct loans of such funds to persons, firms and corporations in this state, taking promissory notes and other evidences of indebtedness secured by mortgages or liens encumbering real property in this state?

Such a foreign banking association, not being a bank and trust company incorporated under the laws of this state or a national banking corporation located in this state, and having trust powers, is prohibited, by §660.10, F. S., from exercising any of the powers and duties and from acting in any of the capacities, within this state, set out in said section. The powers, duties and capacities set out in the above question do not seem to bring the foreign banking association in question within either the 1st, 2nd, 3rd, 5th, 6th, 7th or 8th subsections of said §660.10, F. S.

The 4th subsection would prohibit the said foreign banking association from acting "as trustee of any real estate in this state or any interest therein under any agreement whereby the beneficial interest in such property is vested in others." (Emphasis supplied.)

Under the laws of this state (§697.01 and 697.02, F. S.) "a mortgagee does not have an estate or interest in mortgaged lands, by virtue of his mortgage, but is merely the owner of a chose in action creating a lien on the property." (Shavers v. Duval Co., Fla., 73 So. 684, text 687, and cases therein cited). In this state a mortgage is not subject to a common law execution (Evins v. Gainesville Nat. Bank, 80 Fla. 84, 85 So. 659, text 660) and does not pass under a deed of conveyance unless the mortgage indebtedness be assigned (Hemphill v. Nelson, 95 Fla. 498, 116 So. 498, text 500). In this state the mortgage debt is the essential fact and the mortgage itself a mere incident of it (Younghusband v. Fort Pierce Bank and Trust Co., 10 Fla. 1088, 130 So. 725, text 728). A trustee investing trust funds in a mortgage indebtedness in this state and acquiring a mortgage encumbering lands in this state would not acquire or hold an interest in real estate in this state; he would hold a chose in action creating a lien on real property in this state.

Section 659.57, F. S., provides that nothing in the state banking code (Chs. 659-661, F. S.) may be construed as prohibiting a foreign banking corporation from "acquiring, holding, leasing, mortgaging, contracting with respect to or otherwise protecting, managing or conveying property in this state which has heretofore or may hereafter be assigned, transferred, *mortgaged* or conveyed to it as security for, in whole or in part in satisfaction, of a loan or loans made by it or obligations acquired by it in the transaction of any business authorized by this section." There seems to be implied in the above quoted provision of the statute a right to make mortgages on real property in this state by foreign banks without violating the state banking code. However, in this connection, there seems to be a distinction between the status of a bank's own funds and those held by it as trustee for others (Edwards v. Lewis, 98 Fla. 956, 124 So. 746; Myers v. Matusek, 98 Fla. 1126, 131 So. 360; Campbell v. Vining, 101 Fla. 939, 133 So. 555; Bryan v. Coconut Grove Bank and Trust Co., 101 Fla. 947, 132 So. 481, 134 So. 229). This being true, it may be that §659.57, F. S., is limited to transactions by foreign banks in this state as such banks and not as trustee.

We find nothing in the Florida Statutes prohibiting a foreign corporate trustee investing trust funds in this state and taking a mortgage on real property in this state to secure the repayment of such funds; however, should such a trustee have to buy such property in at a mortgage foreclosure sale to protect the interests of cestui que trustant it would be confronted with the same problems as those set out in our opinion of Sept. 5, 1956, (056-275) where a foreign corporate trustee takes title to property at a foreclosure sale. This gives a limited affirmative answer to the above stated question.

However, apart from the above question, should a foreign corporate trustee come into this state to make direct loans on

real estate mortgage security and in that connection have agents in this state to ascertain the value of the property to be mortgaged, the sufficiency of title, inspect the property generally, look after and see that there is no waste of the security, see that taxes are paid or insurance payments are kept current, and other duties usually carried out by mortgagees, a problem would be presented on the question of doing business in this state requiring qualification of the trustee as a foreign corporation in this state under Ch. 613, F. S. (In this connection, see *John Hancock Mut. Ins. Co. v. Girard*, 57 Idaho 198, 64 P. 2d 254; *State Life Ins. Co. v. Dupre*, 19 Tenn. App. 301, 86 S. W. 2d 894 and 23 Am. Jur. 335-339, §361). No attempt is here made to determine the application of said Ch. 613, F. S., in this opinion as the same might probably involve facts and circumstances not now before us; we merely make mention of a possible further problem.

056-330—November 27, 1956

COUNTY SCHOOL SYSTEM

CONSTRUCTION OF BUILDINGS—CHANGES IN REQUIREMENTS AFTER AWARD OF CONTRACT—§235.321, F. S.

To: *Thomas D. Bailey, Superintendent of Public Instruction, Tallahassee*

QUESTION:

Can a county school board legally proceed on reconstruction of a failed cafetorium structure by expending the sum of \$2,600 to account for the cost of materials over and above those included in the original plans, provided, that the original contractor, original architect and the sub-contractor have agreed to finance the actual cost of reconstruction on the basis of revised plans, and provided, that a change order including the aforesaid \$2,600 will be issued not to exceed the limit allowed by §235.321, F. S.?

As I understand the facts involved in the situation contemplated by your question, the building in question was found to be faulty upon completion.

By negotiation the architect, contractor and a subcontractor agreed to correct the deficiencies in design and construction at their own expense. A small item was incurred for additional materials not contemplated in the original design and the board is willing to pay for these materials since they constitute additional necessary costs not previously covered by the original contract.

Section 235.321, F. S., provides a procedure for making changes in construction requirements after award of a contract. It provides, among other things, that no changes can be made other than those which result from conditions which were not foreseen at the time of the award of the contract. It also provides other limitations as to amount of costs involved.

In my opinion, the situation described in this case comes

within the "unforeseen conditions" exception described in the statute.

Assuming, therefore, that the change order otherwise conforms to the provisions of §235.321, F. S., it is my opinion that your question must be answered in the affirmative.

056-331—November 28, 1956

ELECTORS AND ELECTIONS

REREGISTRATION OF FREEHOLDERS FOR BOND ELECTIONS — §§97.081 AND 100.241, F. S.

To: *Joe Oldmixon, Supervisor of Registration, Pensacola*

QUESTIONS:

1. Will only persons who reregister as freeholders be eligible to vote in bond election held subsequent to reregistration, or, would a person who is registered to vote under the permanent registration system, as a freeholder, who fails to reregister, be eligible to vote in such an election on condition that he signs the affidavit referred to in §100.241(2)(d), F. S.?

2. Will it be necessary that we go through the permanent registration records and every person who fails to reregister whose freeholder status is now "yes" be changed to "no" in order not to have two sets of freeholders?

3. Will new persons who register as freeholders for this election become a part of the permanent registration records in Escambia county and be qualified to vote in primary and general elections under this registration?

Chapter 31404, 1956, passed by the 1956 extraordinary session of the legislature, amended sub §(2) of §97.081, F. S., to make it mandatory that a reregistration of freeholders be conducted when requested by a resolution of the board of public instruction for the purpose of securing a new list of freeholders eligible to participate in an election called for the purpose of approving the issuance of bonds to finance the construction of school buildings. It is assumed that the resolution adopted by your school board was in pursuance of the authority granted by this law.

Despite the reference in §97.081, F. S., to "lists" of freeholder electors, the effect of the later enactment found in §100.241, when read in conjunction with §97.081, is that the regular registration books of the county shall be used in freeholder elections rather than the specially prepared freeholder lists that were formerly contemplated for use in such elections. See opinion 053-239, found in the 1953-1954 Biennial Report of the Attorney General on p. 100.

Section 97.081, F. S., as amended by Ch. 31404, 1956, contemplates a *reregistration* of freeholder electors and prescribes the period during which such reregistration may be accomplished.

The stated purpose of the reregistration of freeholders is to obtain "a new and up-to-date list of freeholders." Sub §(3) of §97.081 provides that "The latest list of reregistered qualified freeholders shall supersede prior lists and in any bond election held after a reregistration of freeholders the power to issue bonds shall be based upon the approval by a majority of the votes cast in an election in which a majority of the reregistered freeholders who reregister and are qualified shall participate."

As your questions appear to rise from doubt as to whether the freeholder reregistration will affect the permanent registration, it can be concluded from the foregoing that the reregistration of freeholders does affect the permanent records and that once the reregistration is called, the only freeholder electors in the county are those who register or reregister during or after the reregistration period. With this in mind, it is my opinion that your questions should be answered as follows:

1. With the exception of those registered electors who on election day evidence that they are freeholders in the manner prescribed by §100.241(2)(d), F. S., no one will be permitted to vote at the bond election who did not reregister during the time that the registration books were open for the reregistration of freeholder electors.

2. In some manner the registration records must be made to show that only those persons who registered or reregistered as freeholders during the freeholder reregistration period are eligible to vote in freeholder elections. Those who prove their eligibility as freeholders on the day of the bond election or who reregister or register as such on subsequent days when the books are open shall also be considered thereafter as qualified freeholder electors, but freeholder registrations recorded prior to the reregistration of freeholders shall be of no effect as to freeholder status. The failure of an elector to reregister as a freeholder does not mean, however, that he is no longer a registered elector. It only means that he is no longer a registered freeholder elector.

3. Previously unregistered persons who register for the first time during the freeholder reregistration period, will be eligible to vote in all subsequent primary and general elections. If they register as freeholders, or if they prove their freeholder status on election day, they may vote in the school bond election and all subsequent freeholder elections until at some future date there might be another freeholder registration at which, or after which, they and all other freeholders would have to reregister in order to maintain their freeholder status.

056-332—November 29, 1956

TAXATION

OCCUPATIONAL LICENSE — FORTUNE-TELLERS — §§205.41
AND 205.411, F. S.

To: *Ray E. Green, Comptroller, Tallahassee*

QUESTION:

Where an applicant for an occupational license

under §205.41, F. S., complies with the requirements of §205.411, F. S., is he required to comply with said §205.411, to obtain licenses under said §205.41 for subsequent years?

"No license to engage in the occupation of fortune-telling or any other pursuit for which a license is required by §205.41, shall be issued to any person unless such person holds a permit therefor given by the board of county commissioners of the county wherein such license is sought." No such permit may be issued until after certain designated conditions are fulfilled (§205.411, F. S.). Among the requirements for obtaining such a permit is the requirement that the "applicant shall have been a resident of Florida for at least two years and shall be a registered voter in the county where the permit or license is applied for;" and the said applicant must establish his good moral character.

After the application is filed with the board of county commissioners, their clerk is required to make a substantial investigation concerning the applicant. Other county officers are required to assist in the making of this investigation. Any tax collector or other officer who may issue a license under §205.41, F. S., "upon an application not accompanied by the permit required" by said §205.411, "shall be guilty of malfeasance and subject to removal from office." Licensees under §205.41 are required to display at their places of business not only their license but also their permit issued under said §205.411. Note Ch. 31284, 1955, relative to Sumter county.

The requirements of §205.411, F. S., are clearly under the police powers of the state, are regulatory in their nature, and designed to protect the public from untrustworthy operators. One of the requirements is that the licensee be a resident of the state and a duly registered voter in the county where the license and permit are issued. It is general knowledge that the residences of persons at a particular time in one year may not be their residence one or more years later; and persons registered to vote one year may not be registered voters a year later.

Considering the purpose and intention of §205.411, F. S., and that it was designed as a regulation under the state's police powers, we feel, and, therefore, hold that persons desiring to obtain occupational licenses under §205.41, F. S., must comply annually with §205.411, F. S. Only by strict compliance with §205.411, F. S., may its purpose and intent be accomplished and the protection thereby designed be accorded the public.

The question is, therefore, answered in the affirmative.

056-333—November 30, 1956

INSURANCE

STATE FIRE INSURANCE FUND; QUALIFICATION
OF AGO 056-119 — §§284.02 AND 255.01-255.03, F. S.

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*

QUESTION:

Question 2. in opinion 056-119 is here repeated:

"2. What is the application of said proviso in §284.02 to fire insurance coverage of certain risks constructed by the board of control under a financing plan involving issuance of revenue certificates, as described?"

Attached hereto is copy of said opinion 056-119. It is apparent the proviso referred to in the above question was added to §284.02, F. S., by the 1953 legislature, requiring that the general revenue fund be reimbursed from other funds the amount of premiums paid into the state fire insurance fund for their benefit. A discussion of this 2nd question begins on p. 3 of the opinion and concludes at the bottom of p. 4.

Attention is directed to the fact that while there are several completed projects of the nature contemplated by this question, copy of the resolution applicable only to one of these projects was furnished to this office and the answer given to the question in such opinion was limited to that one constructed project. With respect to this particular project see paragraph beginning at bottom of p. 3 of said opinion. Attention is further directed to the statement appearing as the last paragraph on p. 4 of the opinion. Hereafter in this opinion, reference to "risk" shall be accepted to cover one or more separate risks included in such particular financial program and of such nature as to be insurable in the state fire insurance fund.

Summarized the effect of said opinion in relation to this question and applicable to said risk is as follows: Were it not for the italicized words of the following provision in the mentioned resolution:

"The proceeds of such insurance shall be used only for the reconstruction, repair or replacement of the facilities of the project damaged or destroyed, or for the redemption of the last maturing certificate or the purchase of last maturing certificates at not more than the then redemption price of such certificate."

the risk in this project, if otherwise insurable in the state fire insurance fund, would be eligible for fire coverage in that fund; that, however, laws relating to the state fire insurance fund are to be read in connection with the "replacement fund" consisting of proceeds of insurance, in event of loss, as specified in §§255.01-255.03, F. S.; that the above italicized wording precludes coverage of this risk in said fund. This conclusion warrants reconsideration.

It is reasonably apparent that the part of the above-quoted wording not italicized is not in conflict with the provisions of §§255.01-255.03. Further, the alternatives in the quoted wording are subject *only* to the election of the board of control; and it would appear that when the board obtained fire coverage on the risk in the state fire insurance fund, it did so with full knowledge of existing laws, particularly the provisions of the mentioned sections, and by so placing said coverage exercised the election concerning disposition of insurance proceeds, in the event of loss, provided by that part of the above-quoted wording not italicized.

Hence, reasonably the risk involved in this particular financed project is eligible for insurance in the state fire insurance fund;

and by reason of the nature, use and occupation of such property involved in said project, under the reasoning employed in former opinion 055-53, copy attached, the premium for such coverage properly is payable from the general revenue fund and the mentioned proviso has no application to such premium. To the extent only that these conclusions may be at variance with the answer to the 2nd question dealt with in former opinion 056-119, such answer is modified.

056-334—November 30, 1956

CRIMES

PUNISHMENT FOR CULPABLE NEGLIGENCE — §§784.05 AND 782.07, F. S.

To: *Edward M. Booth, Assistant County Solicitor, Jacksonville*
QUESTION:

Does §784.05, F. S., cover a situation wherein a person, while operating an automobile under conditions evidencing culpable negligence, runs into a pedestrian and causes serious bodily injury which does not result in the death of the pedestrian?

Section 782.07, F. S., makes it manslaughter to kill a human being by culpable negligence, regardless of whether the killing be caused by the culpably negligent operation of an automobile or by some other culpably negligent means.

For some years after the enactment of what is now §782.07, F. S., we had no statute providing for punishment of a person who injured, without killing, another person through culpable negligence, however serious the injury might have been. To remedy this omission in our laws, the 1903 legislature enacted §784.05, F. S., which authorizes a conviction for inflicting personal injury upon another by means of any culpably negligent conduct. Any kind of culpable negligence which would be sufficient under §782.07 is sufficient under §784.05, including the culpably negligent operation of an automobile.

Therefore, it is my opinion that your question is properly answered in the affirmative.

056-335—December 1, 1956

BANKS AND BANKING

FILING TAX, ARTICLES OF INCORPORATION — §§608.05 AND 659.15; §18, ART. III, STATE CONST.

To: *R. A. Gray, Secretary of State, Tallahassee*

QUESTION:

Do the provisions of §608.05(3) or 659.15, F. S., control with respect to the filing tax required of a banking corporation?

Section 608.05(3), F. S., provides in effect that in connection with articles of incorporation, amendments, etc., the filing tax for a corporation organized "to conduct a banking, safe deposit, trust (and other described activities) company," shall be based upon the authorized capital stock thereof, according to the following schedule: \$2 upon each \$1,000 par value of stock up to and including \$125,000; 50¢ upon each \$1,000 par value of stock in excess of \$125,000 and not in excess of \$2,000,000; 25¢ upon each \$1,000 par value of stock in excess of \$2,000,000; with the provision that no par value stock shall be valued at \$100 a share.

Present Ch. 608, F. S., was originally Ch. 28170, 1953, which was a revision of our corporation laws. Former Ch. 611, F. S., applied to those corporations now described in present §608.05(3), and former §611.05, F. S., provided the same schedule of license taxes as now set forth in present §608.05(3). According to the records in the office of the secretary of state, Ch. 28170 was originally house bill 1125; passed the house on May 27, 1953; passed the senate on May 29, 1953; was not approved by the governor and was filed in the office of the secretary of state on June 15, 1953. Section 3 of Ch. 28170 provided that the act should take effect on Oct. 1, 1953.

Section 659.15, F. S., provides in effect that on the filing of any charter or other papers relative to "banks and trust companies" with the secretary of state, among others set forth the following fees and taxes should be paid: "for charter, \$2 for each thousand dollars of the total amount of capital stock authorized, and for certificate of increase of capital stock, \$2 for each thousand dollars of the total increase authorized, but in no case less than \$20."

Chapters 658-661, F. S., were originally Ch. 28016, 1953, which was a revision and codification of certain of our laws relating to banks and trust companies. Present §659.15, F. S., is identical with former §655.25, F. S. The records of the office of the secretary of state evidence that Ch. 28016 was originally committee substitute for house bill 46; passed the house April 30, 1953; passed the senate May 6, 1953; was not approved by the governor and was filed in the office of the secretary of state on May 20, 1953. Since no provision of Ch. 28016 fixed an effective date for the act, it became effective on the 60th day "from the final adjournment" of the 1953 regular legislative session (§18, Art. III, Fla. Const.).

Sections 608.05(3) and 659.15, F. S., were re-enacted by the 1955 legislature as a part of Florida Statutes, 1955. There is presented here conflict in the provisions of these two sections. Were the provisions of §608.05(3) general in terms and not particularizing as to the corporations affected thereby, there is substantial authority that the provisions of §659.15 pertaining to particular corporations would control as to such corporations (*Dickson v. Cahoon*, Fla., 144 So. 345). However, that is not the case. We have two enactments of the 1953 session specifically referring to banks and trust companies in conflict. There is the well-known rule that repeals by implication are to be avoided if possible (*Scott v. Stone*, Fla., 176 So. 852; *State ex rel Holloway v. Keller*, Fla., 182 So. 779); that this rule is particularly true with respect to statutes relating to the same subject matter passed at the

same session (*Curry v. Lehman*, Fla., 47 So. 18). However, if there exists irreconcilable conflict between two acts, the most recent act must prevail (*Stewart v. DeLand-Lake Helen Special Road & Bridge Dist.*, Fla., 71 So. 42; *Tamiami Trails Tours v. Lee*, Fla., 194 So. 305); and when such a repeal is required it is no less effective than a direct repeal (*State v. Herndon*, Fla., 27 So. 2d 833). There is another rule here relevant to the effect that where conflicting provisions are in a revision of our statutes, "we may look behind the revision to ascertain which act was the last expression of the legislature" (*Lykes Bros. v. Bigby*, Fla., 21 So. 2d 37, citing *Hillsborough County v. Jackson*, Fla., 50 So. 423).

Applying these rules, it follows that the last expression of the legislature with respect to the mentioned taxes in relation to banking corporations is §608.05(3), F. S.

In light of the foregoing, in my opinion the above question is answered as follows:

Section 608.05(3), F. S., controls with respect to taxes described therein in relation to banking corporations.

While the specific question deals only with such described filing taxes, should there exist a conflict between other provisions of §§608.05 and 659.15, F. S., with respect to other fees or taxes payable to the secretary of state, the provisions of the former section shall control.

056-336—December 3, 1956

PUBLIC BUSINESS

SEMINOLE INDIAN RESERVATION—USE AND DISPOSITION OF INCOME FROM LANDS— §§285.01-285.06 AND 285.12, F. S.

To: Board of Commissioners of State Institutions, Tallahassee
QUESTION:

1. What is the interest of the Florida Indians in and to the lands set apart by the state as Indian reservations and the income from such lands?
2. May a part of the income from such reservation lands be used for administering the same by the state?
3. Who has the power of direction over the expenditure of the income from state Indian reservations from leases and otherwise?

There are three Indian reservations in Florida: (1) The Dania reservation, a small reservation some 25 miles north of Miami in Broward county; (2) the Brighton reservation on the northwest shore of Lake Okeechobee; and (3) the Big Cypress reservation in the swamplands some 45 miles south of Lake Okeechobee. Chapter 7310, 1917 (§§285.01-285.03, F. S.), made provision for an Indian reservation in Monroe county; however, this location not being satisfactory to the Indians, provision was made by Ch. 17065, 1935 (§§285.04-285.06, F. S.), for a substitute reservation in a more

satisfactory location to the Indians. Under §285.06, F. S., title to Indian reservation lands is "held in trust, by the board of commissioners of state institutions, for the perpetual benefit of the Indians and as a reservation for them." It is here noted that the lands are held by the board not only as a reservation for the Indians but also for the perpetual benefit of the Indians. Section 285.12, F. S., provides that Indian tribes residing on a state Indian reservation "shall benefit from the discovery and development of all mineral deposits on the lands of the reservation the same as if the title to the lands *were vested in the tribe.*" (Emphasis supplied) Where land is set apart for use and occupation of Indians and there is nothing in the establishing law to warrant a contrary construction, the grant will be held to give the Indians the beneficial ownership not only of the land but the minerals therein as well (42 C. J. S. 696, §30) and where mineral rights are sold in such lands the proceeds therefrom will be for the use and benefit of the Indians. Until properly disposed of such proceeds are held in trust, and such trust is an active one and not a dry trust (42 C. J. S. 699, §30).

Had title to the reservation been vested in the occupying Indian tribe (see §285.12, F. S.), then the proceeds from leases thereon and interests therein would have been tribal property belonging to the tribe as a community and not the members severally (42 C. J. S. 670, §19). Section 285.12, F. S., in effect makes the income from oil, gas and mineral leases on Indian reservation lands tribal property. This being true, and in light of the provisions in §285.06, F. S., such funds are held by the board of commissioners of state institutions in trust for the use and benefit of the Seminole Indian tribes (referred to as Miccosukee and Muskogee or Cow Creek) who are resident on the state Indian reservations. The property is held in trust for the Indian tribes and not the individual Indians composing the said tribes. There being no statutes or laws providing otherwise we feel that such funds held in trust should be disbursed only upon tribal consent and authority or direction. The fund appears to be a trust and subject to general trust limitations, except in so far as otherwise provided by statute. Generally where a trustee, in good faith and with due care, prudence and diligence, incurs costs and expenses in the administration of a trust, he is entitled to be indemnified or reimbursed therefor out of trust funds (90 C. J. S. 412, §285; 54 Am. Jur. 279, §355). "It is a general rule that a trust estate must bear the necessary expenses of administration of the trust" (54 Am. Jur. 279, §355, note 14). The proceeds from the lease of oil, gas and mineral rights in Indian reservation lands being in the nature of a trust, if not actually a trust, the necessary expenses of administering the trust may be paid from the fund unless otherwise provided by law.

In the light of the above and foregoing statutes, authorities and observations we feel that:

1. The interest of the Florida Indian tribes in and to the lands set apart by the state as Indian reservations and the income from such lands is that of a cestue que trust. Title to such lands and property is vested in the board of commissioners of state institutions as trustees.

2. The income from such reservation lands may be used to the extent necessary for the administration of such income.

3. In the light of §285.12, F. S., the Indian tribes, through their tribal authorities, seem to have the general direction subject to the discretion of the board of commissioners of state institutions, over the expenditure of the income from the state Indian reservations from oil, gas and mineral leases and otherwise.

056-338—December 7, 1956

COURTS

JUVENILE COURT—RUNAWAY, 12-YEAR-OLD DELINQUENT —EXTRADITION LAW—§39.02 AND CH. 941, F. S.

To: *Marion W. Gooding, Judge, Juvenile Court of Duval County, Jacksonville*

QUESTION:

When a 12-year-old girl is adjudged to be a delinquent and, after being committed to a boarding home, runs away and goes to the state of Georgia, may she be extradited and returned to the jurisdiction of the juvenile court which has jurisdiction of the delinquency proceedings?

There is no way to extradite anyone from another state except under the federal extradition law (Title 18, §3182, U. S. Code) or under the provisions of the uniform criminal extradition law (Ch. 941, F. S.), which has also been enacted by the state of Georgia. The said federal and state laws authorize extradition of none except persons charged with treason, felony or other crime.

A child who has been adjudged to be delinquent is not charged with or convicted of treason, felony or other crime (§39.10(3), F. S.). And even if a 12-year-old child should be charged with delinquency by reason of a violation of the law, he or she could not be transferred to a court having jurisdiction to charge and try him or her for such violation unless he or she should affirmatively demand such transfer (§39.02(6), F. S.); the fact that the girl in question was adjudged delinquent by you negatives any idea that you transferred her case to a criminal court under this statutory provision.

Therefore, your question is answered in the negative for the reason that the girl is not subject to being extradited from Georgia because she does not come within either the federal or the state extradition laws.

056-339—December 7, 1956

TAXATION

EXCISE TAX—PROMISSORY NOTES SIGNED IN OTHER STATES BUT ACCEPTED IN FLORIDA—§201.08, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where a promissory note is signed by its maker in

another state and mailed to the payee in this state, after which it is examined, approved and accepted and a loan in the principal amount of the note made to the maker, is such promissory note subject to taxation in this state under §201.08, F. S.?

It appears from your file handed us with the request for opinion that purchasers of insurance in other states may finance the premiums upon their insurance policies by preparing and signing a promissory note in the proper amount and sending the same by mail, together with an assignment of their rights to return premiums in case of cancellation and their policy of insurance, to certain financial institutions in this state. When these instruments are received by the financial institution in this state, they are examined and if in proper form and acceptable to the institution, are accepted and the loan made. We have examined what purports to be one of the premium contract notes and find that it purports to be an "agreement, made, executed and delivered at Jacksonville, Florida" These premium contract notes are made payable in either monthly, quarterly, semiannual or annual payments, at the place of business of the institution in this state making the loan. This premium contract agreement contains provisions authorizing the financial institution making the loan "to cancel said policies and recover unearned and returned premiums thereon, or its right to payment out of the proceeds of a loss"

The facts here are also similar to those involved in *Graniteville Mfg. Co. v. Query*, 283 U. S. 376, 51 S. Ct. 515, 75 L. Ed. 1126, and *Plymouth Citrus Growers Assn. v. Lee*, 157 Fla. 893, 27 So. 2d 415, that had the promissory notes been signed in this state and mailed to banks in other states under like circumstances and there accepted and the loan made, they would have been subject to taxation under the statutes of this state. Should the state where the said notes are signed have a law like the Florida Statutes, they are probably subject to taxation in such other states where signed. The fact that such notes may be subject to taxation in another state would not of that fact alone prevent taxation in this state (84 C.J.S. 139, §43). Our problem here is to determine the taxability of the said premium contract note in this state under §201.08, F. S.

The statute in question, §201.08, F. S., levies a tax "on promissory notes, non-negotiable notes, written obligations to pay money, assignments of salaries, wages and other compensation, *made, executed, delivered*, sold, transferred or assigned in the state" (Emphasis supplied.) Should we admit for the purposes of this opinion that a promissory note completed and signed in another state is "made" in such other state, the question of whether or not it may have been executed and delivered in this state is not answered. This brings us to the question of what is intended by the terms "executed" and "delivered."

In the law of negotiable instruments "by 'execution' is meant both the signing and the delivery of the bill or note. The mere signing does not constitute 'execution.'" (10 C.J.S. 417, §8). The word "executed" has been held "to be equivalent to 'signed, sealed and delivered'" (*Einstein's Sons v. Shouse*, 24 Fla. 490, 5 So. 380, text 382). "Delivery is usually an essential element of the execu-

tion of a contract in writing, and delivery requires an acceptance." (17 C.J.S. 414, §64). "It is well settled that no contract arises on a bill or note until the delivery of the instrument . . ." (Curry v. Wright, 101 Fla. 1489, 134 So. 508, text 509; see also 10 C.J.S. 510, §78). Under the uniform negotiable instruments acts (see §674.18, F. S.) "every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto." Under the same uniform acts "delivery" means transfer of possession, actual or constructive, from one person to another (§674.01, F. S.).

"Delivery may be made by mail, in which case, if so delivered at the request of the payee, the delivery is complete when the instrument is placed in the mail . . . On the other hand, if not so sent at the request of the payee, the instrument is not delivered until received . . ." (10 C.J.S. 513-4, §78). "An instrument drawn and signed in one place, but mailed from there to the payee in another, is deemed executed where it is so mailed if the delivery to the post office consummates the contract between the maker and the payee. If, however, the instrument is not binding on its obligors from the time of mailing, its efficacy being contingent on its acceptance by the payee, then the instrument is executed where it is received and accepted by the payee . . ." (7 Am. Jur. 808, §35). In *Peters v. E. O. Painter Fertilizer Co.*, 73 Fla. 1001, 75 So. 749, text 750, the court said "that the place of the acceptance, and not the place of proposal, is the place of the contract."

Although the file before us indicates that the contracts in question are probably Florida contracts, that is a question that must be determined from all the applicable facts and circumstances in each particular case. Generally, the above question would seem to be subject to an affirmative answer; however, by the very nature of the instruments under consideration no general answer applicable in all cases may be given. The above rules must be applied in each case and the answer determined.

056-340—December 10, 1956

TAXATION AND FINANCE

TAX DEED, GRANTEE—CLERKS' FILING FEE—§194.54, F. S.

To: *Arthur W. Newell, Clerk of the Circuit Court, Orange County, Orlando*

QUESTION:

Where the grantee of a tax deed files the petition contemplated by §194.54, F. S., for possession of real estate, is the clerk's fee governed by said §194.54, F. S., or by §28.241(1), F. S.?

Section 194.54, F. S., provides a summary proceeding for recovery of possession of lands by the grantee under a tax deed, either directly or as the county's grantee. It provides a fee of \$2.50 for the clerk. This statute as it now reads came from Ch. 22079, 1943.

Section 28.241(1), F. S., had its origin in Ch. 26931, 1951,

but was amended by Ch. 29749, 1955. The pertinent portion thereof provides:

"(1) Upon the institution of *any civil action, suit or proceeding* in the circuit court . . . there shall be paid by the party or parties so instituting such *action, suit or proceeding*, as fees of the clerk . . . for all services to be performed by him therein, *in lieu of all other fees heretofore charged*, except as hereinafter provided, the sum of \$10;" (Emphasis supplied.)

The question is does the clerk receive \$2.50 or \$10 where a petition is filed under §194.54, F. S. In other words, does the fee provided by §28.241(1), F. S., apply?

We held in opinion 055-196, dated August 11, 1955, that by reason of sub §(4) of §28.241, F. S., the population act therein considered was not repealed. The opinion has no bearing on the present problem since *local or population acts* are exempted from repeal by sub §(4).

Repeals by implication are not favored (*State ex rel Halloway v. Keller*, 133 Fla. 335, 182 So. 779; *Parker v. City of Jacksonville*, Florida, 82 So. 2d 131). For a court to declare one statute impliedly repeals another, there must be positive repugnancy between the two or it must appear the last was clearly intended to prescribe the only rule, or it revises the subject matter of the former (*Atkinson v. State*, 156 Fla. 449, 23 So. 2d 524, and other cases). Another rule of statutory construction is that where there is positive repugnancy between two statutes, the last expression of the legislature will control (*State ex rel Charlotte County v. Webb*, Fla., 49 So. 2d 93).

The filing of the petition under §194.54, F. S., is the institution of a "civil action, suit or proceeding in the circuit court." The \$10 fee is expressly "in lieu of all other fees heretofore charged." It was the apparent intent of the legislature in enacting §28.241, F. S., to cover the entire subject matter of filing fees except as therein set forth.

It is my conclusion that to the extent of conflict, §28.241(1), F. S., controls, and the clerk is entitled to a fee of \$10 where the proceeding is filed under §194.54, F. S.

056-341—December 10, 1956

TAXATION

MUNICIPAL OCCUPATIONAL LICENSE TAX—INSURANCE COMPANIES—§§205.02, 205.43 and 205.59, F. S.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTION:

May a municipality require payment by an insurance company of an occupational license tax?

Section 205.43, F. S., imposes an annual occupational tax of \$200 upon insurance companies engaged in business in this state.

Section 205.02, F. S., provides among other things, "that incorporated cities and towns may impose such further license taxes of the same kind upon the same subjects as they may deem proper, except when otherwise provided by law, but the license tax so imposed shall not exceed 50% of the state license tax, except as otherwise authorized by law."

The words "except when otherwise provided by law," refer to possible limitations in the state law regarding described business activities as, for example, certain of the provisions of §205.59, F. S.; and in this connection see *American Bakeries Co. v. Haines City, Fla.*, 180 So. 524. However, regardless of such a provision in the state law, specific legislation subsequently enacted could remove the limitation.

The effect of the quoted wording is to authorize (save in instances contemplated by the preceding paragraph) a municipality by ordinance to provide an occupational license tax for businesses not in excess of the state tax for the like business, without the necessity of specific legislative grant of power to impose such tax; but the words "except as otherwise provided by law" refer to specific legislation authorizing a municipality to fix the amount of license tax regardless of the amount fixed by the state.

We are here dealing with occupational license taxes. "The term 'license taxes' has a well-settled connotation in legal terminology and has reference to a charge imposed for the privilege of engaging in a business or profession." (*City of St. Petersburg v. Florida Coastal Theatres, Fla.*, 43 So. 2d 525). A tax imposed solely or primarily for the purpose of raising revenue and merely granting the person taxed the right to conduct a business or profession, is not an "excise tax" but a "general tax"; further, a tax imposed for nothing more than the cost of issuing a license and inspecting and regulating a business is an "excise tax". Only where a business involves public health, comfort, safety, morals or welfare properly may a municipality impose an excise tax with respect thereto (*American Can Co. v. City of Tampa, Fla.*, 14 So. 2d 203). Reasonably since the administration of our laws relating to the business of insurance is vested in the insurance commissioner, no occasion would exist for imposition of an "excise tax" by a municipality upon an insurance company, except as may be specifically provided by general law (E.g., §§175.05 and 185.09, F. S.). These remarks in this paragraph are to make it clear that the above question is concerned only with "license taxes".

In view of the foregoing, in my opinion the question is answered as follows:

A municipal corporation in this state is empowered by ordinance to fix an occupational license tax for an insurance company operating within its limits. If the municipality has no particular charter provision authorizing it to impose an occupational license tax on persons engaged in various business and professional pursuits, including the business of insurance, the amount of such an occupational license tax so imposed may not exceed 50% of the mentioned state tax. If the municipality by charter provision is granted power to fix occupational license taxes without the

50% limitation in the state law, it is not restricted to the limitation; but any such imposition should not be unjust and unreasonable.

We do not construe the 2% premium tax levied by subsection (2) of §205.43, F. S., a license tax within the purview of §205.02, F. S., and no premium tax may be levied by a county or a city.

The foregoing constitutes as clear an answer as the question permits.

056-342—December 10, 1956

INSURANCE

LEGALITY OF COMPANY PLAN FOR FINANCING INSURANCE PREMIUMS—§§625.19, 613.01 and 613.02, F. S.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTION:

Is the plan of Hardware Mutuals (Hardware Mutual Casualty Co. and Hardware Dealers Mutual Fire Insurance Co.) for financing premiums due under issued contracts, as described, lawful for use in this state?

On Oct. 15, 1956, a conference was had in the insurance department between representatives of that department, this office and said companies. The plan contemplates extension of credit to insureds, formerly accomplished for Hardware Mutuals by the Premium Finance Co., by the Hardware Mutual companies as a part of their operations. The plan makes provision for such extension of credit with respect to 1-, 3- and five-year contracts. However, at such conference it was explained by the company representatives that since their filings in Florida permitted issuance of 3- and 5-year contracts on an instalment basis that the plan would not be used in Florida except with respect to 1-year contracts. Hence this opinion considers the plan only in relation to such specified contracts.

It is sufficient here to state that the plan with respect to 1-year contracts requires payment at the outset of 20% of the premium; the balance with interest charges payable in 6 equal monthly instalments. The interest or carrying charge "is computed at a factor of .0175, the equivalent of approximately 6% per annum on the unpaid balance for 6 months." At the time of the conference objection was raised by this office to the following feature of the plan: That under the agreement executed in connection with the financing or extension of credit with respect to such a policy, upon failure of an insured to make an instalment payment and after notice the company issuing the contract would cancel the policy *pro rata*, the company officials calling attention to the standard policy provision that requires such in event of cancellation by the company. We insisted that since this aspect of the plan would result in more favorable treatment of a person under the plan than would be accorded a person who paid cash for his policy and cancelled the same, that a discrimination under our rating laws resulted. Subsequent to such conference,

we have been advised by the company representative as follows: "We . . . have recognized the discrimination was possible. Our write-up will be changed to provide that in the event of cancellation for non-payment of an instalment a short rate basis will be utilized. Only if the cancellation results from non-payment of the down-payment will a pro rata basis be used . . . the memorandum of agreement . . . will contain a statement that default in payment of any instalment shall constitute a request by the insured for cancellation but that prior to canceling the policy in accordance with policy provisions, the insured will be reminded of any default occurring."

Section 625.19, F. S., provides that no insurer, by itself or any other party, and no insurance agent, etc., "personally or by any other party shall offer, promise, allow, give, set off or pay, directly or indirectly, as inducement for insurance on any risk in this state now or hereafter to be written, any rebate of or part of the premium payable on the policy, or on any policy, or of agent's commission thereon, or earnings, profits, dividends or other benefits founded, arising, accruing or to accrue on such insurance or therefrom, or any other valuable consideration or inducement to or for insurance which is not specified, promised or provided for in the policy contract of insurance." Now quite apparently, if this contemplated extension of credit were without cost to the insured or extended at a rate of interest patently inadequate, such would constitute an inducement for insurance within the meaning of said section. However, the interest rate or carrying charge of approximately 6% appears to be substantial and reasonable in relation to the credit extended.

The corporate powers of these two mutual companies derive from their charters and the laws of their domiciliary state relating to companies of their nature. There is here involved an extension of credit which reasonably could not be characterized as an investment. Traditionally this proposed corporate activity is not the business of insurance. Hence, it is suggested that these companies demonstrate to your satisfaction their authority for engaging in the activity as a condition to your approval of this plan.

Granted that they do possess the power to engage in such activity, since this financing of premiums or extension of credit is not traditionally the business of insurance, we direct attention to the status of these mutual foreign companies operating such a plan in this state. On May 14, 1954, in opinion 054-118 we dealt with the question of whether a foreign mutual insurance company applying for a permit to engage in business in this state restricted to investment of its funds was required to pay a charter tax to the secretary of state based on the assets which the corporation intended to employ in this state, as contemplated by §§613.01 and 613.02, F. S. That question was answered as follows: "Since a foreign mutual insurance company has no capital stock which could be used as a basis for determining the amount of charter tax which it should pay under §613.02, F. S., and since the secretary of state has long followed the practice of not demanding such a tax from foreign mutual insurance companies, the company in question would not have to pay such tax and may be issued a permit when it has com-

plied with all other laws applicable to the admission of foreign corporations." We consider that such conclusion applies with equal force to this extension of credit contemplated by the above plan.

In view of the foregoing, in my opinion the question is answered as follows:

There appear to be no impediments under Florida laws to this plan of these mutual insurance companies. Hence, we suggest that the insurance commissioner will be justified in approving the plan in relation to 1-year contracts of these companies, provided that these companies shall demonstrate to the satisfaction of the insurance commissioner their power to engage in the activity contemplated by the plan.

056-343—December 11, 1956

CRIMINAL PROCEDURE

LOTTERIES—PREREQUISITES FOR FELONY CHARGE— CONVICTIONS IN MUNICIPAL COURT—§849.09, F. S.

To: Dwight W. Miller, Municipal Judge, Pompano Beach

QUESTION:

Is it proper to charge a man in a state court with a felony when he violates the lottery statute after having twice been convicted on lottery charges in a municipal court?

Section 849.09, F. S., deals with lotteries, prescribes what acts constitute violations of said statute, and prescribes the penalties for such violations.

I assume that your question is not concerned with sub §(2) of said statute because no previous conviction of any kind is needed as a prerequisite to imposing imprisonment in the state prison for the violations mentioned therein, all of which are felonies because they are punishable by imprisonment in the state prison (Chapman v. Lake, 151 So. 399, 402).

Subsections (3) and (4) of said statute read as follows:

"(3) Any person who is convicted of violating *any of the provisions of paragraphs (e), (f), (g) or (i) of sub §(1) of this section* shall be punished by imprisonment in the county jail for not less than 90 days nor more than 1 year; provided that any person who, *having been convicted of violating any provision thereof*, thereafter violates any provision thereof shall be punished, upon conviction, by imprisonment in the state prison for not less than 1 year nor more than 5 years.

"(4) Any person who is convicted of violating *any of the provisions of paragraphs (h) or (j) of subsection (1) of this section* shall be punished by imprisonment in the county jail for not less than 90 days nor more than 1 year or by fine of not less than \$100 nor more than \$5,000 or

by both such fine and imprisonment; provided, that any person who, *having been convicted of violating any provision thereof*, thereafter violates any provision thereof shall be punished, upon conviction, by imprisonment in the state prison for not less than 1 year nor more than 5 years, or by fine of not less than \$500 nor more than \$5,000, or by both such fine and imprisonment." (Emphasis supplied.)

It therefore appears that in order for a person to commit a felony and be subject to imprisonment in the state prison under said sub §§(3) and (4), he must have been previously convicted of violating one of the enumerated provisions of sub §(1). A conviction in a municipal court is not a conviction of violating one of said enumerated subsections; a conviction in a municipal court is always for violating a city ordinance, not a state statute, even if the city ordinance should contain the same provisions as the state statute and even if it should provide that a violation of a specified state statute would constitute a violation of the ordinance. Therefore, a previous conviction in a municipal court is not such a conviction as is required by sub §§(3) and (4) of §849.09, F. S., as a prerequisite to charging a defendant as a felon in a state court.

The result is that in my opinion your question is properly answered in the negative.

056-344—December 11, 1956

CRIMINAL PROCEDURE

PRESERVATION OF COURT REPORTER'S NOTES—§§924.07, 924.09, 924.10 and 924.23, F. S.

To: Robert J. Haslett and Emily L. Mann, Clerk and Official Court Reporter, respectively, Criminal Court of Record, Bartow

QUESTIONS:

1. How long is the court reporter required to keep stenographic notes taken at trials of criminal cases, where no appeal is taken to a higher court? The criminal court of record in and for Polk county handles all crimes which do not carry a death penalty.

2. Where an appeal is taken from the judgment and sentence of the criminal court of record, and the stenographic notes filed with the clerk along with the transcript of testimony and proceedings, how long is the clerk of the criminal court of record required to keep the original stenographic notes on file in his office?

AS TO QUESTION 2:

Answering your 2nd question first, §924.23, F. S., provides as follows:

"924.23 Transcribing and filing notes of stenographic reporter upon appeal by defendant.—When notice of appeal

is filed by the defendant the trial court shall direct the stenographic reporter to transcribe his notes of the proceedings. The reporter shall certify to the correctness of the notes and the transcript thereof, and shall file the notes and the transcript with the clerk. If the prosecuting attorney or counsel for the defendant questions the correctness of the notes or transcript the question shall be settled by the court. The defendant shall pay the costs of such stenographic report, unless he is insolvent, when the costs shall be paid by the county."

It is my opinion that when the court reporter's notes are filed with the clerk in accordance with said statute, they become a part of the clerk's records and it is his duty to preserve them permanently, just as he would preserve any other record in his office.

AS TO QUESTION 1:

Question 1 presents a difficult question, the full answer to which is not clearly revealed by any law which I have been able to discover.

Certain it is that the court reporter should preserve his or her stenographic notes of trial proceedings in criminal cases until the time allowed to the defendant by law for appeal has expired; otherwise, he or she could not comply with said §924.23 in the event of an appeal by the defendant. Section 924.09, F. S., allows the defendant 90 days after entry of the judgment or sentence appealed from in which to appeal, except that an appeal from both judgment and sentence may be taken within 90 days after the sentence is entered.

The application of this rule would require the court reporter to preserve his or her notes for varying lengths of time, depending upon the situation in the particular case. For instance, a defendant might be adjudged guilty and placed on probation for 5 years and have his probation revoked and sentence imposed upon him 4 years and 11 months afterwards, in which event he would have 90 days after actual imposition of sentence in which to appeal. For further example, the judgment and sentence might be imposed immediately upon the return of the guilty verdict by the jury, and if the defendant files a motion for new trial within the time allowed by §920.02(3) he will have 90 days after denial of such motion in which to appeal even if the motion be denied 6 months or a year after it is filed, the reason being that the judgment and sentence are not regarded as fixed and final until the denial of a timely filed motion for new trial.

Section 924.23, F. S., does not mention appeals by the state. However, §924.07, F. S., permits the state to appeal from an order granting a new trial and §924.10, F. S., allows the state 30 days in which to do so. An appeal from such an order cannot ordinarily be properly perfected in the absence of a court reporter's transcript of the trial proceedings and therefore, in the event the defendant is granted a new trial, the court reporter should preserve his or her notes of the trial proceedings at least

until the time allowed to the state for an appeal has expired and, in case of such appeal, at least until he or she has furnished a transcript of such notes for use on the appeal, if such transcript be requested.

I find no law which says that a court reporter must preserve his or her stenographic notes after the time for appeal has expired without an appeal having been taken. However, from time to time we have been confronted with habeas corpus cases and coram nobis cases, filed perhaps years after the trial, in which no direct appeal had been taken and no transcript made and in which we and/or the prisoners desired to ascertain what the court reporter's stenographic notes showed but were unable to do so because they had been lost or destroyed. Consequently, I think that when the court reporter's notes are not filed with the clerk under §924.23, F. S., they should nevertheless, as a matter of public policy, be preserved indefinitely so that access thereto might be had in the event that either the legal representatives of the state or the prisoner should need them in order to correctly exhibit what actually transpired at the trial if habeas corpus or coram nobis proceedings should be instituted, maybe long years after the notes were taken. As indicated above, I find no law requiring that this be done, but I think that it would be a highly commendable practice, in cases in which §924.23, F. S., does not govern because no appeals are taken by the defendant, for the court reporter's notes to be delivered to and indefinitely preserved by the clerk.

056-345—December 11, 1956

REGULATION TRADES AND VOCATIONS

SEPTIC TANK CLEANERS — NECESSITY FOR PLUMBER'S
LICENSE — CITY OF TAMPA — CHS. 469 AND 553, F. S.

To: *Henry E. Williams, Jr., Asst. City Attorney, Tampa*

QUESTION:

Can the city of Tampa, under Ch. 469, F. S., lawfully issue an occupational license to a person to engage in the business of cleaning septic tanks without first requiring the person to pass an examination as to his practical knowledge of plumbing, house drainage, and plumbing ventilation?

The question being limited to persons engaged in the business of "cleaning septic tanks," no consideration is given to the right of such persons to construct or repair septic tanks. It is assumed that a septic tank cleaner does nothing more than empty the contents of the tank, dispose of such contents, clean the interior of the tank, and free from stoppages or from obstructions the pipes leading to and from the tank. It is also assumed that Ch. 469, F. S., is applicable in the city of Tampa and that there are no special or local laws that affect the answer to this question.

The following definition in §553.03(2), F. S., is indicative of the intent of the legislature as to what is meant by the term "plumbing," and in the absence of a different definition in Ch. 469,

F. S., may be assumed to control also with respect to Ch. 469.

"Plumbing — Plumbing is the practice, materials, and fixtures used in the installation, maintenance, extension and alteration of all piping fixtures, appliances and appurtenances in connection with any of the following: Sanitary drainage or storm drainage facilities, the venting system and the public or private water-supply systems, within or adjacent to any building, structure or conveyance; also the practice and materials used in the installation, maintenance, extension or alteration of the storm water or sewerage and water supply systems of any premises to their connection with any point of public disposal or other acceptable terminal."

Although minor maintenance, as defined in §553.03(4), F. S., may be performed on one's own property without compliance with Ch. 553, F. S., the performance of minor maintenance on the property of another requires compliance with the law. (See §555.11(2), F. S.) Minor maintenance is defined as including "the clearance of stoppage." Compliance with the provisions of Ch. 553 presupposes compliance with Ch. 469, F. S. (See §553.03(1), F. S.)

From this it appears that anyone who performs even minor maintenance on the property of another is engaged in the business of plumbing. Since minor maintenance includes such simple things as replacing a washer in a faucet, clearing a stopped drain, and repairing leaks, the cleaning of a septic tank, the clearing of the pipes leading to it, and repair of the drain field leading from it might be considered as a major rather than a minor maintenance job.

There may be some doubt as to whether a person who customarily works at only a single phase of the plumbing business can be said to be "engaged in or working at the *business* of plumbing." But the statutes under consideration can not be so construed that they could be avoided or circumvented by the simple expedient of specializing in an isolated phase of the business and thereby avoiding the necessity of complying with the law.

Therefore, it is my opinion that a person engaged in the business of cleaning septic tanks comes within the purview of Ch. 469, F. S., and Ch. 553, F. S., in those areas where it is applicable. Not having immediate access to the ordinances of the city of Tampa, it can not be determined whether compliance with Chs. 469 and 553, F. S., is made a prerequisite to the issuance of an occupational license. However, since there is little doubt that both the municipal occupational license and the certificate required by Ch. 469 must be secured by a septic tank cleaner, the board of representatives of the city of Tampa by an ordinance may clarify the matter of which requirement should be met first. The logical conclusion, of course, is that the obtaining of a certificate of proficiency should precede the issuance of an occupational license.

056-346—December 11, 1956

TAXATION

EXCISE TAX ON DOCUMENTS—APPLICATION OF §201.04, F. S., TO SHARES OF STOCK REISSUED TO SUCCESSOR OR SURVIVING TRUSTEES

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where by reason of the death or resignation of the sole trustee, or one of two or more trustees, shares of corporate stock held by the trust are transferred to the successor trustee or the surviving trustees, is such transfer of corporate stock subject to documentary stamp taxes under and pursuant to §201.04, F. S.?

Under said §201.04, F. S., documentary stamp taxes are levied and assessed "on all sales, agreements to sell, or memoranda of sales or deliveries of, *transfers of legal title to shares*, or certificates of stock. . . ." Chapter 201, F. S., was first enacted as Ch. 15787, 1931, and was patterned on, and largely derived from, §901, et seq., title 26, U. S. code (now appearing as §§4321, et seq., title 26, U. S. code); so that due consideration should be given to the construction placed upon the federal statutes when construing the Florida statutes (*State v. Cook*, 108 Fla. 157, 146 So. 223). Under current federal tax regulations (and evidently under prior regulations) "deliveries or transfers of stock from trustees to surviving, substituted, succeeding, or additional trustees of the same trust are not subject to tax." (Regulation 113.35a, paragraph h).

Generally speaking, and except where changed by statute or otherwise provided in a trust instrument, on the death of a sole trustee, pending the appointment of a new or substitute trustee, the title of the trustee may pass to the heirs or the personal representatives of the deceased trustee; however, such heirs or personal representatives have no right or power to administer the trust and merely hold title for the new or successor trustee when appointed or selected (90 C. J. S. 207-209, §§236-238; 54 Am. Jur. 236 and 237, §§298 and 299). Where there are two or more trustees and one of them dies or resigns, the trust property vests in the surviving trustees, who usually may administer the trust, until a new or successor trustee or co-trustee is appointed or selected (see C. J. S. and Am. Jur. above cited). We gather from the authorities that trust property, upon the death or resignation of a trustee, passes to his heirs or personal representatives, in case of a sole trustee, or to his successor trustee or trustees in case of co-trustees. When a new or successor trustee is selected or appointed, the trust property vests in him by operation of law. This being true, the issuance of new certificates of stock merely evidences a transfer previously effected by operation of law.

Under the above authorities, and especially the federal tax regulation above mentioned, and the fact that the state statutes were derived from the federal statute, we feel that the above stated question should be answered in the negative.

056-347—December 11, 1956

EXPENDITURE OF PUBLIC FUNDS

STATE SUBSCRIPTIONS AND PURCHASE OF NEWS- LETTERS AND SIMILAR PUBLICATIONS — §4, ART. IX, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

May state funds be used for the purchase of or subscriptions to newsletters, prepared and published in this state, which may or may not be classified as newspapers under state or federal statutes?

You submitted with your request for opinion a copy or two of the newsletters in question, which, upon examination, seem to be in the nature of a report of news, politics, and general matters of interest, such as is often reported in the newspapers. The matters reported may be of some general and public interest. We construe your request for opinion to be in connection with your official duties and the payment of such subscriptions to and purchase of newsletters and similar documents from state funds in the state treasury.

Section 4, Art. IX, State Const., provides that "no money shall be drawn from the Treasury except in pursuance of appropriations made by law." Under this section of the state constitution, the power to appropriate state funds for lawful state purposes is legislative (State v. Green, 95 Fla. 117, 116 So. 66) to be exercised through the enactment of statutes and laws (State v. Green, *supra*; Advisory Opinion, 156 Fla. 48, 22 So. 2d 398). The object of this constitutional provision is to prevent the expenditure of public funds without the consent of the people, expressed through their duly elected legislative officials. It secures to the legislature the exclusive power of deciding how, when and for what purposes the public funds shall be applied in carrying on the government (Lainhart v. Catts, 73 Fla. 735, 75 So. 47). Before a claim against the state may be paid from state funds, funds for the payment of such claim must have been appropriated by the legislature and the said claim must have been audited and approved by the state comptroller as being one included within such appropriation. Before the state comptroller may approve a claim for payment, he must find that the same is within some law or statute appropriating state funds, otherwise the same may not be paid.

Generally, under the express or implied provisions of the constitution, public funds may be used only for a public purpose (81 C. J. S. 1147, §133; State v. North Miami, Fla., 59 So. 2d 779, text 785). "The financing of a private enterprise by means of public funds is entirely foreign to a proper concept of our constitutional system" (State v. North Miami, *supra*). Before the purchase of a publication, or a subscription to the same, may be paid from public funds, the same must be found to serve some public or state purpose. Legal publications, although needed by the attorney general and other legal officers and employees of the state, for which their purchase would serve a public or state purpose, would be of little, if any, benefit to the commissioner of agriculture or superintendent of public instruction, unless they maintain a legal department. While

publications dealing with education might serve a public purpose in the department of education, they would serve but a limited purpose in the office of the attorney general or the secretary of state.

Many other examples might be given. Publications aiding and assisting the sheriff's bureau and highway patrol of the state, would be of little, if any, assistance to other state departments, and vice versa. The fact that a publication might be of personal interest to a state officer or agency or their employees will not make it a public purpose; the publication must serve some *direct public interest* before it may be purchased or paid for from public funds. Whether or not a particular publication is needed by a particular state officer, board or agency, and will serve some public purpose for his department, is largely for the determination of such officer, board or agency, subject, however, to the right of the state comptroller to review such determination. Such a determination by such officer, board or agency, being *prima facie* correct, it should not be reversed by the state comptroller unless clearly wrong.

It is impossible for me to all inclusively state that newsletters such as those herein described might not under any conditions serve some authorized state purpose in the proper discharge of the duties of certain state agencies or state officers and in those instances could not be purchased at state expense. However, it is my opinion that in so far as many of the state agencies and officials are concerned, such newsletters would not reasonably serve any authorized purpose directly or indirectly related to the proper discharge of the functions of their departments. This being so, it appears to me that in each situation where a proposed purchase or subscription of a newsletter is desired by a state agency or state official, the same would have to be justified by it or him and clearly shown to serve some authorized public purpose for its or his particular department, and such justification submitted would be subject to your review and approval or disapproval.

This answers the question as well as it is possible to do so.

056-348—December 12, 1956

TAXATION

EXEMPTION — GOVERNMENTAL AGENCY, UNIVERSITY PRESS

To: *W. G. Hendricks, Business Manager, Board of Control, Tallahassee*

QUESTION:

Is the University Press as a department of the university of Florida a tax exempt governmental agency?

Reference is made to a letter to the university of Florida from Mr. R. C. Dunlap of the U. S. treasury department stating that the records in his office show that on Feb. 12, 1945, the university of Florida was held to be exempt from federal income tax as an instrumentality of the state.

Reference is also made to a letter from the attorney general of Florida to the board of control dated Oct. 10, 1955, stating that

contributions to the board of control are charitable contributions within the meaning of the federal income tax laws and deductible as such.

The University Press is a department of the university of Florida, operated by the university for educational purposes, and is an agency of the state under the direction and control of the state board of control.

Your question is therefore answered in the affirmative.

056-349—December 14, 1956

EDUCATION

THE COUNTY SCHOOL SYSTEM—ABOLITION OF SCHOOL DISTRICT TRUSTEES—§10A, ART. XII, STATE CONST. (SJR 638, 1955)

To: *Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee*

QUESTIONS:

1. Is it mandatory upon school boards to request a referendum through the county commissioners?

2. Is there any time limit for requesting such an election or is the authority continuing?

3. What are the qualifications for voting in the referendum authorized in this amendment, in the event one is requested by the county school board and called by the county commissioners?

4. Is it mandatory upon county commissioners to call the special election upon request of the school board? Can there be grounds for non-compliance and if so what would constitute sufficient grounds for refusal?

5. Who must pay the expenses of such special election?

6. Who would appoint the election officials?

7. What advertising procedure should be followed and what length of notice prior to the election should be given?

8. Who canvasses the votes?

9. If the referendum is in favor of abolishing the office of trustee, when do the trustees turn over their duties to the county school board?

The constitutional amendment in question provides:

"Section (1) From and after Jan. 1, 1957, the office of county special tax school district trustees shall be abolished and all duties of district trustees shall be vested in the county board of public instruction, including levying taxes provided by article XII of the constitution, in all

counties wherein the proposition is affirmed by a majority vote of the qualified electors of any such county.

"(2) To submit the proposition contained in sub §(1) above to the electors a special election shall be called by the county commissioners of any county upon the request of the county board of public instruction therein, which election may be held at the same time as the next general election and the result thereof shall determine whether sub §(1) shall be effective in such county.

"(3) Any county adopting the provisions of sub §(1) hereof may after four (4) years return to its former status and reject the provisions of this section by the same procedure outlined in sub §(2) hereof for adopting the provisions thereof in the beginning."

AS TO QUESTION 1:

It is apparent from the language of the amendment quoted above that implementation of the amendment by requesting the county commissioners to call a special election is discretionary with the county school board. Your 1st question is therefore answered in the negative.

AS TO QUESTION 2:

No time limit is provided by the amendment for the school board to request an election. Therefore the authority of the school board to do so is continuing.

AS TO QUESTION 3:

No special qualifications for voting are provided. Therefore the qualifications provided by existing general laws for electors in Florida would be applicable.

AS TO QUESTION 4:

The language of the constitutional amendment makes it mandatory for the county commissioners to call a special election upon request of the county board of public instruction. No exception is provided and I am of the opinion that since such duty is mandatory there are no legal grounds for non-compliance.

AS TO QUESTION 5:

The amendment provides that the election is to be called by the county commissioners. No special provision is made for the expense of the election or its conduct, so it must be assumed that the election would be paid for, controlled and operated by the board of county commissioners.

AS TO QUESTION 6:

This question has been answered above in the statement regarding question 5. In other words, election officials should be appointed by the county commissioners.

AS TO QUESTION 7:

No special advertising procedure is provided. It is my opinion,

therefore, that the county commissioners should provide for reasonable notice and advertising of the election. I believe that an appropriate legal notice of the holding of the election published in 4 consecutive weekly issues of a newspaper of general circulation published in the county immediately next prior to the date of the election would constitute reasonable notice.

AS TO QUESTION 8:

Canvassing the votes would be a responsibility of the county commissioners.

AS TO QUESTION 9:

If the special election results in implementation of the constitutional amendment abolishing the office of school district trustee, the office would terminate forthwith and the trustees would be relieved of their duties immediately, or as soon thereafter as it would be possible from a practical standpoint for them to turn over necessary records or equipment to the county board of public instruction.

056-350—December 17, 1956

CORRECTIONAL SYSTEM

PAROLE AND PROBATION — COMPACTS WITH OTHER STATES — §949.07, F. S.

To: *Francis R. Bridges, Jr., Florida Parole Commission,
Tallahassee*

QUESTION:

Should the word "state", as used in §949.07, F. S., authorizing and relating to a compact between Florida and other states concerning persons placed on probation or released on parole, be construed as including Alaska, Hawaii, Puerto Rico, the Virgin Islands, and the District of Columbia?

Section 949.07, F. S., was originally enacted as a part of Ch. 20455, 1941, a uniform law for out-of-state probation and parole supervision. Section 949.07 authorized and directed the governor of Florida to enter into a compact on behalf of the state with "*any state of the United States*" legally joining therein in the form specified by said section. There are only 48 "states of the United States" and in my opinion the said statutory directive applied only to a compact with one or more of the 48 states and not to Alaska, Hawaii, Puerto Rico, the Virgin Islands or the District of Columbia.

There are additional reasons why I think that your question should be answered in the negative.

The compact authorized by and set forth in §949.07 states that it is entered into with the consent of the congress, granted by an act granting the congress' consent to any two or more states to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and for other purposes. At

the time that §949.07 was enacted in 1941, the congressional act mentioned therein (§420, Title 18, U. S. C., later §111, Title 4, U. S. C.) referred to "states" and made no mention of territories or possessions or of the District of Columbia. On Aug. 3, 1956, an act of congress was approved which amended said title 4, §111, so as to add thereto the following new subsection: "(b) For the purpose of this section, the term 'States' means the several states and Alaska, Hawaii, the Commonwealth of Puerto Rico, the Virgin Islands, and the District of Columbia". I think that by thus amending said statute the congress recognized that, as it previously existed, it did not embrace any of the territories or possessions or the District of Columbia. Therefore, it is my opinion that in 1941 there was no U. S. statute authorizing a probation and parole supervision compact between Florida and Alaska, Hawaii, Puerto Rico, the Virgin Islands or the District of Columbia. It appears to me that in the absence of such an enabling act of congress any such compact would have been invalid by reason of Art. I, §10, U. S. Const., even if §949.07, F. S., had purported to authorize it.

Furthermore, it appears that in enacting various other laws which contain provisions referring to other states, the Florida legislature has specifically defined "state" as including the territories and/or possessions and/or the District of Columbia whenever it meant that "state" should be construed to include them, and the failure of the legislature to do so in said Ch. 20455 (which embraced what is now §949.07, F. S.) indicates that the legislature intended the word "state", as used therein, to mean just that, viz., one of the 48 states. Examples of such legislative definitions of "state" are as follows:

In 1937 the legislature enacted Ch. 18402, the "Unemployment Compensation Law", and in §3 thereof provided, as is now provided in the successor §443.03, F. S., that "state" includes, in addition to the states of the U. S., Alaska, Hawaii, and the District of Columbia.

In 1941 (the same year in which what is now §949.07 was first enacted), the legislature enacted the uniform criminal extradition law, now a part of Ch. 941, F. S., and in §941.01 defined the term "state" as including any other state or territory, organized or unorganized, of the U. S., when said term was used to refer to a state other than Florida.

In 1941 the legislature also enacted the uniform law on fresh pursuit, now §§941.31-941.37, F. S., and in §941.34 defined "state" as including the District of Columbia.

In 1941 the legislature also enacted the uniform witness extradition law, now Ch. 942, F. S., and in §942.01 defined "state" as including any territory of the U. S. and the District of Columbia.

In 1943 the legislature enacted the uniform stock transfer law, now Ch. 614, F. S., and in §614.02 provided that as used in said chapter, unless the context or subject matter otherwise requires, "state" includes state, territory, district and insular possession of the U. S.

In 1955 the legislature enacted the uniform reciprocal enforcement of support law, now Ch. 88, F. S., and in §88.031 provided that

the word "state" shall include any state, territory or possession of the U. S. and the District of Columbia in which said law or a substantially similar reciprocal law has been enacted, unless the context requires otherwise.

In 1955 the legislature enacted what are now §§941.38-941.42, F. S., relating to the extradition of persons alleged to be of unsound mind, and in §941.39 provided that, unless the context or subject matter otherwise requires, the word "state" shall mean states, territories, districts and insular and other possessions of the U. S.

The failure of the legislature to define "state" in some such fashion in the 1941 uniform law for out-of-state probation and parole supervision, of which the present §949.07 was a part, indicates the legislative intent that said law should mean only one of the 48 states when it referred to a "state".

Therefore it is my opinion that your question is properly answered in the negative.

056-351—December 19, 1956

SOCIAL SECURITY FOR PUBLIC EMPLOYEES

FLORIDA INDUSTRIAL COMMISSION — OASI COVERAGE
FOR COUNTY EMPLOYEES — STATUS OF NON-INSTRUC-
TIONAL EMPLOYEES OF COUNTY SCHOOL BOARD —
§§1.01(10), 650.10, 650.02(6) AND 230.04-230.21, F. S.

To: *Herbert W. Miller, Assistant Director, OASI, Florida Industrial Commission, Tallahassee*

QUESTION:

For the purposes of Ch. 650, F. S., may the school board of a county be deemed a "political subdivision" or an instrumentality thereof, so as to entitle such board's non-teaching employees to a separate referendum, apart from other county employees, on the question of OASI coverage, as contemplated by §650.10, F. S., and applicable federal statutes with respect thereto?

In our opinion 056-263 of Aug. 30, 1956, among other things we concluded: "The wording of §650.10, F. S., constitutes action by the state designating employees of the state and employees of each of our counties, under our State and County Officers and Employees Retirement System, as members of separate retirement systems, within the purview and for the purposes contemplated by §218(d)(6) (42 U. S. C. A., §418(d)(6)) and related provisions of the social security act." While that opinion was and is of general application, it was dealing with the specific situation of a referendum for *employees of a county*. With this in mind, the significance of the question is apparent. If employees of a school board under the state and county officers and employees retirement system are not "employees of a county", not only may they be afforded a referendum election for OASI purposes, but it follows that they may not participate in such a referendum for *county* employees.

Section 650.10, F. S., refers to "employees of any political

subdivision" and "the governing body of such subdivision." This question of what constitutes a "political subdivision" depends upon possible constitutional and statutory provisions; and while under certain legal concepts or statutory definitions a particular public corporation, authority or taxing unit may not be a political subdivision, for other purposes it may be such. In *Roberts v. Board of Public Instruction for Broward County*, 112 F. 2d 459, the court held that a board of public instruction was not a political subdivision of the state but a "public school authority", remarking that, "In none of the acts is the board referred to as a political subdivision of the State of Florida". The court found in the case of *In re City of Fort Lauderdale*, 23 F. Supp. 229, that a municipality was not a political subdivision of Florida, basing that conclusion on holdings of our supreme court. Our court held in *City of Tampa v. Easton, Fla.*, 198 So. 753, that a municipal corporation was not a "subdivision of the state." But definitions generally and for particular purposes have since qualified these findings.

Section 1.01(10), F. S., provides that, "The words 'public body', 'body politic' or 'political subdivision' include counties, cities, towns, villages, special tax school districts, special road and bridge districts, bridge districts, and all other districts in this state."

Title 42 U. S. C. A., §481, provides: "(2) The term 'political subdivision' includes an instrumentality of (A) a State, (B) one or more political subdivisions of a State, or (C) a State and one or more of its political subdivisions."

Reasonably for the purpose of OASI coverage, the following from §650.02(6), F. S., is controlling: "The term 'political subdivision' includes an instrumentality of the state, or one or more of its political subdivisions, but only if such instrumentality is a juristic entity which is legally separate and distinct from the state or subdivision and only if its employees are not by virtue of their relation to such juristic entity employees of the state or subdivision."

In the case of *First National Bank v. Board of Public Instruction, Fla.*, 111 So. 523, our court characterized a county school board as, "a county instrumentality, a corporation organized to conduct certain affairs in that particular county and occupies the status of a trustee for the purposes for which it is created as to county property and county funds." While the present school code was enacted subsequent to said judicial pronouncement, a reading of the school code, particularly §§230.04-230.21, F. S., will evidence that the characterization remains unchanged. A county school board is a corporate "juristic entity"; it is an instrumentality of the county separate and distinct in its functions from the recognized functions of the county; and its employees are not employees of the county.

Title 42 U.S.C.A., §418(a) (6), begins with the words: "If a retirement system covers positions of employees of the State and positions of employees of one or more political subdivisions of the state . . ."

In view of the foregoing, in my opinion the question is answered as follows:

The board of public instruction of a county is a "political

subdivision" within the meaning of mentioned federal and state statutes relating to possible OASI coverage for its non-teaching employees who are members of the state and county officers and employees retirement system. Such a board is "the governing body of such subdivision" with respect to said employees, and may authorize a referendum for said employees to determine if the latter shall have OASI coverage, within the contemplation of §650.10, F. S., and relevant federal statutes. It follows that such employees are not employees of the county (a political subdivision) for such referendum purposes, and may not participate in such a referendum with county employees.

Since the county attorney of Dade county has requested an opinion of this office relating to the same subject matter, copy of this opinion is being furnished to him in response to his request.

056-352—December 21, 1956

AGRICULTURE AND HORTICULTURE

STATE PLANT BOARD—DUTIES AND AUTHORITY— FOREST INSECT AND DISEASE FIELD—§§581.02 AND 581.14, F. S.

To: *W. G. Hendricks, Business Manager, State Plant Board,
Tallahassee*

QUESTION:

Does the state plant board have authority to work in the forest insect and disease field?

Chapter 581, F. S. provides for the duties, authority and responsibilities of the state plant board.

Section 581.02, F. S., provides, in part:

"Same; duties and authority.—The board shall protect the agricultural and horticultural interests of the state, and to that end it shall:

"(1) Inspect, or cause to be inspected by duly authorized employees, plants, plant products or other things and substances that may, in their opinion, be capable of disseminating or carrying insect pests and diseases, and for this purpose shall have power to enter into or upon any place and to open any bundle, package or other container containing, or thought to contain, plants or plant products or other things capable of disseminating or carrying insect pests or diseases;

"(2) Carry on investigations of methods of control, eradication and prevention of dissemination of insect pests and diseases, and for that purpose may employ the necessary experts and may rent, lease or purchase the necessary land when required for this purpose;

"(3) Supervise or cause to be supervised, the treatment, cutting and destruction of plants when necessary to prevent or control the dissemination of insect pests and diseases or to eradicate same and to prescribe rules and regulations therefor;" . . .

"(10) Declare a dangerous insect pest or disease to be public nuisance as well as any plant or other thing infested or infected therewith or that has been exposed to infestation or infection and therefore likely to communicate same;

"(11) Declare a quarantine against any area, place, nursery, grove, orchard, county or counties within this state, other states, territories, foreign countries or portion thereof in reference to dangerous insect pests or diseases and prohibit the movement within this state or any part thereof, or the introduction into this state from other states, territories or foreign countries, of all plants, plant products or other things from such quarantined places or areas which are likely to carry such dangerous insect pests and diseases if such quarantine be determined, after due investigation, to be necessary in order to protect the agricultural and horticultural interests of this state. In such cases the quarantine may be made absolute, or rules and regulations may be adopted prescribing the method and manner under which the prohibited articles may be moved into or within, sold or otherwise disposed of in this state;" . . .

"(17) Enter into cooperative arrangements with any person, municipality, county and other departments of this state, and boards, officers and authorities of other states and the U. S. for inspection with reference to insect pests and plant diseases and for the control and eradication thereof and contribute a just proportionate share of the expenses incurred under such arrangements;" . . .

"(19) Enforce the provisions of this chapter and the rules and regulations made pursuant thereto by writ of injunction in the proper court as well as by criminal proceedings. . . ."

Section 581.14, F. S., defines plants and plant products as follows:

"Trees, shrubs, vines, forage and cereal plants, and all other plants, cuttings, grafts, scions, buds, and all other parts of plants; and fruit, vegetables, roots, bulbs, seeds, wood, lumber, and all other plant products."

In my opinion it is clear from the language quoted above that the legislature has authorized the state plant board to take necessary measures to prevent and destroy dangerous insects and plant diseases which threaten Florida forests, trees or other plants, as well as cultivated trees, plants or shrubbery.

"It is universally conceded police power to include everything essential to public safety, health and morals and to justify the destruction or abatement of whatever may be regarded as a public nuisance." (Lawton v. Steele, 152 U.S. 133, 14 Sup. Ct. Rep. 499).

Also see Bowman v. Virginia State Entomologist, 105 So. 141.

The case of Miller v. Schoene, 276 U. S. 272, 72 L. Ed. 368, 48 S. Ct. 246, held that the state does not exceed its constitutional powers by deciding on the destruction of one class of property in

order to save another which in value, in the opinion of the legislature, is of greater value.

State Plant Board v. Roberts, et. al., a Florida case reported in 72 So. 175—a discussion by the Florida supreme court upholding the powers of the plant board in prescribing rules and regulations in carrying out the powers of the plant board as provided by the legislative acts.

In view of the above, your question is answered in the affirmative.

056-353—December 21, 1956

TAXATION

INTANGIBLE PERSONAL PROPERTY TAXES—LONG TERM LEASE—SUBORDINATION OF FEE TO MORTGAGE OF LEASE—§1, ART. IX, STATE CONST. AND CH. 199, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Is a mortgage encumbering a long time lease for a term of real property subject to Class "C" intangible personal property taxes where the owner of the fee title subordinates it to the lien of the mortgage?

The mortgage in question encumbers a 99-year lease of certain real property in Florida; however, the owner of the fee title subordinates his title to the lien of the mortgage encumbering the said 99-year lease. The said fee title owner stipulates in writing that he subordinates and makes inferior in lien and dignity all of his fee simple title to the property described in the mortgage and further subordinates all of his "right, title and interest in and to the foregoing lease agreement to the lien and operation of the . . . mortgage," and further agrees to "subordinate the fee simple title of the lessor (fee owner) to the associations' mortgage." It is expressly stipulated in the subordination agreement that the fee owner incurs no obligation to pay the mortgage indebtedness. When paragraph numbered "26" of the mortgage, containing the above mentioned provisions is read with all other provisions of the said mortgage, we find nothing therein indicating an intention on the part of the owners of the fee and reversion to encumber such fee title. The effect of the subordination is to subordinate the rights of the owners of the fee title during the life of the lease only and for no longer.

We do not think that the purchaser under a foreclosure of the mortgage in question would acquire the fee title; he would at most merely acquire the leasehold interest for the term mentioned. It may be that such acquisition, by reason of the subordination, would be free and clear of the right of the fee owners to exercise any right of forfeiture or other rights under the leasehold agreement for the term of the lease; however, we do not here decide the question. At the end of the term of the lease the fee owners would seem to be entitled to take possession of the property notwithstanding a foreclosure of the mortgage in question.

Although §1, Art. IX, State Const., authorizes an intangible personal property tax payable upon the recording of the mortgage upon obligations "secured by mortgage, deed of trust or other lien," without requiring that such mortgages, deeds of trust or other liens encumber "real property", the legislature, by Ch. 199, F. S., has only provided for the tax on mortgages, deeds of trust and liens encumbering *real property* situated in Florida. The tax has not been extended to mortgages, deeds of trust and liens encumbering personal property. A leasehold interest for a term of years (the lease in question is for a term of 99 years) is personal property and not real property.

These observations seem to answer the above question in the negative.

056-354—December 21, 1956

CITIES AND TOWNS

CONTROL OVER WATER SHED OF A MUNICIPAL WATER SUPPLY—§§168.14-168.18, 513.07, F. S., AND §30, ART. IV STATE CONST.

To: *Town of Lake Placid, Florida*

QUESTIONS:

1. May municipal corporations prohibit fishing, bathing and other water sports in or on waters within the water sheds from which they draw their municipal water supply?
2. If the above question is answered in the affirmative, may such fishing, bathing and other water sports be prohibited as against abutting owners having riparian rights without compensation?

Your request for opinion does not show whether the lakes in question are navigable or non-navigable waters. Non-navigable waters are usually privately owned and under the control of their owners as to use. Non-navigable waters owned by a municipal corporation would seem to be under the control of the municipality in the same manner and to the same extent as if owned by an individual or corporation. We shall, therefore, presume that your questions have reference to navigable waters, navigable in fact or treated as navigable by the government surveyors in that they were meandered.

Ordinarily a municipal corporation has no power to supervise, control, regulate or protect the use of waters for navigation, unless such power be delegated to them. Such powers are sometimes delegated to enable the municipality to protect the health of its residents or to prevent harmful refuse or material being deposited in the waters detrimental to health and well being (65 C. J. S. 65, §10). The control of a municipality over navigable waters from which it obtains its water supply is not absolute, but limited (65 C. J. S. 153, §65). Provision is made in our statutes for the protection of waters and water sheds used for public water supplies (§§168.14-168.18, and 513.07, F. S., and laws and statutes relative

to public health and the state board of health). However, we would not deem bathing, fishing and other water sports per se violative of these statutes. Only where such bathing, fishing and other water sports would contaminate or otherwise render such water unfit for human consumption, after usual filtering and other treatment, would it seem to be violative of such statutes. The public has a common right to use navigable waters for purposes of navigation, bathing and fishing (65 C. J. S. 87 and 139, §§20 and 55), as well as for recreation and enjoyment and for ordinary purposes of life, which rights are jealously guarded (65 C. J. S. 139, §55, notes 14-16). In addition to these rights of the public generally abutting owners have many riparian or littoral rights (65 C. J. S. 143, §61). A municipal corporation, as a riparian owner, has no more right to take water from a navigable stream than does any other riparian owner (65 C. J. S. 153, §65) unless and until it has acquired all such rights by eminent domain or other proper procedure. A state may control navigable waters for any purpose within the scope of its sovereign, governmental and police powers, so long as such control does not conflict with the constitutional prerogatives of the federal government (65 C. J. S. 63, §10). Under §30, Art. IV, State Const.; municipalities have no authority to control general fishing within their boundaries (*Bell v. Vaughn*, 155 Fla. 551, 21 So. 2d 31).

We seriously doubt the power and authority of a municipality to prohibit fishing, bathing and other water sports in or on waters within the water shed from which it draws its water supply, unless and until it shall clearly appear that such use is detrimental to the health and welfare of the public using such water. Inconvenience to some or all of the public would not seem to justify prohibition; there must clearly appear some menace to public health and welfare directly connected with such use. Such a use would justify action by the state board of health.

Generally the two above questions are answered in the negative; subject, however, to a positive showing of affected health and welfare justifying the exercise of the reserve police powers of the state. In event prohibition is justified and exercised the prohibition might amount to a public taking requiring compensation of abutting property owners. These observations answer the two above questions as well as they may here be answered.

056-355—December 21, 1956

REGULATION OF PROFESSIONS AND VOCATIONS

FLORIDA BOARD OF MASSAGE—POWER RELATING TO TEACHERS OF MASSAGE—§§480.01(3), 480.02(1), 480.02(2), 480.05(2), (3), 480.06, 480.07 AND 480.17, F. S.

To: *Edith Dearborn, Secretary-Treasurer, Florida Board of Massage, Miami*

QUESTION:

Does the Florida board of massage have legal authority under the provisions of Ch. 480, F. S., to prepare and conduct examinations for teachers or instruc-

tors of massage and charge an examination fee therefor?

A "massage school" is defined in §480.01(3), F. S., as "any duly registered massage establishment wherein a tuition fee is charged for instruction of massage or all or any one or more of the subjects and methods of treatments defined in sub §(1) of this section."

Section 480.02(1), F. S., provides that it shall be unlawful for any person or persons to engage in the practice or attempt to practice massage for a fee, or for a gratuity, *or to conduct or teach in a school of massage without a certificate of registration* pursuant to the provisions of Ch. 480, F. S. Section 480.02(2), F. S., provides, in part, that it shall be unlawful for any person or persons "to employ any person as an operator *or instructor* who does not hold a certificate of registration"

The board of massage is empowered and directed to hold at least one examination each year, and is required to examine and inspect all massage establishments and massage schools operated in the state by §480.05(2), (3), F. S.; however, the statute is silent as to any provision for or authority of the board to give specific examinations to teachers of massage. Section 480.06, F. S., provides the requisites for examination, subjects, minimum passing grades, and fees, and further provides that after compliance with these requisites, the applicant "shall be entitled to be registered, as masseur, masseuse, or for a massage school." Other than the requirement of a certificate of registration to practice massage, there are no provisions in Ch. 480, F. S., specifying the qualifications of a person to take a teacher's examination or to teach massage.

Inasmuch as the rule-making power of a public administrative body is delegated legislative power, which it may not use either to abridge the authority given it by the legislature, or to enlarge its powers beyond the scope intended by the legislature, statutory provisions control with respect to what rules and regulations may be promulgated by such a body, as well as with respect to what fields are subject to regulation by it. (73 C. J. S. 94).

Unless there is some municipal ordinance or regulation, as authorized by §480.17, F. S., which requires examinations for teachers or instructors of massage as a prerequisite for teaching massage within the jurisdiction of the municipality, there is no legal authority for the Florida board of massage to prepare and conduct examinations for teachers and to charge an examination fee therefor; and, of course, any existent ordinance or regulation of this kind would apply only to those persons practicing or teaching within the jurisdiction of such municipality.

It is my opinion that the legislature has not delegated authority to the Florida board of massage to conduct any examinations for teachers or instructors of massage and to charge a fee therefor, other than the examination for eligibility to receive a certificate of registration to practice massage as provided by §§480.06 and 480.07, F. S.

Therefore, your question is answered in the negative.

056-356—December 28, 1956

COURTS

JUVENILE COURTS, JUDGES — COMMITTING MAGISTRATES — §§901.01 AND 933.01, F. S.

To: A. Lloyd Layton, Judge Criminal Court of Record, Jacksonville
QUESTION:

Does the judge of the juvenile court in Duval county have the right to issue a search warrant?

Chapter 23651, 1947, amends §2 of Ch. 7005, 1915, which created the Duval county juvenile court. This amendment reads as follows:

"Section 2. The said court shall have exclusive original jurisdiction . . . and, *shall have the usual powers of a committing magistrate.*" (Emphasis supplied)

However, this special act is not considered in the conclusion which is about to be reached because there is some doubt as to whether the "usual powers of a committing magistrate" is constitutionally encompassed within a limited title and a limited act of this nature which refers only to juvenile jurisdiction.

The constitution and general laws of this state, however, answer your question. Section 36, Art. V, Fla. Const., states:

"All judicial officers of this state shall be conservators of the peace."

The Florida supreme court has interpreted that all judicial officers being conservators of the peace are also committing magistrates. See *Ex parte Sirmans*, 94 Fla. 832, 116 So. 282.

The Florida legislature in enacting the criminal procedure act of 1939 included §901.01, F. S., which in part states:

"All judicial officers of this state shall be conservators of the peace and committing magistrates . . ."

It therefore follows that under the general laws of this state all juvenile judges are committing magistrates. Moreover, under §933.01, F. S., all committing magistrates have the right to issue a search warrant for a place, vehicle or thing to be searched within their respective districts or counties.

Although it is the policy of this office not to issue an opinion to a state official which opinion concerns the rights or duties of another state official, your question, based on the aforesaid, is answered in the affirmative because the question was properly before you and because this particular right of a juvenile judge is clearly set forth in the Florida constitution and statutes.

056-357—December 28, 1956

STATE AND COUNTY OFFICERS AND EMPLOYEES

RETIREMENT—SUPREME COURT JUSTICES AND CIRCUIT JUDGES—JUDGES OF COURT OF RECORD FOR ESCAMBIA COUNTY—CHS. 122 AND 123, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Will the provisions of Ch. 123, F. S. (supreme court justices and circuit judges retirement system), be applicable to the judges of the court of record for Escambia county upon the effective date of amended Art. V, State Const.?

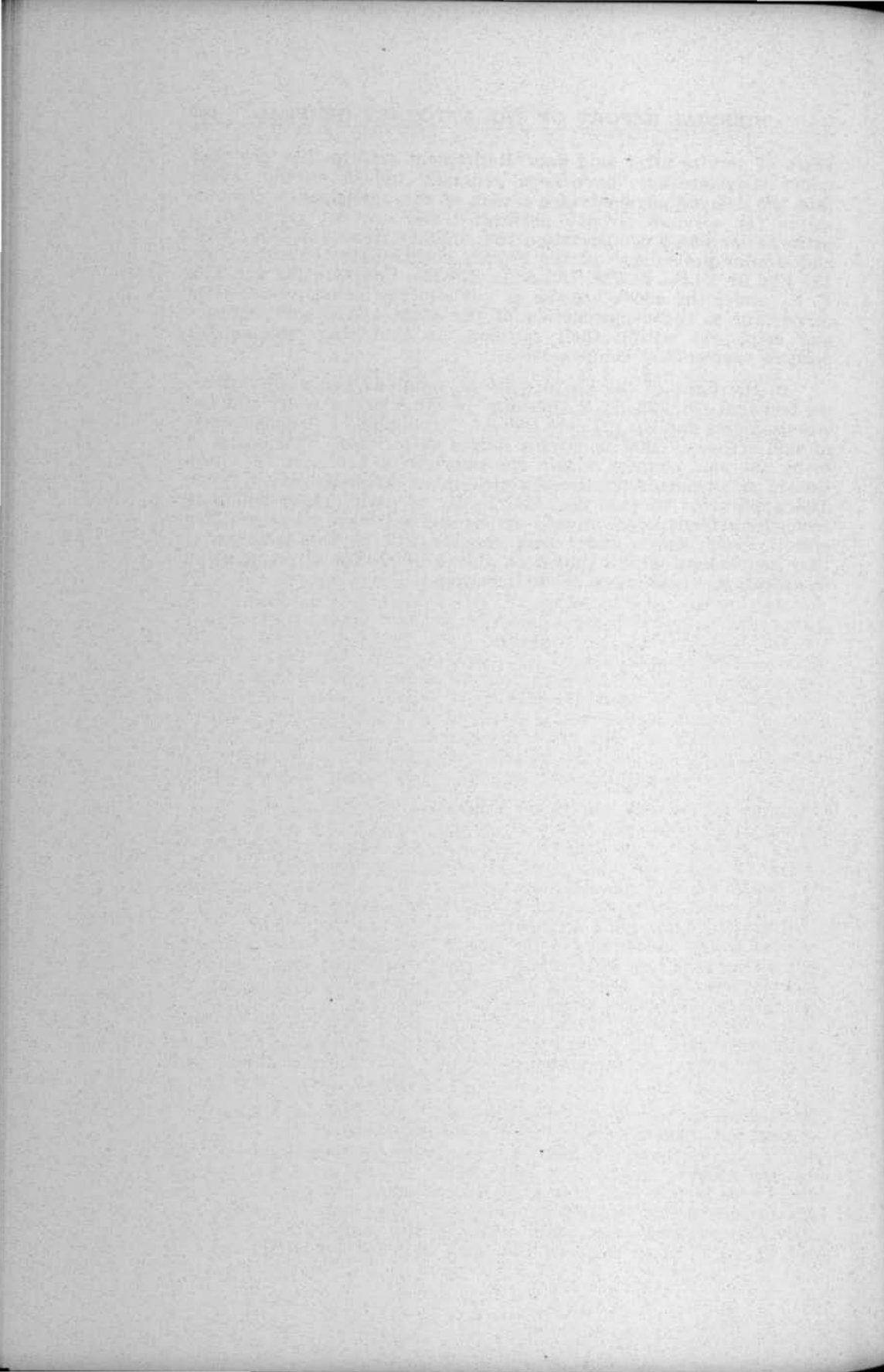
There was adopted at the last general election an amendment of Art. V, State Const., to take effect July 1, 1957. Section 10 of this article provides in part that "the provisions of this Constitution and all laws enacted in consonance therewith pertaining to circuit courts and the officers thereof . . . including the manner of the appointment or election and the terms of office and compensation of said officers shall apply with like effect to the Court of Record of Escambia County and the officers thereof, except as otherwise provided in this section" Section 17 of said amended Art. V requires that "all justices and judges shall automatically retire at age 70." Provision is also made in said §17 for the retirement of disabled justices and judges. This seems to bring us to the question of whether or not Ch. 123, F. S., is a law enacted under the constitution "pertaining to the circuit courts and the officers thereof . . . including . . . compensation of said officers" so as to be within the purview of said constitutional provision.

Chapter 123, F. S., provides a retirement system for supreme court justices and circuit judges; in which provision for transfer to said system is made for such justices and judges who may have, prior to their appointment or election, been members of other retirement systems. This chapter provides for contributions by members to the retirement system of 6% of their salaries (§123.02, F. S.) and for retirement benefits based on a base of $3\frac{1}{3}\%$ of their average final compensation times their number of years service under the said retirement system (§123.06, F. S.). Comparing the obligations and benefits under said Ch. 123, with the obligations and benefits of state and county officers and employees within the purview of Ch. 122, F. S., it is noted that 6% contributions are required (§122.03, F. S.) with a benefit base of 2% of average final compensation times their number of years service under the said retirement system (§122.08, F. S.).

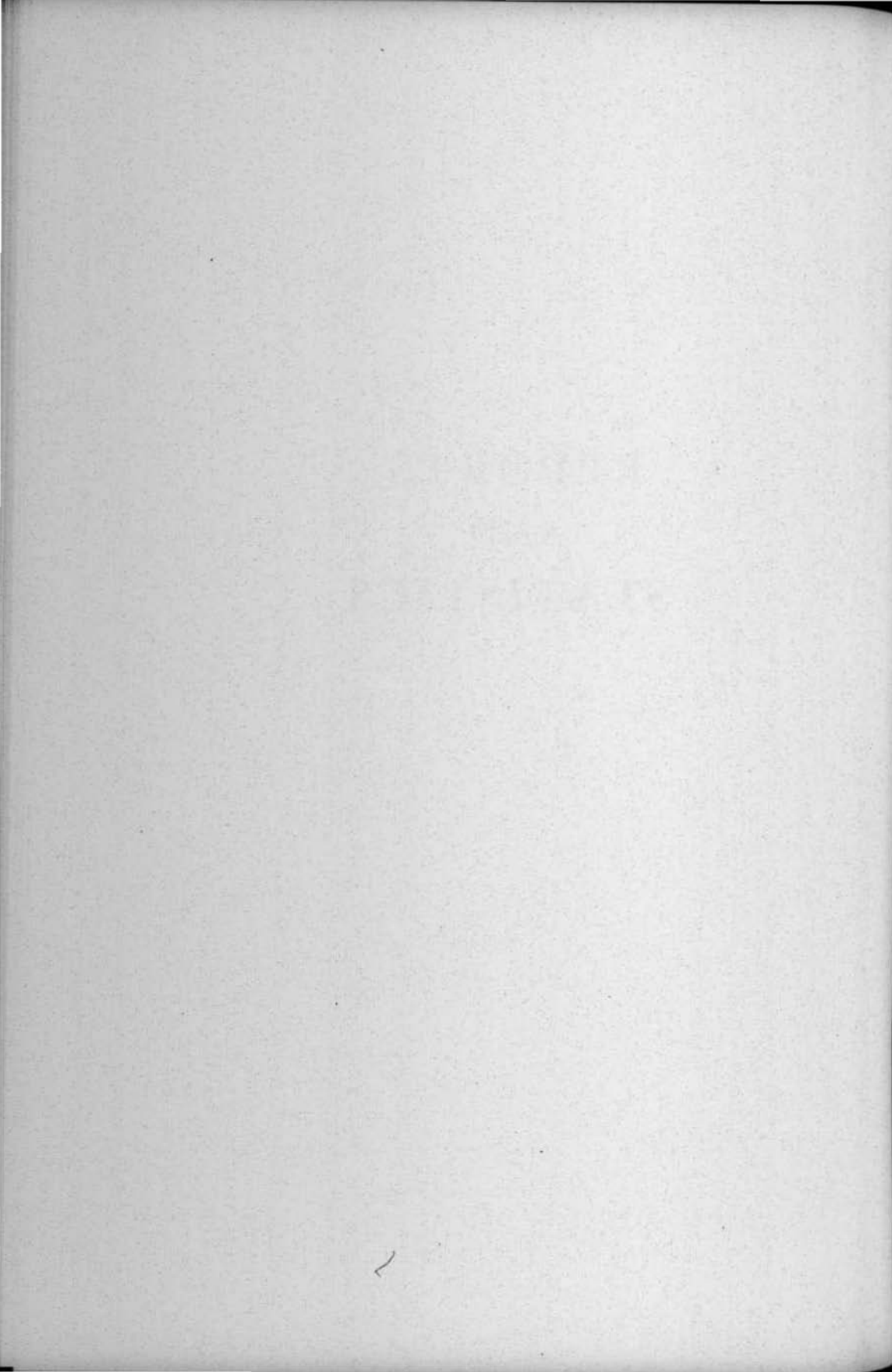
We understand that the judges of the court of record of Escambia county have heretofore been under the state and county officers and employees retirement system. If they continue under this system after July 1, 1957, their retirement benefits will be based upon 2% per years service after said date, but if they come under the supreme court justices and circuit judges retirement system on and after July 1, 1957, their retirement benefits, for services subsequent to that date will be on a basis of $3\frac{1}{3}\%$ for

years of service after said date. Retirement statutes like the ones under consideration "have been generally upheld on the theory that the delayed payments are a part of the participant's compensation for services already performed and are not regarded as extra or increased compensation that would offend §11, Art. XVI, and similar provisions" of the Florida constitution. (*State v. Lee*, 157 Fla. 62, 24 So. 2d 798, 163 A. L. R. 862). Chapters 122 and 123, F. S., under the above holding of our supreme court, would seem to pertain to the compensation of the state and county officers and employees within their purview, in that they provide for delayed payments of compensation.

In the light of the above statutes, opinions and observations, we feel that Ch. 123, F. S., pertains to the supreme court and the circuit courts and the officers thereof, "including . . . compensation of said officers," that is, circuit judges as officers. This seems to bring the said chapter within the purview of §10, Art. V, State Const., as amended, when said article takes effect on July 1, 1957. The application of said Ch. 123, F. S., to such judges will date from the effective date of said article and will have no retroactive effect. Their status under said chapter will be the same as if they had become circuit judges on July 1, 1957. The above question is, therefore, answered in the affirmative.



**REPORTS
AND
STATISTICS**



1956 CONSTITUTIONAL AMENDMENTS

The 1955 session of the Florida Legislature adopted twelve proposed amendments to the Florida Constitution to be submitted to the electors at the general election in 1956, one of which was repealed by the extraordinary session. Ten of the remaining proposed amendments were adopted and one was defeated. The amendments as ratified by the electors of Florida on November 6, 1956 appear below.

LEGISLATIVE DEPARTMENT

Article III

Section 2. Regular and extra sessions.—The regular sessions of the legislature shall be held biennially, commencing on the first Tuesday after the first Monday in April, 1887, and on the corresponding day of every second year thereafter, but the governor may convene the same in extra session by his proclamation. Regular sessions of the legislature may extend to sixty (60) days, but no special session convened by the governor shall exceed twenty (20) days. The regular sixty (60) day biennial session of the legislature may, by a three-fifths vote of the membership of both houses, be extended not exceeding a total of thirty (30) days which need not be consecutive. Recesses in such extended session shall be taken only by joint action of both houses. No extended session may last beyond September 1st following the regular biennial session. During such extended session, no additional proposed legislation shall be introduced unless consent is first obtained by a two-thirds ($\frac{2}{3}$) vote of the members of the House into which it is sought to be introduced.

Provided, that the legislature may also be convened in extra session in the following manner: When twenty per cent (20%) of the members of the legislature shall execute in writing and file with the secretary of state, their certificates that conditions warrant the convening of the legislature into extra session, the secretary of state shall, within seven (7) days after receiving the requisite number of such certificates, poll the members of the legislature, and upon the affirmative vote of three-fifths ($\frac{3}{5}$) of the members of both houses, shall forthwith fix the day and hour for convening of such extra session. Notice thereof shall be given each member by registered mail within seven (7) days after receiving the requisite number of said certificates. The time for convening of said session shall not be less than fourteen (14) days nor more than twenty-one (21) days from the date of mailing said notices. In pursuance of said certificates, affirmative vote of the membership and notice, the legislature shall convene in extra session for all purposes as if convened in regular session; provided, however, that any such extra session shall be limited to a period of thirty (30) days. Should the secretary of state fail to receive the requisite number of said certificates requesting the convening of an extra session of the legislature within a period of sixty (60) days after receipt of the first of said certificates, all certificates previously filed shall be rendered null and void and no extra session shall be called and said certificates shall not be used at any future time for the convening of the legislature.

JUDICIAL DEPARTMENT

Article V

Section 1. Courts. The judicial power of the State of Florida is vested in a supreme court, district courts of appeal, circuit courts, Court of Record of Escambia County, criminal courts of record, county courts, county judge's courts, juvenile courts, courts of justices of the peace, and such other courts, including municipal courts, or commissions, as the legislature may from time to time ordain and establish.

Section 2. Administration. The chief justice of the supreme court is vested with, and shall exercise in accordance with rules of that court, authority temporarily to assign justices of the supreme court to district courts of appeal and circuit courts, judges of district courts of appeal and circuit judges to the supreme court, district courts of appeal, and circuit courts, and judges of other courts, except municipal courts, to judicial service in any court of the same or lesser jurisdiction. Any retired justice or judge may, with his consent, be likewise assigned to judicial service.

Section 3. Practice and Procedure. The practice and procedure in all courts shall be governed by rules adopted by the supreme court.

Section 4. Supreme Court.

(a) *Organization.* The supreme court shall consist of seven members, one of whom shall be the chief justice. Five justices shall constitute a quorum, but the concurrence of four shall be necessary to a decision.

(b) *Jurisdiction.* Appeals from trial courts may be taken directly to the supreme court, as a matter of right, only from judgments imposing the death penalty, from final judgments or decrees directly passing upon the validity of a state statute or a federal statute or treaty, or construing a controlling provision of the Florida or federal constitution, and from final judgments or decrees in proceedings for the validation of bonds and certificates of indebtedness. The supreme court may directly review by certiorari interlocutory orders or decrees passing upon chancery matters which upon a final decree would be directly appealable to the supreme court. In all direct appeals and interlocutory reviews by certiorari, the supreme court shall have such jurisdiction as may be necessary to complete determination of the cause on review.

Appeals from district courts of appeal may be taken to the supreme court, as a matter of right, only from decisions initially passing upon the validity of a state statute or a federal statute or treaty, or initially construing a controlling provision of the Florida or federal constitution. The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law, and may issue writs of certiorari to commissions established by law.

The supreme court may issue writs of mandamus and quo warranto when a state officer, board, commission, or other agency authorized to represent the public generally, or a member of any such board, commission, or other agency, is named as respondent, and writs of prohibition to commissions established by law, to the district courts of appeal, and to the trial courts when questions are involved upon which a direct appeal to the supreme court is allowed as a matter of right.

The supreme court may issue all writs necessary or proper to the complete exercise of its jurisdiction.

The supreme court or any justice thereof may issue writs of habeas corpus returnable before the supreme court or any justice thereof, or before a district court of appeal or any judge thereof, or before any circuit judge.

The supreme court shall provide for the transfer to the court having jurisdiction of any matter subject to review when the jurisdiction of another appellate court has been improvidently invoked.

(c) *Chief Justice.* The chief justice of the supreme court shall be chosen by the members of the court and shall serve for a term of two years. In the event of a vacancy, a successor shall be chosen within sixty days for a like term. During a vacancy or whenever the chief justice is unable to act for any reason, the justice longest in continuous service and able to act shall act as chief justice.

(d) *Clerk and Marshal; Process.* The supreme court shall appoint a clerk and a marshal who shall hold office during the pleasure of the court and perform such duties as the court directs. Their compensation shall be fixed by law. The marshal shall have the power to execute the process of the court throughout the state, and in any county may deputize the sheriff or a deputy sheriff for such purpose.

Section 5. District Courts of Appeal.

(a) *Appellate Districts.* The state shall be divided into three appellate districts of contiguous counties as the legislature may prescribe.

(b) *Organization; number and selection of judges.* A district court of appeal shall be organized in each appellate district. There shall be three judges of each district court of appeal. Not less than three judges shall consider each case and the concurrence of a majority shall be necessary to a decision. The court shall hold at least one session every year in each judicial circuit within the district wherein there is ready business to transact.

The judges of the district courts of appeal organized hereunder shall be selected as follows: Between June first and July first, 1957, the governor shall appoint three persons to serve as judges of each district court of appeal until their successors are elected, as herein provided. The judges so appointed shall take office and assume their duties on July first, 1957, and shall serve for a term to be designated by the governor in accordance with the

following schedule: The governor shall appoint one judge in each district for a term expiring on the first Tuesday after the first Monday in January, 1959, following the election of his successor at the general election in November 1958, which judges shall be identified as Group "A"; one judge in each district for a term expiring on the first Tuesday after the first Monday in January 1961, following the election of his successor at the general election in November 1960, which judges shall be identified as Group "B", and one judge in each district for a term expiring on the first Tuesday after the first Monday in January 1963, following the election of his successor at the general election in November 1962, which judges shall be identified as Group "C".

The successors of the original judges of the district courts of appeal shall be elected at the general election next preceding the expiration of their respective terms of office.

(c) *Jurisdiction.* Appeals from trial courts in each appellate district, and from final orders or decrees of county judge's courts pertaining to probate matters or to estates and interests of minors and incompetents, may be taken to the court of appeal of such district, as a matter of right, from all final judgments or decrees except those from which appeals may be taken direct to the supreme court or to a circuit court.

The supreme court shall provide for expeditious and inexpensive procedure in appeals to the district courts of appeal, and may provide for review by such courts of interlocutory orders or decrees in matters reviewable by the district courts of appeal.

The district courts of appeal shall have such powers of direct review of administrative action as may be provided by law.

A district court of appeal or any judge thereof may issue writs of habeas corpus returnable before that district court of appeal or any judge thereof, or before any circuit judge in that district. A district court of appeal may issue writs of mandamus, certiorari, prohibition, and quo warranto, and also all writs necessary or proper to the complete exercise of its jurisdiction.

(d) *Clerks and Marshals.* Each district court of appeal shall appoint a clerk and a marshal who shall hold office during the pleasure of the court and perform such duties as the court may direct. Their compensation shall be fixed by law. The marshal shall have power to execute the process of the court throughout the state, and in any county may deputize the sheriff or a deputy sheriff for such purpose.

Section 6. Circuit Courts.

(a) *Judicial Circuits.* The legislature may establish not more than sixteen judicial circuits each composed of a county or contiguous counties and of not less than fifty thousand inhabitants according to the last census authorized by law, except that the county of Monroe shall constitute one of the circuits.

(b) *Circuit Judges.* The legislature shall provide for one circuit judge in each circuit for each fifty thousand inhabitants or major fraction thereof according to the last census authorized by law. In circuits having more than one judge the legislature may

designate the place of residence of any such additional judge or judges.

(c) *Jurisdiction.* The circuit courts shall have exclusive original jurisdiction in all cases in equity except such equity jurisdiction as may be conferred on juvenile courts, in all cases at law not cognizable by subordinate courts, in all cases involving the legality of any tax, assessment, or toll, in the action of ejectment, in all actions involving the titles or boundaries of real estate, and in all criminal cases not cognizable by subordinate courts. They shall have original jurisdiction of actions of forcible entry and unlawful detainer, and of such other matters as the legislature may provide. They shall have final appellate jurisdiction in all civil and criminal cases arising in the county court, or before county judges' courts, of all misdemeanors tried in criminal courts of record, and of all cases arising in municipal courts, small claims courts, and courts of justices of the peace. The circuit courts and judges shall have power to issue writs of mandamus, injunction, quo warranto, certiorari, prohibition, and habeas corpus, and all writs necessary or proper to the complete exercise of their jurisdiction.

The circuit courts and circuit judges shall have such extra-territorial jurisdiction in chancery cases as may be prescribed by law.

(d) *Court Commissioners.* A circuit judge may appoint in each county in his circuit one or more attorneys at law, to be court commissioners, who shall have power in the absence from the county of the circuit judge, to allow writs of injunction and to issue writs of habeas corpus, returnable before himself or the circuit judge. Their orders in such matters may be reviewed by the circuit judge, and confirmed, qualified or vacated. They may be removed by the circuit judge. The legislature may confer upon them further powers, not judicial, and shall fix their compensation.

(e) *Recommendation to Attorney General; Report to Legislature.* It shall be the duty of the judges of the circuit courts to report to the attorney general at least thirty days before each session of the legislature such defects in the laws as may have been brought to their attention, and to suggest such amendments or additional legislation as may be deemed necessary. The attorney general shall report to the legislature at each session such legislation as he may deem advisable.

(f) *State Attorneys.* In each judicial circuit a state attorney shall be elected by the qualified electors of that circuit in the same manner as other state and county officials, to serve a term of four years and to fulfill duties prescribed by law.

(g) *Clerks of the Circuit Courts.* In each county a clerk of the circuit court, who shall also be clerk of the board of county commissioners, recorder, and ex officio auditor of the county, shall be elected by the qualified electors of that county in the same manner as other state and county officials, to serve a term of four years and to fulfill duties prescribed by law.

Section 7. County Judges' Courts.

(a) *Establishment.* There shall be a county judges' court in each county.

(b) *County Judges.* There shall be in each county not less than one county judge who shall be elected by the qualified electors of said county at the time and places of voting for other county officers and shall hold his office for four years. His compensation shall be provided for by law.

In any county having a population in excess of one hundred and twenty-five thousand, and not more than two hundred and fifty thousand, according to the last decennial federal census, or census authorized by the legislature and paid for by the county, the legislature may provide for an additional county judge for such county, provided, that any law having for its purpose the creating of an additional county judge in such county shall not become effective unless ratified by a majority of the participating voters of such county at an election presenting the same for approval or rejection. In any county having a population of more than two hundred and fifty thousand according to such census, the legislature may, without referendum thereon, provide for one additional county judge for each additional 250,000 of population or major fraction thereof.

(c) *Jurisdiction.* The county judge's courts shall have original jurisdiction in all cases at law in which the demand or value of property involved shall not exceed one hundred dollars; of proceedings relating to the forcible entry or unlawful detention of lands and tenements; and of such criminal cases as the legislature may prescribe. The county judge's courts shall have jurisdiction of the settlement of the estate of decedents and minors, to order the sale of real estate of decedents and minors, to take probate of wills, to grant letters testamentary and of administration and guardianship, and to discharge the duties usually pertaining to courts of probate. The county judges shall have the power of committing magistrates and shall issue all licenses required by law to be issued in the county.

Section 8. County Courts; organization and officers. The legislature may organize in such counties, as it may think proper, county courts which shall have jurisdiction of all cases at law in which the demand or value of the property involved shall not exceed five hundred dollars; of proceedings relating to the forcible entry or unlawful detention of lands and tenements, and of misdemeanors. The county judge shall be the judge of said court. There shall be elected by the qualified electors of said county at the time when the said judge is elected a prosecuting attorney for said county, who shall hold office for four years. His duties and compensation shall be prescribed by law. Such courts may be abolished at the pleasure of the legislature.

Section 9. Criminal Courts of Record.

(a) *Organization and judges.* The legislature may provide for the establishment of a criminal court of record in any county. Judges of criminal courts of record shall be elected for a term of four years by the qualified electors of the county, in the same manner as other state and county officials. Their compensation shall be fixed by law and paid by the county.

In any county having a population in excess of 125,000, and not more than 250,000, according to the last decennial federal census, or census authorized by the legislature and paid for by the county,

the legislature may provide for an additional judge of the criminal court of record for such county, provided that any law having for its purpose the creating of an additional judge of said court in such county shall not become effective unless ratified by a majority of the participating voters of such county in an election presenting the same for approval or rejection. In any county having a population of more than 250,000 according to such census, the legislature may, without referendum thereon, provide for one additional county judge for each additional 250,000 of population or major fraction thereof.

(b) *Jurisdiction.* The said courts shall have jurisdiction of all criminal cases not capital which shall arise in said counties respectively.

(c) *Terms.* There shall be six terms of said courts in each year.

(d) *Prosecuting Attorney; term.* There shall be for each of said courts a prosecuting attorney who shall be elected for a term of four years by the qualified electors of the county as other state and county officials are elected and whose compensation shall be fixed by law.

(e) *Indictment and information.* All offenses triable in said court shall be prosecuted upon information under oath, to be filed by the prosecuting attorney, but the grand jury of the circuit court for the county in which said criminal court is held may indict for offenses triable in the criminal court. Upon the finding of such indictment the circuit judge shall commit or bail the accused for trial in the criminal court, which trial shall be upon information.

(f) *Criminal courts of record supersede criminal jurisdiction of county courts.* The county courts in counties where such criminal courts are established shall have no criminal jurisdiction and no prosecuting attorney.

(g) *Clerk.* The clerk of said court shall be elected by the electors of the county in which the court is held and shall hold office for four years, and his compensation shall be fixed by law. He shall also be clerk of the county court. The sheriff of the county shall be the executive officer of said court, and his duties and fees shall be fixed by law.

(h) *State attorney eligible for appointment as county solicitor.* The state attorney residing in the county where such court is held shall be eligible for appointment as county solicitor for said county.

(i) *Criminal courts of record may be abolished by legislature.* Such courts may be abolished by the legislature.

Section 9A. Additional judge, Duval County criminal court of record. From and after the adoption of this amendment, there shall be a Judge of the Criminal Court of Record of Duval County, Florida, in addition to the Judge of said Criminal Court of Record already provided in said County, said Judge shall be elected at the General Election next succeeding the coming into effect of this amendment, except as otherwise provided herein, and shall hold office for four years and receive the same salary and allowances for expenses as is provided by law for the Judge of a Criminal Court

of Record of Duval County. He shall have all powers and perform all duties and possess all qualifications that are or may be provided or prescribed by the Constitution or by statute for the Judge of the Criminal Court of Record of Duval County, and all statutes concerning said Judge shall apply to him. Provided, however, that if there be a Judge of a Provisional Criminal Court in Duval County upon the adoption of this amendment, such Judge shall become such additional Judge, and shall be commissioned by the Governor to hold office as a Judge of the Criminal Court of Record of Duval County, until his successor is duly elected and qualified.

Section 9B. Dade County, State Attorney as Prosecuting Attorney, Criminal Court of Record. On and after the first Tuesday after the first Monday in January, 1957, the State Attorney of the Eleventh Judicial Circuit in and for Dade County, Florida, shall be the prosecuting attorney of the Criminal Court of Record and the Court of Crimes of Dade County, and the office of County Solicitor, the position of Assistant County Solicitor, the positions of process server and investigator in Dade County, shall stand abolished and terminated; and thereafter the State Attorney and his Assistant State Attorneys, under his direction, shall perform all of the duties and functions of office heretofore performed by the County Solicitor. Pending informations filed in the Criminal Court of Record or Court of Crimes shall not be invalidated hereby, and the State Attorney, or his Assistant State Attorneys, may file amended informations in any such cases if and when necessary. The Legislature may provide for Assistant State Attorneys and special investigators for the State Attorney of Dade County, and all Assistant State Attorneys shall be appointed by the State Attorney and sworn in by the Court, and such Assistant State Attorneys shall work under the direction of the State Attorney and shall have full authority to do and perform any official act that the State Attorney may do and perform.

Upon this amendment being adopted all funds appropriated by law approved by the Budget Commission and budgeted by the Board of County Commissioners of Dade County for the use of office of County Solicitor of Dade County, Florida, and for the purpose of employing Assistant County Solicitors and other office personnel shall thereafter be used for the operation of the State Attorney's Office of the Eleventh Judicial Circuit in and for Dade County, and the employing of Assistant State Attorneys and other personnel for the operation of that office, and the said State Attorney is hereby authorized to employ such personnel, including Assistant State Attorneys, process servers and investigator, in the same number and to be paid the same salary as the number of Assistant County Solicitors, process servers and investigator employed by the County Solicitor of Dade County, Florida.

Section 10. Court of Record of Escambia County. In Escambia County there shall be a court of record with two or more judges as the legislature may provide, who shall be elected for a term of six years by the qualified electors of said county as other county officials are elected, and whose compensation shall be fixed by the legislature. Said court shall have exclusive jurisdiction of all criminal cases not capital and, concurrent with the circuit court of said county and the judges thereof, the same original jurisdiction

of all cases and matters and the same power and authority to issue all writs as the circuit court of said county and the judges thereof, excepting the power to summon and empanel a grand jury, and jurisdiction of such other matters as the legislature may provide. The rules of procedure and practice applicable to the circuit court of said county shall obtain in the court of record.

The provisions of this constitution and all laws enacted in consonance therewith pertaining to circuit courts and the officers thereof and to appeals and writs of error from circuit courts, including the manner of the appointment or election and the terms of office and compensation of said officers, shall apply with like effect to the court of record of Escambia County and the officers thereof except as otherwise provided in this section; provided that the compensation and expense allowances of said judges of said court of record shall be paid by Escambia County and shall be the same as paid to and received from all sources by judges of the circuit court of said county resident in said county.

At the request of a judge of the circuit court of Escambia County evidenced as now provided by law a judge of the court of record may assume and perform in every respect the jurisdiction and duties of the circuit court of Escambia County or a judge thereof, including the trial of capital cases and the power to summon and empanel a grand jury; and at the request of a judge of the court of record evidenced as now provided by law a judge of the circuit court of Escambia County may assume and perform in every respect the duties and jurisdiction of the court of record of Escambia County or a judge thereof.

There shall hereafter be elected for a term of four (4) years by the qualified electors of Escambia County, Florida, a prosecuting attorney, who shall be known as "County Solicitor of Escambia County, Florida", and who shall be the prosecuting attorney in the Court of Record in and for Escambia County, Florida, and his duties and compensation shall be fixed by law. An election for County Solicitor shall be held at the general election in 1958, and each four (4) years thereafter, and the person elected at any such election shall take office the first Tuesday after the first Monday in January succeeding the date of the election. Any person now occupying such office or who shall hereafter be appointed to fill any vacancy therein shall continue in office until the election and qualification of a County Solicitor hereunder.

All offenses triable in the Court of Record in and for Escambia County, Florida, shall be prosecuted upon information under oath, to be filed by the County Solicitor, but the Grand Jury of the Circuit Court for Escambia County, Florida, may indict for offenses triable in said court. Upon the finding of any such indictment the Circuit Judge shall admit to bail or commit the accused pending trial in the Court of Record in and for Escambia County, Florida, and trial shall be upon information filed by the County Solicitor.

The Clerk of said Court shall be elected by the electors of Escambia County at the General Election in 1960 and each four (4) years thereafter, and the person elected shall hold office for four (4) years. The compensation and duties of the Clerk shall be fixed by law. The Clerk of the Court of Record in and for Escambia

County, Florida, elected at the General Election of 1956 and any successor appointed to fill any vacancy in said office which may occur, shall hold office until the first Tuesday after the first Monday, January, 1961.

The Sheriff of the County shall be the executive officer of said Court and his duties and compensation shall be fixed by law.

In event of vacancy in the office of County Solicitor, Clerk or other officer of the Court of Record in and for Escambia County, Florida, from any cause, the successor to fill such vacancy shall be appointed by the Governor to serve for the unexpired term of such office which has become vacant.

Section 11. Courts of Justices of the Peace.

(a) *Districts and presiding officer.* There shall be not more than five justice districts in each county, and there shall be elected one justice of the peace for each justice district, who shall hold office for four years. Existing justice districts are hereby recognized, but the legislature may, by special act, from time to time change the boundaries of any such district now or hereafter established, and may establish new or abolish any such district now or hereafter existing. Provided, however, that any such changes shall be submitted to the people of any county so affected, by referendum at the next ensuing general election.

(b) *Jurisdiction.* The justices of the peace shall have jurisdiction in cases at law in which the demand or value of the property involved does not exceed \$100.00, and in which the cause of action accrued or the defendant resides in his district; and in such criminal cases, except felonies, as may be prescribed by law, and he shall have power to issue process for the arrest of all persons charged with felonies and misdemeanors not within his jurisdiction to try, and make the same returnable before himself or the county judge for examination, discharge, commitment or bail of the accused. Justices of the peace shall have the power to hold inquests of the dead. Appeal from justices of the peace courts in criminal cases may be tried de novo under such regulations as the legislature may prescribe.

(c) *Constables.* A constable shall be elected by the registered voters in each justice's district, who shall perform such duties, and under such regulations as may be prescribed by law.

Section 12. Juvenile Courts; establishment; jurisdiction; judge; officers; procedure. The legislature shall have power to create and establish juvenile courts in such county or counties or districts within the state as it may deem proper, and to define the jurisdiction and powers of such courts and the officers thereof, and to vest in such courts exclusive original jurisdiction of all or any criminal cases where minors under any age specified by the legislature from time to time are accused, including the right to define any or all offenses committed by any such persons as acts of delinquency instead of crimes; to provide for the qualification, election or selection and appointment of judges, probation officers and such other officers and employees of such courts as the legislature may determine, and to fix their compensation and term of office; all in such manner, for such time, and according to such

methods as the legislature may prescribe and determine, without being limited therein by the provisions in this constitution as to trial by jury in Sections 3 and 11 of the Declaration of Rights, as to the use of the terms "prosecuting attorney" and "information" in Section 10 of the Declaration of Rights, as to election or appointment of officers in Section 27 of Article 3, as to jurisdiction of criminal cases in Sections 6, 7, 9, and 11 of this Article, as to original jurisdiction of the interests of minors in Section 6 of this Article, and as to style of process and prosecuting in the name of the state in Section 20 of this Article, or other existing conflicting provisions of this constitution.

Section 13. Eligibility requirements for justices and judges. No person shall be eligible for the office of justice of the supreme court or judge of a district court of appeal unless he is a citizen of this state, and unless he is, at the time, a member of the Florida Bar in good standing and for a period of at least ten years has been a member of the bar of Florida; and no person shall be eligible for the office of judge of a circuit court or criminal court of record who is not twenty-five years of age and a member of the bar of Florida. Any senator or member of the house of representatives otherwise qualified shall be eligible for appointment or election to any judicial office which may have been created, or the emoluments whereof may have been increased, during the time for which he was elected.

Section 14. Vacancies in office of judge, how filled. When the office of any judge shall become vacant from any cause, the successor to fill such vacancy shall be appointed or elected only for the unexpired term of the judge whose death, resignation, retirement, or other cause created such vacancy.

Section 15. Election of judges. Circuit judges shall be elected by the qualified electors of their respective judicial circuits as other state and county officials are elected.

Judges of district courts of appeal shall be elected by the qualified electors of their respective districts as other state and county officials are elected.

Justices of the supreme court shall be elected by the qualified electors of the state as other state and county officials are elected.

The judges of district courts of appeal identified as belonging to Group "A" shall be elected in 1958 and every six years thereafter; those identified as belonging to Group "B" shall be elected in 1960 and every six years thereafter; and those identified as belonging to Group "C" shall be elected in 1962 and every six years thereafter.

Election of circuit judges shall be held in the year 1960 and every six years thereafter.

Two justices of the supreme court shall be elected in 1958 and every six years thereafter; three justices of the supreme court shall be elected in 1960 and every six years thereafter; two justices of the supreme court shall be elected in 1962 and every six years thereafter.

Such elected justices and judges shall take office on the first Tuesday after the first Monday in the following January.

Section 16. Terms of office of certain judges. The terms of office of justices of the supreme court, judges of district courts of appeal, and circuit judges shall be six years.

Section 17. Retirement suspension and removal of judges. Notwithstanding the provisions of this Article relating to terms of office:

(a) All justices and judges shall automatically retire at age 70;

(b) Subject to rules of procedure to be established by the supreme court, and after notice and hearing, any justice or judge may be retired for disability at retirement pay to be fixed by law, which shall not be less than two-thirds of his then compensation if he has served for ten years or more, by a commission composed of one justice of the supreme court to be selected by that court, two judges of the district courts of appeal to be selected by the judges of said district courts of appeal, and two circuit judges and two county judges to be selected by the supreme court.

(c) Any justice of the supreme court, judge of the district court of appeal, or circuit judge shall be liable to impeachment for any misdemeanor in office.

Section 18. Prohibited activities of judges. Justices of the supreme court, judges of district courts of appeal and circuit judges shall devote full time to their judicial duties, shall not engage in the practice of law or hold any office or position of profit under this state or any office of profit under the United States, and shall not hold office in any political party.

Compensation for service in the state militia or the armed forces of the United States or other defense agencies recognized by the supreme court for such periods of time as may be determined by the supreme court shall not be deemed profit.

Section 19. Judicial salaries and expenses. Justices of the supreme court and judges of all other courts shall receive for their services salaries or compensation provided by law. A retired justice or judge assigned to active judicial service shall, while so serving, receive as additional compensation the difference between his retirement benefits and the compensation applicable to such service. Salaries of circuit judges may be supplemented in any county or counties when authorized by law. Judicial officers shall be paid such actual and necessary expenses as may be authorized by law.

Section 20. Style of process. The style of all process shall be "The State of Florida" and all prosecutions shall be conducted in the name and by the authority of the State.

Section 21. Referees. Any civil cause may be tried before a practicing attorney as referee upon the applications of the parties and an order from the court in whose jurisdiction the case may be, authorizing such trial and appointing such referee. The referee shall keep a complete record of the case, including the evidence taken, and such record shall be filed with the papers in the case in the office of the clerk; and the cause shall be subject to an appeal in the manner prescribed by law.

Section 22. Juries. The number of jurors for trial of causes in any court may be fixed by law but shall not be less than six in any case.

Section 23. Admission and discipline of attorneys. The supreme court shall have exclusive jurisdiction over the admission to the practice of law and the discipline of persons admitted. It may provide for an agency to handle admissions subject to its supervision. It may also provide for the handling of disciplinary matters in the circuit courts and the district courts of appeal, or by commissions consisting of members of the bar to be designated by it, the supreme court, subject to its supervision and review.

Section 24. Effect of reduction of number of judges. Any law reducing the number of judges of any court shall not shorten the term of any judge then in office.

Section 25. Judicial Officers as conservators of the peace. All judicial officers in this state shall be conservators of the peace.

Section 26. Schedule.

(1) This Article shall become effective on the first day of July 1957 and shall replace all of Article V, and shall supersede any other provisions of the present constitution of Florida in conflict herewith, which shall then stand repealed.

(2) Until changed by law as authorized in this Article, the appellate districts shall be composed as follows:

FIRST DISTRICT:

The 1st, 2nd, 3rd, 4th, 5th, 7th, 8th, and 14th judicial circuits as presently constituted.

SECOND DISTRICT:

The 6th, 9th, 10th, 12th, and 13th judicial circuits as presently constituted.

THIRD DISTRICT:

The 11th, 15th, and 16th judicial circuits as presently constituted.

(3) The provisions of the Article governing eligibility for office shall not affect the right of any incumbent to continue in office or to seek reelection.

(4) Except to the extent inconsistent with the provisions of this Article, all provisions of law and rules of court in force on the effective date of this Article shall continue in effect until superseded in a manner authorized by the constitution.

(5) Judges of the district courts of appeal appointed by the governor shall take office on the effective date of this Article.

(6) The supreme court may transfer to the respective district courts of appeal such causes, matters and proceedings as are pending in the supreme court on the effective date of this Article which are within the jurisdiction of such courts as the supreme court may see fit. No case that has been orally argued before the supreme court shall be so transferred. The supreme court shall have and retain jurisdiction and authority over all causes, matters and

proceedings not so transferred to the district courts of appeal.

(7) All trial courts as organized and constituted on the effective date of this Article shall, except as otherwise provided herein, continue with their jurisdiction, judges and officers, including the manner of their election or appointment, until otherwise provided by the legislature.

(8) Until otherwise provided by law, there shall be an additional judge for the Fourth Judicial Circuit who shall reside in Duval County, and shall receive the same salary and allowances for expenses as other circuit judges in and for the circuit court of said county, which salary and expenses shall be paid by said county out of its general revenue. The additional judge of the circuit court of Duval County holding office on the effective date of this Article under former Section 42 of Article V shall become the additional judge here provided for until the expiration of his then term of office.

(9) There shall be an additional circuit judge for the circuit court of the judicial circuit wherein the state capital is located. Subsequent to the first Tuesday after the first Monday in January 1957, the governor shall appoint the first judge hereunder to serve for a term expiring on the first Tuesday after the first Monday in January 1959, following the election of his successor at the general election in November 1958, which successor shall serve for a term expiring on the first Tuesday after the first Monday in January 1961, following the election of his successor at the general election in November 1960, which successor shall serve for the full term and his successors chosen as otherwise provided for circuit judges.

(10) Until otherwise provided by the legislature, orders of the Florida Industrial Commission shall be subject to review only by petition to the district courts of appeal for writ of certiorari.

(11) All provisions of law pertaining to the State Board of Law Examiners shall continue in effect until superseded in a manner authorized by this Article.

(12) This Article shall not disturb the terms of incumbent judges.

(13) The provision for automatic retirement in Section 17 of this Article does not apply to any person now holding office.

(14) Upon the adoption of this Article, the legislature shall enact such laws and make such appropriations and the supreme court shall make such rules as may be necessary or proper to give effect to its provisions.

COUNTIES AND CITIES

Article VIII

Section 11. Dade County, Home Rule Charter. (a) The electors of Dade County, Florida, are granted power to adopt, revise, and amend from time to time a home rule charter of government for Dade County, Florida, under which the Board of County Commissioners of Dade County shall be the governing body. This charter:

(i) Shall fix the boundaries of each county commission district, provide a method for changing them from time to time, and fix the number, terms and compensation of the commissioners, and their method of election.

(ii) May grant full power and authority to the Board of County Commissioners of Dade County to pass ordinances relating to the affairs, property and government of Dade County and provide suitable penalties for the violation thereof; to levy and collect such taxes as may be authorized by general law and no other taxes, and to do everything necessary to carry on a central metropolitan government in Dade County.

(iii) May change the boundaries of, merge, consolidate, and abolish and may provide a method for changing the boundaries of, merging, consolidating and abolishing from time to time all municipal corporations, county or district governments, special taxing districts, authorities, boards, or other governmental units whose jurisdiction lies wholly within Dade County, whether such governmental units are created by the Constitution or the Legislature or otherwise, except the Dade County Board of County Commissioners as it may be provided for from time to time by this home rule charter and the Board of Public Instruction of Dade County.

(iv) May provide a method by which any and all of the functions or powers of any municipal corporation or other governmental unit in Dade County may be transferred to the Board of County Commissioners of Dade County.

(v) May provide a method for establishing new municipal corporations, special taxing districts, and other governmental units in Dade County from time to time and provide for their government and prescribe their jurisdiction and powers.

(vi) May abolish and may provide a method for abolishing from time to time all offices provided for by Article VIII, Section 6, of the Constitution or by the Legislature, except the Superintendent of Public Instruction and may provide for the consolidation and transfer of the functions of such offices, provided, however, that there shall be no power to abolish or impair the jurisdiction of the Circuit Court or to abolish any other court provided for by this Constitution or by general law, or the judges or clerks thereof although such charter may create new courts and judges and clerks thereof with jurisdiction to try all offenses against ordinances passed by the Board of County Commissioners of Dade County and none of the other courts provided for by this Constitution or by general law shall have original jurisdiction to try such offenses, although the charter may confer appellate jurisdiction on such courts, and provided further that if said home rule charter shall abolish any county office or offices as authorized herein, that said charter shall contain adequate provision for the carrying on of all functions of said office or offices as are now or may hereafter be prescribed by general law.

(vii) Shall provide a method by which each municipal corporation in Dade County shall have the power to make, amend or repeal its own charter. Upon adoption of this home rule charter by the electors this method shall be exclusive and the Legislature shall have

no power to amend or repeal the charter of any municipal corporation in Dade County.

(viii) May change the name of Dade County.

(ix) Shall provide a method for the recall of any commissioner and a method for initiative and referendum, including the initiation of and referendum on ordinances and the amendment or revision of the home rule charter, provided, however, that the power of the Governor and Senate relating to the suspension and removal of officers provided for in this Constitution shall not be impaired, but shall extend to all officers provided for in said home rule charter.

(b) Provision shall be made for the protection of the creditors of any governmental unit which is merged, consolidated, or abolished or whose boundaries are changed or functions or powers transferred.

(c) This home rule charter shall be prepared by a Metropolitan Charter Board created by the Legislature and shall be presented to the electors of Dade County for ratification or rejection in the manner provided by the Legislature. Until a home rule charter is adopted the Legislature may from time to time create additional Charter Boards to prepare charters to be presented to the electors of Dade County for ratification or rejection in the manner provided by the Legislature. Such Charter, once adopted by the electors, may be amended only by the electors of Dade County and this charter shall provide a method for submitting future charter revisions and amendments to the electors of Dade County.

(d) The County Commission shall continue to receive its pro rata share of all revenues payable by the state from whatever source to the several counties and the state of Florida shall pay to the Commission all revenues which would have been paid to any municipality in Dade County which may be abolished by or in the method provided by this home rule charter; provided, however, the Commission shall reimburse the comptroller of Florida for the expense incurred if any, in the keeping of separate records to determine the amounts of money which would have been payable to any such municipality.

(e) Nothing in this section shall limit or restrict the power of the Legislature to enact general laws which shall relate to Dade County and any other one or more counties in the State of Florida or to any municipality in Dade County and any other one or more municipalities of the State of Florida, and the home rule charter provided for herein shall not conflict with any provision of this Constitution nor of any applicable general laws now applying to Dade County and any other one or more counties of the State of Florida except as expressly authorized in this section nor shall any ordinance enacted in pursuance to said home rule charter conflict with this Constitution or any such applicable general law except as expressly authorized herein, nor shall the charter of any municipality in Dade County conflict with this Constitution or any such applicable general law except as expressly authorized herein, provided, however, that said charter and said ordinances enacted in pursuance thereof may conflict with, modify or nullify any existing local, special or general law applicable only to Dade County.

(f) Nothing in this section shall be construed to limit or restrict the power of the Legislature to enact general laws which shall relate to Dade County and any other one or more counties of the State of Florida or to any municipality in Dade County and any other one or more municipalities of the State of Florida relating to county or municipal affairs and all such general laws shall apply to Dade County and to all municipalities therein to the same extent as if this section had not been adopted and such general laws shall supersede any part or portion of the home rule charter provided for herein in conflict therewith and shall supersede any provision of any ordinance enacted pursuant to said charter and in conflict therewith, and shall supersede any provision of any charter of any municipality in Dade County in conflict therewith.

(g) Nothing in this section shall be construed to limit or restrict the power and jurisdiction of the Railroad and Public Utilities Commission or of any other state agency, bureau or commission now or hereafter provided for in this Constitution or by general law and said state agencies, bureaus and commissions shall have the same powers in Dade County as shall be conferred upon them in regard to other counties.

(h) If any section, subsection, sentence, clause or provision of this section is held invalid as violative of the provisions of Section 1, Article XVII of this Constitution the remainder of this section shall not be affected by such invalidity.

(i) It is declared to be the intent of the Legislature and of the electors of the State of Florida to provide by this section home rule for the people of Dade County in local affairs and this section shall be liberally construed to carry out such purpose, and it is further declared to be the intent of the Legislature and of the electors of the State of Florida that the provisions of this Constitution and general laws which shall relate to Dade County and any other one or more counties of the State of Florida or to any municipality in Dade County and any other one or more municipalities of the State of Florida enacted pursuant thereto by the Legislature shall be the supreme law in Dade County, Florida, except as expressly provided herein and this section shall be strictly construed to maintain such supremacy of this Constitution and of the Legislature in the enactment of general laws pursuant to this Constitution.

Section 23. Escambia County officers' salaries; disposition of fees. On and after the first day of October, 1957, all fees, revenues or other charges collected by the several county officers of Escambia County shall be paid into the general county fund of Escambia County subject to disbursement as provided by law. The legislature shall provide by local or special legislation for the salaries, expenses and compensation to be paid the several county officers of Escambia County. Any legislation which shall have heretofore been enacted in contemplation of the ratification of this amendment is hereby confirmed and shall have the same force and effect as if the said legislation were enacted subsequent to the ratification of this amendment.

EDUCATION

Article XII

Section 2A. County Superintendent of Public Instruction; appointment in certain counties.

(1) From and after January 1, 1957, the county superintendent of public instruction shall be appointed by the county board of public instruction in the counties of Duval, Sarasota, Dade and Pinellas wherein the proposition is affirmed by a majority vote of the qualified electors of any such county, or by a special act of the legislature making the office of county superintendent of public instruction appointive.

(2) To submit the proposition contained in subsection (1) above, to the electors a special election shall be called by the county commissioners of such county upon the request of the county board of public instruction therein, which election shall be held within sixty (60) days after request and the result thereof shall determine whether subsection (1) shall be effective in such county.

(3) Any county adopting the provisions of subsection (1) hereof may after four (4) years return to its former status and reject the provisions of this section by the same procedure outlined in subsection (2) hereof for adopting the provisions thereof in the beginning, or by a special act of the legislature.

Section 10A. Abolition of County School District Trustees.

(1) From and after January 1, 1957, the office of county special tax school district trustees shall be abolished and all duties of district trustees shall be vested in the county board of public instruction, including levying taxes provided by article XII of the constitution, in all counties wherein the proposition is affirmed by a majority vote of the qualified electors of any such county.

(2) To submit the proposition contained in subsection (1) above to the electors a special election shall be called by the county commissioners of any county upon the request of the county board of public instruction therein, which election may be held at the same time as the next general election and the result thereof shall determine whether subsection (1) shall be effective in such county.

(3) Any county adopting the provisions of subsection (1) hereof may after four (4) years return to its former status and reject the provisions of this section by the same procedure outlined in subsection (2) hereof for adopting the provisions thereof in the beginning.

MISCELLANEOUS PROVISIONS

Article XVI

Section 4A. Civil Jury Trials in Pinellas County; location in certain municipalities within said county.—The Legislature may, from time to time and as the business of Pinellas County may require, provide that trial by jury of all civil suits, properly triable by jury according to law, may be had and held in any municipality, within said county, having a population of more than seventy-five

thousand (75,000) inhabitants according to the latest official census. The legislature may provide also that the clerk of any court or any other court officer, within said county, shall maintain such offices within such municipality, and keep such official books and records therein, as may be necessary to accomplish the purposes of this amendment; provided, however, that the principal offices of such clerks or other officers shall not be removed from the county seat.

Section 34. Civil Service System and Boards.—The Legislature may by general, special or local laws create Civil Service systems and Civil Service Boards for municipal, county and state employees and for municipal, county and state officers not appointed by the governor or elected by the people and the Legislature may authorize such Civil Service Boards to provide for the qualifications and method of employing such employees and officers and to prescribe the length of their terms of office or employment.

IMPORTANT COURT PROCEEDINGS AND DECISIONS

Appeal—Certiorari

Hamel v. Danko, 82 So. 2d 321—Section 59.021, F. S., was declared unconstitutional by the Supreme Court which held that the statute is a manifest and palpable violation on its face of the separation of powers doctrine which is imbedded in article II of the state constitution and for that reason it is void, frustrate and of no effect.

Elections—Qualification of State and County Officers

State v. Newell, 85 So. 2d 124—The Supreme Court held unconstitutional the provision contained in the last sentence of subsection (3) of section 99.061, F. S., as amended by chapter 29936, 1955, which provision attempts to exempt certain counties from the provision of the state election law which prescribes the periods within which candidates for state and county offices shall qualify. The court said such exemptions were not based on a classification predicated upon a reasonable basis and that it violated the provision of the constitution which prohibits special laws for opening and closing elections for state and county offices.

Crimes—Petit Larceny

Anglin v. Mayo, 88 So. 2d 918—The Supreme Court held that the offense condemned by section 817.01, F. S., is clearly comprehended by the offense condemned by section 811.021, F. S., and that section 811.021, F. S., being a later enactment as well as a revision of the laws theretofore applicable to various offenses supersedes section 817.01, F. S., and that the appellant who had been sentenced to imprisonment for five years for crime of petit larceny under section 817.01, F. S., superseded by section 811.021, F. S., limiting such offense to imprisonment of six months, was illegally sentenced and entitled to writ of habeas corpus.

Reapportionment—Senate and House of Representatives

Brewer v. Gray, 86 So. 2d 799—Chapter 31378, Laws of Florida, extraordinary session, 1955, reapportioning the House of Representatives was declared valid by the Supreme Court, stating that the existence of two constitutional duties of the legislature to reapportion the Senate and to reapportion the House of Representatives, does not make performance of one duty ineffectual until the other has been accomplished unless it is clear that that is the intent of the constitution.

Statutes—Population Acts

State v. Tindell, 88 So. 2d 123—The Supreme Court declared

chapter 30227, Laws of Florida, 1955, relating to prosecution of homicides, unconstitutional, in that the scope of the act was broader than the title. The title provided that the act apply to counties having a population of 490,000 or more and the first section of the law, that its provisions apply to judicial circuits having a population of more than 490,000.

Statutes—Special Acts

Fronton, Inc. v. Florida State Racing Commission, 82 So. 2d 520—The Supreme Court declared unconstitutional chapter 31125, Special Acts of 1955, relating to the operation of frontons in Palm Beach County, requiring an election be held prior to assignment of dates by the state racing commission for holding jai alai or pelota games, as a denial of the equal protection of the law.

Succession to Office of Governor

Ervin v. Collins, 85 So. 2d 852—The Supreme Court, in its opinion on an appeal by the attorney general from a decree entered by the circuit court, Leon County, in a proceeding to obtain a declaratory decree as to whether the governor who had been elected to fill an unexpired term was eligible for re-election to the following full term as governor, held that the governor who was elected pursuant to section 19, article IV of the state constitution which did not contain any express or implied provision against his running for the succeeding full term to fill unexpired term of governor, following death of incumbent, was not made ineligible to run for election to such full term by section 2, article IV of the constitution which provides that governor shall not be eligible for re-election to the office for next succeeding term.

Supreme Court—Jurisdiction

City of Dunedin v. E. W. Bense, —So. 2d——The Supreme Court held subsections (2)-(4) of Section 75.09, F. S., which were added to the section by chapter 29691, Laws of Florida, 1955, unconstitutional, stating that the legislature in enacting this legislation undertook to confer original jurisdiction on the Supreme Court in contravention of the provisions of section 5, article V of the state constitution.

THE OFFICE OF ATTORNEY GENERAL IN FLORIDA

The attorney general in Florida derives his office from the people. He is elected by popular choice and acquires his powers and authority and is charged with the duties of his office from three primary sources: First, the common law; second, the Constitution of Florida; third, the statutory law.

Judicial decision, interpretation and construction enter the picture by way of defining, declaring and designating this authority and these duties within the common law, constitutional and statutory, grant and limitation.

COMMON LAW POWERS, DUTIES AND AUTHORITY

He is as much the representative of the State of Florida in the supreme court, as the King's Attorney General is his representative in the Court of King's Bench. It is his sole duty to appear in and attend to, in behalf of the state, all suits or prosecutions, civil or criminal, or in equity, in which the state may be a party, or in anywise interested, in the supreme court of this state. At common law his office is in many respects judicial in character and he is clothed with considerable discretion. If the power exists, it is not a question of right in him to institute the necessary proceeding when in his opinion a condition exists which requires the exercise of the power, it is a matter of duty. At common law it is his duty to prosecute all actions necessary to protect state's property and revenue, to represent the state in all criminal cases before the appellate court; to revoke and annul grants made by the state improperly or when forfeited by the grantee; to determine the right of anyone who claims or usurps any office; to vacate the charter or annul the existence of a corporation for violations of its charter or for omitting to exercise its corporate powers; to enforce trusts; to prevent public nuisances; and in the absence of express legislative restrictions, to exercise all such power and authority as public interest may require. *State ex rel Landis, Attorney General, et al v. S. H. Kress & Co.*, 115 Fla. 189, 155 So. 823.

CONSTITUTIONAL POWERS, DUTIES AND AUTHORITY

Article IV, Section 22 of the Constitution of Florida, provides as follows: "The Attorney General shall be the legal advisor of the Governor and of each of the Officers of the Executive Department, and shall perform such other legal duties as may be prescribed by law. He shall be the Reporter for the Supreme Court." The full import of this constitutional field of duty has never been defined by the Supreme Court of Florida. Courts of other states have gone very far in their application of similar provisions in the charge of legal duty, responsibility and field of legal representation held to belong to the office.

STATUTORY POWERS, DUTIES AND AUTHORITY

In addition to his common law and constitutional powers,

duties and authority, the attorney general has the following general and regular statutory powers, duties and authority, to:

1. Appear in and attend to suits or prosecutions in any of the courts of the state or in any courts of any other state or of the United States in behalf of the State of Florida (§16.01).

2. Give his official opinion and legal advice in writing on any matter touching their official duties, upon the written requisition of the governor, secretary of state, treasurer, comptroller or superintendent of public instruction (§16.01, F. S., and §22, Art. IV, Fla. Const.).

3. Exercise all powers and perform all duties incident to such office and to make and keep in his office a record of all official acts and proceedings, such record to contain copies of his opinions (§16.01).

4. Make a written report on the effect and operation of the acts of the last previous legislative session, and the decisions of the court thereon, to the governor, five days before the first day of every session of the legislature (§16.05).

5. Call a biennial session of circuit judges to consider their report on desirable or necessary legislation (§16.06).

6. Exercise general superintendence and direction over the several state attorneys (§16.08).

7. Direct and be in charge of the Statutory Revision Department, which also includes legislative bill drafting (§§16.43, 16.44, 16.46-16.48, 16.51).

8. Prepare alphabetical indexes for the journals of the legislature and in this connection employ competent indexers who shall be attaches of the legislature and paid as other attaches are paid (§16.44).

9. Participate with other states in preserving the constitutional integrity of the state (§16.52).

10. Approve the bond of the comptroller (§17.01).

11. Legal advisor to the state auditing department (§21.091).

12. Represent the state treasurer in connection with claims for funds deposited with him by receivers, trustees, legal representatives and other fiduciaries (§69.07).

13. Conduct condemnation proceedings on behalf of the Board of Commissioners of State Institutions and on behalf of the adjutant general's office for military purposes (§73.22).

14. Conduct quo warranto proceedings (§80.03).

15. Represent the state in proceedings under the Declaratory Judgment Law where the constitutionality of statutes is involved (§87.10).

16. Devise a suitable seal for the supervisors of registration (§98.341).

17. Examine audited reports of state executive committee and file same as public record (§103.121).
18. Approve title to real estate in which the state is interested (§135.16).
19. Represent the state in tax lien foreclosure proceedings by municipalities involving Murphy Act lands (§196.21).
20. Assist in the collection and enforcement of retail store license taxes (§204.13).
21. Prepare contracts for purchase of uniform school books (§233.16).
22. Approve school district bonds (§236.48).
23. Prosecute violations of school budget law (§237.23).
24. Legal advisor to board of trustees of the Teachers Retirement System (§238.03(9)).
25. Represent Board of Control in eminent domain proceedings (§240.14).
26. Conduct condemnation proceedings on behalf of the armory board (§250.40).
27. Act as ex officio member and legal advisor of the State Civil Defense Council (§252.05).
28. Pass upon and approve regulations of district drainage board (§298.53).
29. Act as legal advisor for the State Road Department. Said department, however, has a special attorney authorized by statute (§334.18).
30. Act as attorney for the Railroad and Public Utilities Commission (this work is negligible because of the fact that the Railroad and Public Utility Commission has authority to employ its own special counsel) (§§350.29, 350.30, 350.62, 350.66).
31. Assist Railroad and Public Utilities Commission in making investigations relating to the regulation of private wire service (§§365.06, 365.07).
32. Give special attention to legal proceedings in connection with the salt water fishing industry (§370.02(8)).
33. Attend to all legal business arising in connection with the laws governing the salt water fishing industry and State Board of Conservation (§370.02(8)).
34. Enforce the Vital Statistics Law (§382.37).
35. Represent the state in proceedings to suspend or revoke licenses of labor union business agents (§447.10).
36. Represent the state in disbarment proceedings in the supreme court (§454.28).
37. Assist in the enforcement of the Basic Science Law (§456.22).

38. Institute proceedings in the name of the state for the purpose of recovering monies due the state from any medical scholarship recipient (§458.083).

39. Assist in the enforcement of laws regulating the practice of optometry (§463.19).

40. Institute proceedings in the name of the state for the purpose of recovering monies due the state from any dental scholarship recipient (§466.45).

41. Represent the State Board of Architects in judicial proceeding to which the board may be a party, however, the board is authorized by statute to secure other legal advice or service (§467.14).

42. Approve the form for bonds of nonresident outdoor advertisers (§479.06).

43. Assist in the enforcement of the laws regulating the sale of milk, cream and milk products (§502.26).

44. Assist in the enforcement of laws regulating small loan businesses (§516.23).

45. Pass upon permits of associations doing business under a declaration of trust (§§517.03, 609.05).

46. Investigate and rectify commercial discriminations (§§540.02-540.05).

47. Enforce the anti-trust laws of the state (§542.03).

48. Bring proceedings to forfeit charters of corporations which violate the laws or fail to comply with mandatory requirements of same (§§542.03, 542.04, 542.09).

49. Prosecute combinations against Florida meats (§544.02).

50. Bring proceedings against combinations in restraint of motor vehicle financing (§545.08).

51. Act as attorney for the State Racing Commission. Said commission, however, has statutory authority to employ its special counsel (§550.01).

52. Represent the commissioner of agriculture in connection with the enforcement of Florida seed certification law (§575.08).

53. Act as legal advisor and attorney for the State Plant Board (§581.02).

54. Bring proceedings against fair associations for annulment of their charters when laws relating to same are violated (§§615.11, 616.09).

55. Bring proceedings, under certain conditions, for annulment of franchises of social clubs (§617.09).

56. Bring proceedings, under certain conditions, to annul franchises of corporations not for profit (§617.09).

57. Bring proceedings to test the validity of the incorporation

of cooperative marketing associations and non-profit cooperative associations (§§618.23, 619.09).

58. Sue to recover fines for doing business without a license (§625.17).

59. Conduct prosecutions against defaulting and delinquent surety companies (§626.08).

60. Conduct proceedings against insolvent or defaulting insurance companies (§§626.08, 626.12).

61. Represent the insurance commissioner in connection with insurance matters (§§637.54, 640.13).

62. Assist in fixing values of securities deposited with the state treasurer by trust companies under the trust law (§660.08).

63. Bring proceedings to recover escheated property (§731.33).

64. Bring proceedings to forfeit prize money in lotteries (§849.12).

65. Represent state in all appeals from judgments of forfeiture of gambling devices to the supreme court (§849.42).

66. Subversive activities, enforcement of laws re (§§876.22-876.31).

67. Conduct extradition hearings for the governor (§941.04).

68. Act as attorney for the Parole Commission (§947.11).

MEMBERSHIP IN BOARDS, COMMISSIONS AND COUNCILS

The attorney general is a member of the following state boards, commissions and councils:

1. Board of Commissioners of State Institutions (Fla. Const. §17, Art. IV).

2. State Board of Education (Fla. Const. §3, Art. XII, §229.15, Florida Statutes).

3. Interstate Cooperation Commission (§13.05, Florida Statutes).

4. Trustees of Internal Improvement Fund (§253.02, Florida Statutes).

5. State Board of Drainage Commissioners (§298.69, Florida Statutes).

6. State Budget Commission (§216.01, Florida Statutes).

7. State Board of Conservation (§§370.02(1), 377.07, Florida Statutes).

8. State Board of Pardons (Fla. Const. §12, Art. IV).

9. State Canvassing Board (§102.111, Florida Statutes).

10. Florida Securities Commission (§517.03, Florida Statutes).

11. Railroad, etc., Assessment Board (§195.01, Florida Statutes).
12. Board for fixing values of investment securities of trust companies (§660.08, Florida Statutes).
13. Board for supervision and regulation of forms to be used for assumption of risks by surety companies (§648.16, Florida Statutes).
14. State Housing Board (§424.04, Florida Statutes).
15. Department of Public Safety Executive Board (§321.01, Florida Statutes).
16. State Board for Vocational Education (§229.15, Florida Statutes).
17. State Board of Trustees of Teachers Retirement System (§238.03, Florida Statutes).
18. State Textbook Purchasing Board (§233.13, Florida Statutes).
19. State Purchasing Council (§287.03, Florida Statutes).
20. Member of State Civil Defense Council (§252.05, Florida Statutes).
21. Governor's Cabinet (Fla. Const. §20, Art. IV).
22. Judicial Council (§43.15, Florida Statutes).
23. State Merit System Personnel Board (§110.02, Florida Statutes).
24. Sheriffs' Bureau (§30.36, Florida Statutes).

STATUTORY REVISION DEPARTMENT

The 1943 Legislature created a permanent statutory revision, legislative, drafting and reference department, which is designated and known as the statutory revision department, under the direct supervision and control of the attorney general (§§16.43 et seq., Florida Statutes). The powers, duties and functions of the said statutory revision department are set out in full in the foregoing cited statutes.

In compliance with the foregoing statutes, the statutory revision department was set up and developed, as a department, in the office of the attorney general and under his direct supervision and control. The work of the said statutory revision department is now carried on under the following plan and system.

Continuing plan of operation—The statutory revision department operates, as directed under the statutes (see §§16.19-16.24, 16.27, 16.43, 16.44, 16.46-16.48, 16.50, 16.51, Florida Statutes), to the fullest extent and according to the intent and purpose of said statutes, its work being carried forward in a continuous manner and in the following objective classification:

(1) Continuing a systematic study of general statutes and laws for the purpose of reducing bulk, removing inconsistencies, eliminating redundances and surplusages, correcting mistakes in grammar, punctuation, language, etc., combining and consolidating duplicate laws and otherwise performing the revisory function contemplated in the law and providing for said revision by revisers' bills to be submitted to each session of the Legislature.

(2) Carrying on the arrangement and identification of the general statutes and laws of this state as adopted in Florida Statutes, by adding, in the proper place, all new matter belonging therein; this material is compiled, revised and published biennially and adopted by each session of the legislature as the official Florida Statutes.

(3) Indexing each of the journals of the two branches of the Legislature.

(4) Preparing and having printed from time to time pamphlets, special indexes and other materials relating to statutes and laws; securing copyrights and republishing when necessary.

(5) Carrying on a continuous reworking of the general index to the Florida Statutes in order that said index may be improved with each biennial publication.

(6) Indexing the general laws of each legislative session that are to be incorporated in the Florida Statutes. This material is indexed in the light of the existing general index so that the new material will fit into the existing pattern of said general index.

(7) To make a complete biennial revision of the general statutes and laws of this state to conform with the numbering system, style, contents and other characteristics of the Florida Statutes.

(8) Maintaining a bill drafting department for the benefit of the members of the legislature and the state officials, boards and agencies.

(9) Maintaining a legislative reference library in conformance with legislative authorization.

(10) Preparing, compiling and having printed such handbooks, and other publications of the attorney general as may be required by law or that in the opinion of the attorney general is deemed advisable.

(11) Assisting other state departments, bureaus and agencies in compiling laws affecting their activities and operation, and lending such assistance as may be required in having such compilations printed in proper form.

(12) Maintaining contacts with similar departments in other states, and with lawbook publishing companies and editors who show a tendency to cooperate and exhibit an interest toward the mutual betterment and advancement of work in this field.

Preservation of type used.—All type used in printing publications of the statutory revision department is required by law to be preserved, and is stored and protected by adequate insurance in conformity with such law.

Selection and supervision of personnel.—Personnel is selected and maintained according to the best talent available, and the work of the department is assigned and distributed to the personnel in such manner as to secure the best results, giving consideration to the particular talents of each person. Generally, however, responsibility is divided as follows:

(1) General supervision and control is under the attorney general, who, under authority of §16.43, Florida Statutes, selects a director. The director has the direct supervision and control of the department, who with the advice of the attorney general selects and employs the operating personnel and fixes their compensation.

(2) Principal study of the statutes, revisions and preparation of revisers' bills is under the supervision of the director.

(3) Indexing and continuous study and revision of index material is by a qualified indexer who is under the administrative supervision of the director.

(4) Related work is kept up to date under the supervision of the director.

(5) Proofreading and checking is carefully and meticulously done by qualified persons.

(6) Stenographic and clerical work is performed by accurate and careful stenographers and clerks.

(7) Bill drafting and research between and during sessions of the Legislature is done by such members of the department and the attorney general's office as may be qualified for such work, under the direction of the attorney general originally and upon recommendation and advice of the director.

The revisers' bills, as provided by statute, are prepared by the director and the department under his direction. The principal objectives of revisers' bills are to correct, amend, consolidate, revise, repeal or otherwise immaterially alter or change any general statute or law, or parts thereof, of a general nature and application which may appear to be subject to revision but without changing substance, or altering operation and effect. They do not deal with:

(1) Statutes relating to or concerning only one or more counties or municipalities, or parts thereof, except in certain cases where the subject matter relates to the creation or jurisdiction of state, county or municipal courts.

(2) Statutes relating to, concerning, or that would be operative in only a portion of the state, except in cases where the subject matter relates to the creation or jurisdiction of state or county courts.

(3) Statutes relating to or concerning only a certain municipal corporation.

(4) Statutes relating to or concerning only one or more designated individuals or corporations.

(5) Statutes incorporating a designated individual corporation or making a grant thereto.

(6) Road designation laws.

The omission of any statute coming within the classifications aforesaid is properly accounted for in the tables or indexes.

In the compilation of material and the drafting of revisers' bills, the following rules and procedure are adhered to:

- (1) A continuing and systematic study of the statutes is carried on.
- (2) A careful search is made for:
 - (a) Inappropriateness of run-in lines to sections.
 - (b) Misspelled words and poor punctuation.
 - (c) Statutes limited as to time of operation and which have expired.
 - (d) Sections, or parts of sections, that conflict with, or the operation of which is inconsistent with, the logical operation of other sections.
 - (e) Laws that have become obsolete.
 - (f) Sections that are so poorly written that the meaning is not clear or that may be subject to more than one interpretation.
 - (g) Sections containing lengthy and superfluous matter that may be rewritten for the sake of brevity.
 - (h) Sections that are poorly or incorrectly phrased in their reference to other parts of the statutes, or otherwise.
 - (i) Sections that, because of amendments and additions to the statutes, should be renumbered and placed in different sequence.
 - (j) Sections, or parts of sections, that have been constructively repealed or made inoperative by other laws.
 - (k) Conflicting powers and duties of officials.
 - (l) Repetitious statutes.

The department carries continuing history notes on each section of the statutes; maintains a running file containing a list of errors, suggestions, etc., that are submitted by members of the Florida Bar; and maintains a system of keeping comprehensive notes and data for the final preparation of the revisers' bills. In the preparation of revisers' bills, sections containing new material to be added or for the purpose of replacing existing sections are written with due regard to brevity, using as plain and modern language as possible and simple rather than complex words and phrases, with due regard to correct punctuation, avoiding verbosity and repetitions.

Each revisers' bill is accompanied by complete explanatory memos.

Printing.—Departmental printing is advertised and bids received for it according to the requirements of law. In addition, invitations to bid are mailed with copies of specifications, to all qualified printers within the state. Specifications are made up as simply as possible, with due regard for the insurance of a first-class product and for the protection of the state. Specifications are made up with a view toward economy, without sacrificing quality. General specifications and requirements are compiled and used so far as possible in the contracts for printing. Wide variance in style and form from that presently used is avoided.

COMPILED STATEMENT OF CASES HANDLED IN THE ATTORNEY GENERAL'S OFFICE

(From Jan. 1, 1955 Through Dec. 31, 1956)

CRIMINAL CASES

January 1, 1955—cases pending	193	
New Cases—1955	288	
Re-opened cases—1955	7	
Total	296	296
New Cases—1956	238	
Re-opened cases—1956	20	
Total	258	258
Total		747
Closed cases—1955	235	
Closed cases—1956	310	545
January 1, 1957—cases pending	202	

CIVIL CASES

January 1, 1955—cases pending	315	
New Cases—1955	119	119
New Cases—1956	156	156
Total		590
Closed Cases—1955	157	
Closed cases—1956	115	272
January 1, 1957—cases pending	318	

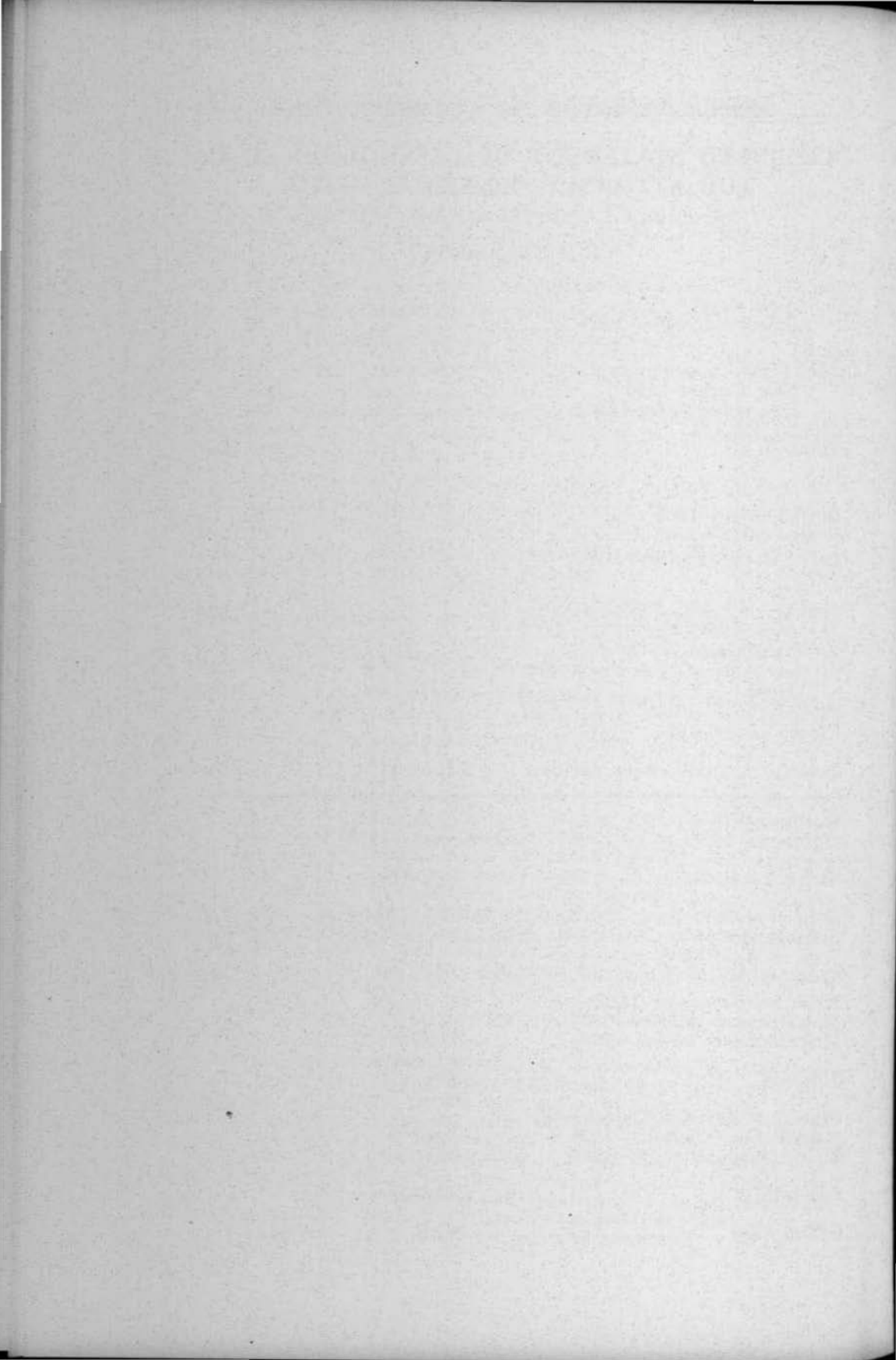
Opinions—1955	347	Extraditions—1955	549
Opinions—1956	357	Extraditions—1956	425
Total (1955-1956)	704	Total (1955-1956)	974

Subjects—1955	839	Extraditions Rejected—1955	33
Subjects—1956	700	Extraditions Rejected—1956	20
Total (1955-1956)	1,539	Total	53

Attorney General's Office	
Miscellaneous letters—1955	10266
Miscellaneous letters—1956	10287
Sub-total	20553

Statutory Revision Department	
Miscellaneous letters—1955	7563
Miscellaneous letters—1956	8585
Sub-total	16148

Grand total 36701



SUMMARY
of
ADVISORY OPINIONS
rendered the
GOVERNOR OF FLORIDA
by the
JUSTICES
of the
SUPREME COURT OF FLORIDA
under
ARTICLE IV, SECTION 13,
CONSTITUTION OF FLORIDA
DURING 1955-1956

Prepared by David V. Kerns, Research Assistant to Justice Campbell Thornal, Supreme Court of Florida.

(Reported in 68 So. 2d through 90 So. 2d)
Supplementing summary appearing in Biennial Report
of the Attorney General of Florida for 1953-1954,
beginning at page 757.

ADVISORY OPINIONS

Relator's petition for extraordinary relief insofar as it sought the "advice of the Court" as to whether elections should be held in 1954 for a Governor to serve the remaining term of the late Honorable Dan T. McCarty, was refused, the Court unanimously being of the view that such advice was "a prerogative only of the Governor within the narrow channel set out in Section 13 of Article IV of the Constitution." *State ex rel. Ayres v. Gray*, Fla. 1953, 69 So. 2d 187.

Distinguishing a proceeding for declaratory decree, the Court said: "The provision for such advice to the Governor is embedded in the Constitution and is applicable in a very narrow field. The inquiry is not addressed to the 'Court' but to the 'justices' and can concern only a question affecting the Governor's 'Executive powers and duties'." *State et al. v. Lewis*, Fla. 1954, 72 So. 2d 823. To similar effect: *Sarasota-Fruitville Drainage District v. Certain Lands, etc.*, Fla. 1955, 80 So. 2d 335.

Governor's request for opinion was construed to be inquiry whether lawful power and authority to countersign a warrant existed. The constitutionality of an act of the Legislature would not be passed upon in nonadversary advisory opinion unless absolutely essential to a correct answer. *Advisory Opinion to the Governor*, Fla. 1955, 82 So. 2d 494.

Governor's inquiry whether act of legislative reapportionment should be submitted to him for approval or veto involved an "executive power or duty" and fell within contemplation of Section 13, Article IV, so as to authorize Justices to reply. *In re Advisory Opinion to the Governor*, Fla. 1955, 81 So. 2d 782.

GOVERNOR

Governor's inquiry whether act of legislative reapportionment should be submitted to him for approval or veto involved an "executive power or duty". *In re Advisory Opinion to the Governor*, Fla. 1955, 81 So. 2d 782.

JUDGES

Compensation of retired Justices of Supreme Court is to be determined by statutory formula applied to current compensation of active Justices. *Advisory Opinion to the Governor*, Fla. 1955, 82 So. 2d 494.

Where judge of Civil and Criminal Court of Record was disqualified and there was no similar judge in the State having jurisdiction equally broad or extensive, the Governor was advised to assign a circuit judge to preside in his place. *In re Advisory Opinion to the Governor*, Fla. 1956, 86 So. 2d 158.

Despite circumstances indicating abduction, unexplained absence of Circuit Judge for approximately a month was not sufficient under statute to authorize Governor to declare office vacant or to increase number of Circuit Judges. *In re Advisory*

Opinion to the Governor, Fla. 1955, 81 So. 2d 778 (one Justice submitted a separate opinion).

However, after an absence of over a year, during which meticulous search produced no word of the Circuit Judge, whose disappearance, according to law enforcement officers, was marked by signs of foul play and whose absence was resulting in serious delay in judicial administration in his circuit, the Governor was authorized to declare a vacancy. Advisory Opinion to the Governor, Fla. 1956, 88 So. 2d 756. One Justice stated further that the Circuit Judge's cessation of inhabitancy of the Judicial Circuit was established by circumstantial evidence; that the time thereof, and hence the time of the resulting vacancy, could be concluded to have occurred at or about the time of disappearance; and that the Governor was empowered to appoint to fill such vacancy until the first Tuesday after the first Monday in January next after the election and qualification of a successor in the next general election.

Under amendment revising Article V of Constitution of Florida, adopted at the general election on November 6, 1956, the Governor is authorized to appoint an additional Circuit Judge for the Circuit Court of the Judicial Circuit in which the state capital is located at any time after the first Tuesday after the first Monday in January, 1957, the term of such Circuit Judge to commence on July 1, 1957. In re: Advisory Opinion to the Governor, filed December 3, 1956, not yet published.

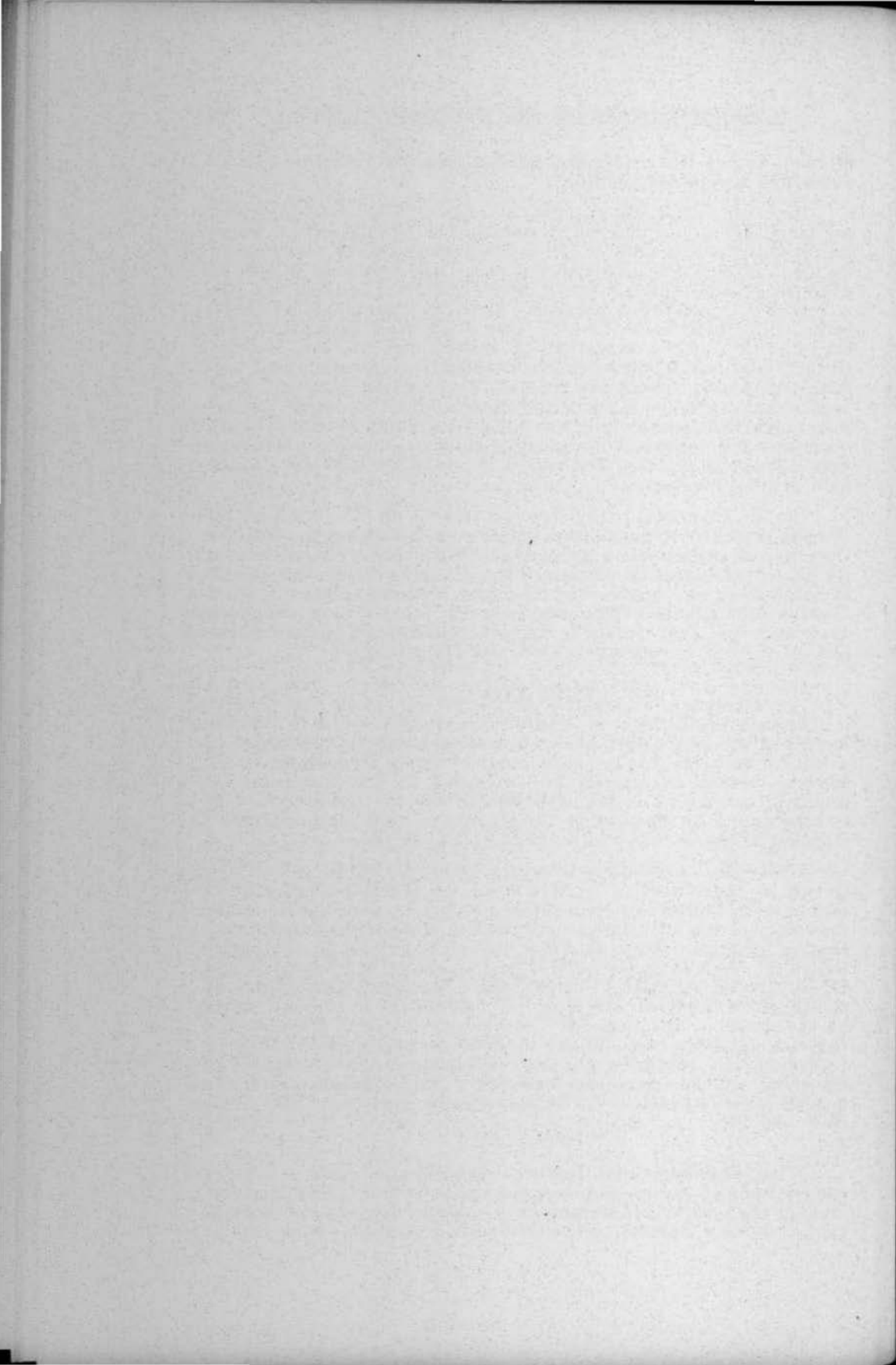
LEGISLATIVE

Legislature's duty of apportioning representation in the houses of the Legislature could be exercised only by enactment of a bill by both houses, in the manner of other legislation, which likewise would necessarily be submitted to the Governor for approval or veto. The inquiry came within the Governor's duty to take care that the laws be faithfully executed. In re Advisory Opinion to the Governor, Fla. 1955, 81 So. 2d 782.

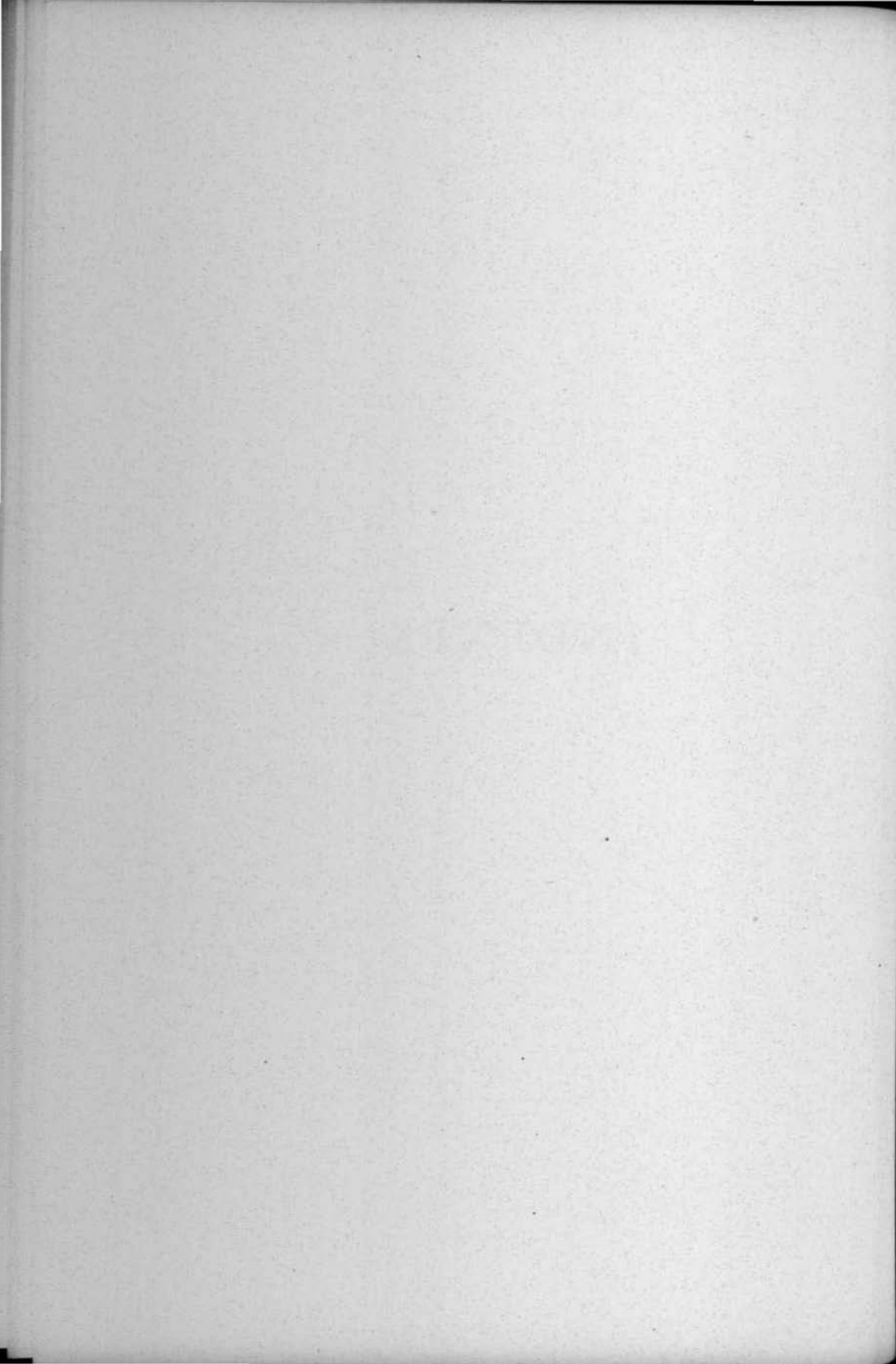
While the Legislature is in session pursuant to call of the Governor under Section 3, Article VII of the Constitution (i.e., on reapportionment) or is in recess of such session, the Governor nevertheless has authority to call the Legislature in extraordinary session for stated purposes under Section 8, Article IV, the Legislature not then being in regular session under Section 2, Article III, of the Constitution. Further, since the terms of members of the House of Representatives and of a portion of the Senate expire at the close of the polls at the biennial general election, the expiring Legislature could not bind the incoming Legislature by recessing to a date after the general election; a new call by the Governor would be necessary to convene the Legislature after the general election. Advisory Opinion to the Governor, Fla. 1956, 88 So. 2d 131.

PENSIONS

When Supreme Court Justice retired in good faith accepting commitment of statute as to pension, a contractual obligation was created that could not be impinged upon by subsequent legislation. Advisory Opinion to the Governor, Fla. 1955, 82 So. 2d 494.



INDEXES



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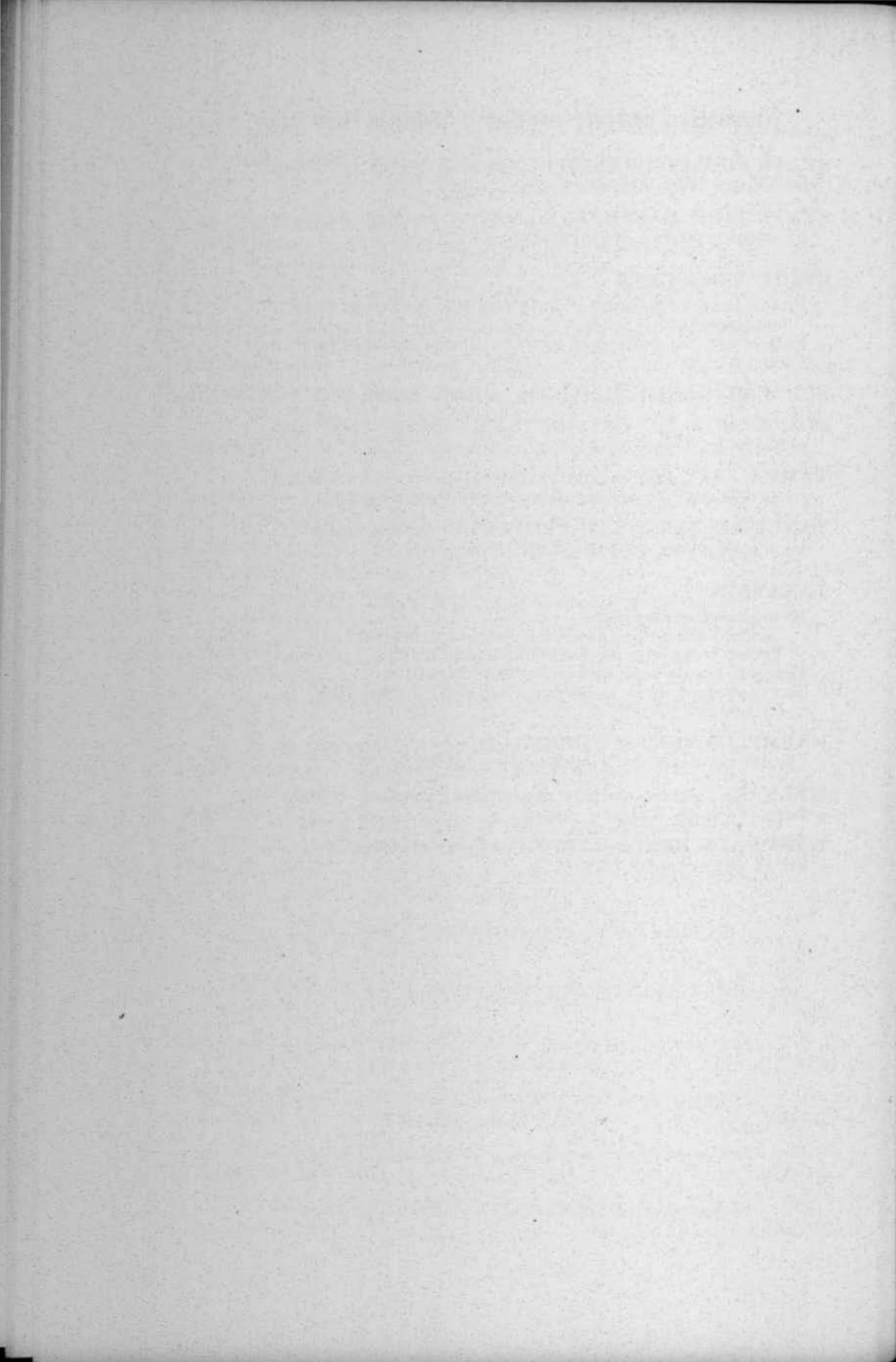
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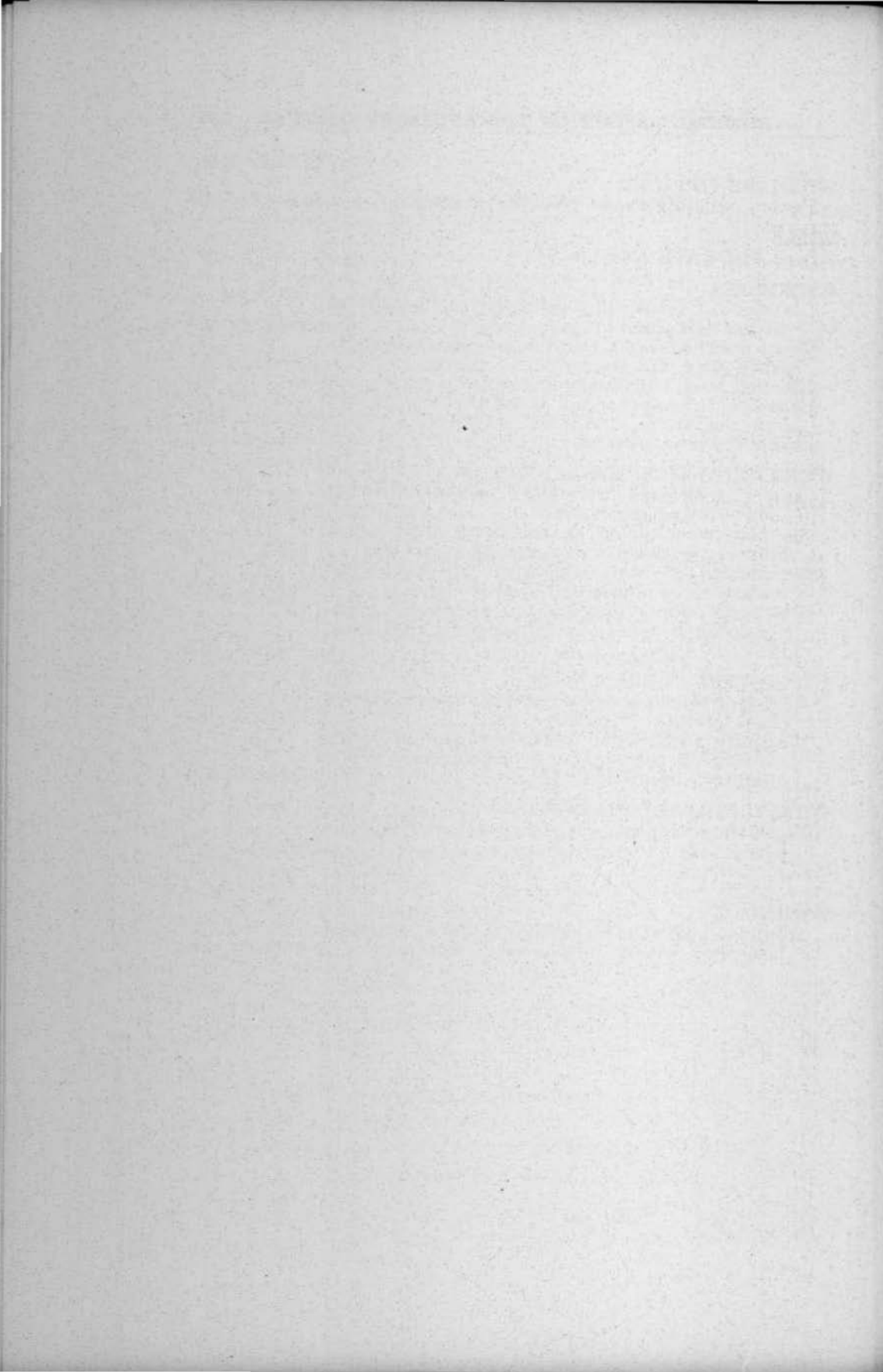
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